

# ORIGINAL

"THE CHANGING ROLE OF ONE TRIAL LAWYER"

PRESENTED TO THE

AMERICAN COLLEGE OF TRIAL LAWYERS

BY

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(This transcript was prepared from a tape recording.)

1 (Applause)

2 THE ATTORNEY GENERAL: It is just like Washington,  
3 nothing works. The podium is supposed to go up and down.

4 (Laughter)

5 Good morning and thank you for the opportunity to  
6 appear before you, sandwiched in between a very formidable  
7 speech by President Janofsky and I'm sure a very humorous  
8 and light discussion of the Debit Committee report to  
9 follow.

10 (Laughter)

11 I thought what you needed in this twenty-minute  
12 or half hour segment was an historical analysis of the  
13 Office of Attorney General and the Department of Justice  
14 and a comparison of its myriad duties as well as a strong  
15 demonstration of the glittering managerial abilities of the  
16 present office-holder.

17 (Laughter)

18 But then on second thought, I decided that that  
19 would really be quite boring and I give a sufficient number  
20 of boring speeches around the country at all kinds of  
21 gatherings and organizations.

22 There is one person in the audience who knows full  
23 well what the job of the Attorney General is like, and that  
24 is Griffin Bell, of Washington, D. C. Is that listed on  
25 your registration, Judge Bell?

1 (Laughter)

2 The setting in which the Attorney General's  
3 office operates in Washington is a surprise to me. It  
4 perhaps shouldn't be, but I was from the hinterlands, quite  
5 a long way away, I cared little about Washington and what  
6 happened there. I was from Baltimore.

7 (Laughter)

8 And I thought that the academic halls and trial  
9 lawyers had a monopoly on arrogance until I got to  
10 Washington.

11 (Laughter)

12 And I found there that there was an amazing  
13 synergistic effect, a few brains and a little power produced  
14 a fatal disease. First it blinded the eye and then it in-  
15 capacitated the ear for any listening whatsoever.

16 (Laughter)

17 So the Attorney General of the United States has  
18 to operate within and be careful to take all possible pre-  
19 ventative medicine to avoid that common ailment in  
20 Washington.

21 Arrogance reminds me about Strauss a little bit.  
22 Saturday night, there was one of those large to-dos they  
23 have in Washington about four or five times a year. This  
24 particular one is called the Gridiron Club Annual Spring  
25 Dinner, and it is largely put on by newspaper people and

1 media people, and everyone attends. It is a very enjoyable  
2 event. Political skits are put on, and in this particular  
3 one on Saturday night, Pat Lucey, former Ambassador to  
4 Mexico was representing Senator Kennedy and he had the  
5 misfortune of preceding Bob Strauss who was representing  
6 President Carter on the platform. Strauss began his re-  
7 marks after some fairly pithy and humorous statements by  
8 Ambassador Lucey began his remarks by saying that Senator  
9 Kennedy was stating that Pat Lucey was a Kennedy  
10 answer to Bob Strauss. Strauss said that is like saying  
11 Bella Abzug is the answer to Bo Derrick.

12 (Laughter)

13 In the same frame, they were talking about the  
14 economy, and if anyone can get a joke or a laugh out of  
15 the economy these days they are doing fairly well. And the  
16 first suggestion was what the government ought to do is go  
17 to Chrysler and see if Chrysler wouldn't bail us out.

18 (Laughter)

19 And on second thought, the suggestion was, no,  
20 let's have a meeting and get Antitrust Division approval for  
21 a merger between Chrysler and New York City. You could call  
22 it the "big lemon."

23 (Laughter)

24 It is difficult to describe and speak of the  
25 Attorney General's office without being boring and without

1 self-aggrandizement. Even the title of the subject of that  
2 kind of discussion was difficult. "The Changing Roll"  
3 is as neutral a topic to express reflections by a trial lawyer who is  
4 gradually -- I can't say suddenly, really -- but gradually  
5 put in the position of being a manager, an adviser as well  
6 as a legal decision-maker as Attorney General.

