

PUBLIC AFFAIRS STAFF

ATTORNEY GENERAL GRIFFIN BELL

[Q&A Following Judge Bell's Formal Address]

Langley, Virginia

Tuesday, May 8, 1979

[Address, followed by applause.]

ATTORNEY GENERAL GRIFFIN BELL: Thank you. And I'll now do my best to answer questions. It's not too often you get to cross-examine the Attorney General.

[