7 We could have said something more striking like  
8 how does a poor Baltimore trial lawyer find happiness as  
9 Attorney General of the United States. But I thought about  
10 it and decided to try to compare from about five aspects  
11 my experiences and talents and skills developed as a trial  
12 lawyer which are similar to the ones that you've developed  
13 and are familiar with, with the differences by contrast  
14 with some of the scope of the duties, the nature of the  
15 duties, the tasks as well as the skills required as Attorney  
16 General, and to discuss them in the framework of certain  
17 propositions which are sometimes put forth as absolutes or  
18 truths, such as the Department of Justice is the largest  
19 law firm in the world and therefore what it takes really is  
20 a very fine lawyer to manage that largest law firm with the  
21 greatest efficiency with which some very large law firms  
22 are managed in the country; or the myth that the Department  
23 of Justice is so monolithic and so complicated that it  
24 doesn't matter who is Attorney General, that it will carry  
25 on its affairs and that it makes little difference who the

1 Attorney General is; or the third myth or proposition that  
2 if we could only provide and if the responsible people in  
3 the Department of Justice would fulfill their obligations  
4 by simply making careful, honest and fair decisions, their  
5 job is substantially complete or done.

6 Each of those propositions has a certain half  
7 truth within it, but it far misses the mark. Take, for  
8 example, the scope of the work of a trial lawyer. We  
9 represent by and large specific clients in specific disputes  
10 and we retain and reserve considerable choice in that repre-  
11 sentation and in the particular disputes. Our duty  
12 generally is not only our duty to the court and to the law  
13 but advice and advocacy both oral and written in the per-  
14 formance of the representation of specific clients in  
15 specific matters.

16 And think for a moment in contrast to that the  
17 scope and the duties of the Attorney General as the head of  
18 the Department of Justice. It strikes you immediately that  
19 the opportunity or the choice and freedom with which the  
20 trial lawyer operates does not exist in the Department of  
21 Justice nor exist in the office of Attorney General.

22 Representing the citizens of the country, the  
23 government and its officials and the entities of government,  
24 there is little choice in declining a case or declining to  
25 undertake the litigation or the resolution of the policies

1 which are being presented.

2 And then with the nature of the work, it goes  
3 recently, for example, from serious consideration of the  
4 effects and options regarding economic sanctions in our  
5 efforts to combat the terrible and tragic circumstances of  
6 our hostages in Iran and the aggressive actions of the  
7 Soviet Union in Afghanistan through prison policy, through  
8 the consideration of the use of the Credit Control Act,  
9 as well as the new conservation gasoline fee, in terms of  
10 trying to develop a program that will have an effect on  
11 dampening inflation and deaccelerating it, as well as con-  
12 stantly bearing in mind within the scope of the work First  
13 Amendment rights, other constitutional sanctities and the  
14 effectiveness of law enforcement throughout the government.

15 With regard to the nature and difference of con-  
16 trasts between a trial attorney and his performance of  
17 advocacy, both oral and written, consider that, yes, the  
18 Attorney General does have that responsibility and clearly  
19 one untrained and unexercised in the practice of law would  
20 have significant difficulties in fulfilling the role, and  
21 we have seen that happen from time to time in the past.

22 But more than that, the Attorney General has to  
23 broaden his understanding and vision on an enormous variety  
24 of legislative matters, he has to have some at least  
25 appetite for financial matters -- after all, the budget of

1 the Department of Justice now, although it is one-half of  
2 one percent of the federal budget, is approaching \$3 billion  
3 a year -- managerial skills, with which a trial lawyer is  
4 frequently unconcerned unless it relates to a case and the  
5 representation of a corporate client, or unless he happens  
6 to double his role as not only a trial lawyer but as a  
7 managing partner. But the managerial concerns of the  
8 Department of Justice and the Attorney General are enormous.  
9 After all, there are almost 55,000 employees within the  
10 umbrella of the Department of Justice, 26 different units  
11 and divisions and operations within the department. And  
12 the academic duties or the planning duties, divisionary  
13 duties which may be most essential to the Department of  
14 Justice and for which there is so precious little time are  
15 far beyond the ordinary scope and tasks of the trial  
16 attorney. His direction is on the concrete, it is on this  
17 year, it is on this case, on successfully winning and  
18 representing the clients who trust their fate to him or to  
19 her.

20 But the planning, the direction of five-year pro-  
21 grams or ten-year programs, the attack on new ideas and the  
22 defeat of bad ideas is not frequently in long-range terms  
23 within the concern of the day-in-day-out activities of the  
24 trial attorney.

25 And speaking of bad ideas for a moment, no truly

1 bad idea ever dies.

2 (Laughter)

3 I have had the pleasure of being the Assistant  
4 Attorney General and the Deputy Attorney General, and now  
5 the Attorney General, and it is almost as if I have changed  
6 name and personality and style because the same bad ideas  
7 that I turned down as Assistant Attorney General have now  
8 been presented to me twice again as Deputy and as Attorney  
9 General, or many of the same.

10 And in addition to those things that I mentioned  
11 contrasting the scope and duties of the trial advocate with  
12 the Attorney General, there is the political differences,  
13 politics in the small "p" sense, the recognition of an  
14 understanding, appreciation and development of skills re-  
15 lating to the entities of government with which the Department  
16 of Justice must work with to be effective, not only the  
17 Congress but the Departments of Defense and State and  
18 Agriculture and H.E.W., or whatever it is going to be  
19 called in the future, HUD, Energy, and the remainder. It  
20 requires a greater depth of patience than I have been able  
21 to completely muster within myself, coming from an environ-  
22 ment such as you now enjoy, wherein you are the masters of  
23 those cases and the decisions which you make are unilateral  
24 decisions, of course, with the benefit of the client's  
25 guidance.

1           And in that client-lawyer relationship, a moment's  
2 observation will bring forth the realization that the de-  
3 cisions of the trial lawyer, although they       require  
4 sometimes in the course of a trial a split-second response,  
5 and although they are important decisions in the strategy,  
6 in the course and the preparation of litigation, they are  
7 interim decisions. The ultimate decisions--trial, settlement,  
8 the amount, whether to go forward or not--are the client's  
9 decisions and he makes them or it makes them on the basis  
10 of your best and soundest advice.

11           But in the true sense the decisions the Attorney  
12 General makes with regard to matters and cases as well as  
13 to programs are final decisions, and particularly so in  
14 the last five years under Attorney General Levi and  
15 Attorney General Bell and continuing with myself as Attorney  
16 General.

17           The independence of the Department of Justice has  
18 been enlarged tremendously during those five years. It is  
19 one of the healthy phenomenon of the post-Watergate era,  
20 but it places on the Attorney General the responsibility  
21 with that independence for an enormous variety and range of  
22 final decisions as compared with the semi-final or advisory  
23 decisions which the trial lawyer enjoys and exercises in  
24 his practice.

25           One of the most difficult contrasts or one of the

1 most difficult performances in the Attorney General's of-  
2 fice relates to the myth or at least the suggestion about  
3 fair and honest decisions, and if we could just obtain  
4 those we would be accomplishing our job.

5 Certainly in the trial practice, decision-making  
6 based on merit and the integrity of our profession as well  
7 as the cause of our client and our duty to the court is  
8 enough ordinarily. But in the Department of Justice, in  
9 the public eye, public affairs or relations -- and I've  
10 always thought those were awkward words to use, they have  
11 other connotations to be speaking about affairs and  
12 relations -- but that aspect of government service and  
13 government business and duty is one that I find particularly  
14 difficult.

15 In private practice, relationships with the press  
16 from time to time became important on a particular matter,  
17 but as in the ordinary course I was far better off and my  
18 clients were far better off to have as little relationship  
19 with the press and public affairs in the publicity sense  
20 as possible.

21 But in the government practice, as Attorney General,  
22 you not only have to make fair, careful and honest decisions,  
23 you have to be able to make them in a timely fashion and you  
24 have to be able to explain and make them on a foundation  
25 and a basis which is understandable to the press at all

1 times, and that requires a certain amount of art, a certain  
2 amount of energy, and a considerable amount of time. It is  
3 a little like the circumstance of a general who comes back,  
4 he has won a particular battle, and the press speaks to him  
5 or talks to him and the first thing they suggest is, well,  
6 you won that battle but why did you have to use weapons.  
7 And on the other side, the general comes back from a losing  
8 battle and the press says to him, well, why didn't you use  
9 more weapons. It is that kind of circumstance with regard  
10 to decisions, whether they are won or lost, the press will  
11 take an opposite tact. I think that is their responsibility.  
12 I welcome it. But it is difficult to be prepared for it  
13 thoroughly and well at all times.

14 The Department of Justice and its programs and the  
15 decisions it makes are only sound and only good, not on  
16 their intrinsic merit alone but if they are understood and  
17 well communicated and accepted by the American public, and  
18 you have the support of the American public and the profes-  
19 sion which knows the most about the Department of Justice's  
20 business and that, of course, is our profession.

21 So public affairs and public relations are an  
22 extremely important and integral part of the duties of the  
23 Attorney General and the operation of the Department of  
24 Justice.

25 With regard to performance, what I miss most about

1 being a trial lawyer is, of course, appearing in court, in  
2 combat, the challenge of individuality and enjoyment of  
3 success or the good fight that is afforded in trial advocacy.  
4 The Attorney General's role is spent, as you can imagine,  
5 with the scope of the work, in meetings, in written direc-  
6 tives, in orders, in the review of paper to ad nauseam, and  
7 not much in direct action on the line but, rather, in  
8 directing policy and decision-making and reviewing the  
9 systems which are established within the Department of  
10 Justice and which need from time to time refurbishing to  
11 make sure that the great power exercised by the Department  
12 of Justice is being exercised carefully and well.

13 In speaking of meetings, I recall one of the first  
14 meetings that I had in the Department of Justice in which  
15 I was much used to the kind of meetings that you have in  
16 litigative matters with clients -- they are for a specific  
17 purpose, the decisions are made, the meetings may take a  
18 little longer than necessary, but they are working, active,  
19 action meetings. And fresh into the Department of Justice,  
20 I had a meeting with another agency and the head of that  
21 agency and its general counsel, and they had a problem with  
22 regard to a backlog of fraud cases, and I was prepared for  
23 the meeting. I had my people there and I said, as the  
24 meeting opened, let's attack this backlog. Now, how many  
25 cases are there, what categories are they in, what geographic

1 areas do they cover, how long have they been backlogged, and  
2 how many men will it take, lawyers and investigators, to  
3 resolve the backlog.

4 And as I was speaking in those terms in the first  
5 seven or ten minutes of the meeting, I could see my lawyers  
6 and people starting to slide gradually under their chairs  
7 and couches, they were turning a little green, and when the  
8 representatives of the other department and agency began to  
9 speak, they said, well, "We don't know exactly how long these  
10 cases have been pending and we haven't done the geographic  
11 review of where they are, we haven't age-dated them, we  
12 don't know the dollar volume of categories. I was a  
13 little perturbed about that point and I began to suggest  
14 that maybe we ought not to have a meeting and they ought to  
15 go home and and come back again  
16 when they were prepared, whether that was in a week or two  
17 weeks or a month or whatever. And at that everyone in the  
18 room, all the governmental people turned white, and the  
19 meeting ended shortly thereafter, and I realized that from  
20 then I was known as "un-civil" Civiletti.

21 (Laughter)

22 And I realized and have since realized that the  
23 meeting that had been proposed was a spiritual meeting.

24 (Laughter)

25 That meeting was to have a laying on of hands so

1 that the heads of the two units, Justice and its counterpart  
2 agency, could say I'm a good fellow and you're a good fellow  
3 and we will work together and have our workers solve these  
4 problems. It was a spiritual meeting and I had made a bad  
5 mistake in trying to get anything done at the meeting.

6 (Laughter)

7 I haven't quite lost that capacity though I am  
8 afraid I have lost some of it in aiming at meetings which  
9 accomplish a purpose and for which decisions are made.

10 With regard to the skills and tasks of the trial  
11 attorney as compared to the Attorney General, many of them  
12 are the same. It helps to be observant and perceptive,  
13 certainly care is required, resiliency, a certain degree of  
14 oratory, although not essential for an Attorney General,  
15 but it is helpful, temporary expertise clearly, instant  
16 experts in one area or another, and great precision. All of  
17 those things are cross-related.

18 But leadership is essential for an effective  
19 Attorney General. It may not matter for a trial attorney.  
20 The analytic balancing that takes place in the development  
21 and the process of new programs and new initiatives as well  
22 as competing interests, for example, between energy produc-  
23 tion and conservation. The exercise of authority and the  
24 discrimination in work effort is probably crucial to being  
25 an effective Attorney General. It has some relevance to the

1 role of a trial attorney, but if you cannot exercise author-  
2 ity with some comfort and you cannot discriminat between  
3 those matters which are significant and those which are  
4 routine, you are easily overwhelmed in any management posi-  
5 tion or position of authority in the Department of Justice  
6 and certainly as Attorney General.

7 Overall, I think that, yes, the Department of  
8 Justice is the largest law firm in the world, but it has  
9 a dozen functions and duties which have little to do with  
10 the law and particularly little to do with litigation which  
11 are equally as important and require from any lawyer and  
12 particularly from a trial lawyer an openness and a learning  
13 process which for me has been and is exhilarating.

14 Yes, the department could more or less run itself  
15 without an Attorney General, certainly in the reactive or  
16 responsive areas of our duties. The cases would be brought,  
17 they would be litigated, and generally the routine business  
18 of the department would work well. But there would be no  
19 developments such as Attorney General Levi lent to the  
20 Department of Justice in his service to the Department in  
21 reorganizing, the guidelines for the operation of the FBI,  
22 for example, for laying the seeds for the development of  
23 interrelationship between the law and intelligence gather-  
24 ing; there would be no accomplishments such as Griffin Bell  
25 achieved in improvements in the administration of justice,

1 in establishment now of an institution in the Department  
2 of Justice, the Office for the Improvement of the Adminis-  
3 tration of Justice, the Magistrates Act, the Disputes  
4 Resolution Act, perhaps even the Omnibus Judgeship Bill,  
5 and his development of the seeds of the ideas of Attorney  
6 General Levi of the admixture of the law and intelligence  
7 into now what has been introduced in Congress for the first  
8 time in the history of the country and the first time in  
9 the history of the world a spelling out in a public forum  
10 through legislative process of the details and the  
11 charter and principles for the guidance of all of our in-  
12 telligence operations, as well as, of course, the FBI  
13 charter which is now before the Congress.

14 We would have none of that without the effective  
15 leadership of Attorneys General, and we would have none of  
16 the future developments in the areas of civil liberties,  
17 the preservation of the environment in certain areas of the  
18 environmental conditions, the strength of pollution control  
19 and enforcement units, the development of civil rights  
20 units, for example, in United States Attorneys offices, and  
21 the follow-through on those programs developed by Attorney  
22 General Bell and Attorney General Levi.

23 As for the future, I think that you can expect  
24 from the Department of Justice under the Carter administra-  
25 tion and probably beyond that that those improvements that

1 have been made in the last -- since 1975, the support of  
2 research and development in the administration of justice  
3 as well as in other areas of prison reform, of investiga-  
4 tive tactics and practices to continue in the Department of  
5 Justice. It has had the support of this administration and  
6 President Carter. You can expect the precision to be ap-  
7 plied in investigations and prosecutions more carefully  
8 throughout the department, not only in the criminal law  
9 area, where we have seen a dynamic change from an across-  
10 the-board approach to a concentration in particular areas  
11 devastating to the country and to citizens, with organized  
12 crime, drug trafficking, public corruption, and white collar  
13 crime being the focus, you can see a reprecisioning within  
14 each of those areas of particular antisocial behavior as  
15 being the focus of Justice Department activity. You can  
16 see a further integration between investigative and prose-  
17 cutive or lawyering responsibilities and duties. You can  
18 see the continuation of innovation and initiatives; and,  
19 lastly and perhaps most importantly, I think we have about  
20 institutionalized the essential independence of the Depart-  
21 ment of Justice from the political process, not only be-  
22 cause of the attitudes of the last three Attorneys General  
23 but because we now have policies that are in writing and  
24 developed to maintain independence of the decision-making  
25 with regard to investigations and case management and case

1 decisions from unseemly or untowards, no matter how well-  
2 intentioned interference by politicians and particularly by a  
3 well-meaning White House.

4 President Carter receives little credit for the  
5 support of these items, as President Ford received little  
6 credit for the support of these four matters. I think they  
7 deserve an enormous amount of support and I predict that  
8 with this steady development and continuity between different  
9 parties and different AttorneysGeneral that I have high  
10 hopes and expectation of high hopes that we have now in-  
11 stitutionalized them to the extent that no President and no  
12 Attorney General, no matter how ill-chosen, could success-  
13 fully erode or damage that essential independence.

14 Lastly, the Department of Justice, our profession,  
15 and our country needs your support, needs your constant  
16 attention. You here this morning and other fellows of the  
17 American College of Trial Lawyers are the very best that we  
18 can produce. You offer the hope and the expectation for  
19 the preservation of the practice of law as we know it, as to  
20 its development within the control of the profession as  
21 opposed to governmental control. You afford through your  
22 resources and through your imagination and through your  
23 objectivity the balance that is essential to check govern-  
24 mental decisions overreaching, bad policy developments. We  
25 in the government and we particularly in the Department of

1 Justice treasure the work of this great association and  
2 that of the ABA and its efforts, and I want to seek your  
3 continued unselfish devotion of your thoughts and your time  
4 and energy to the public good and the country's good and  
5 occasionally say something good for America.

6 Thank you.

7 (Applause)

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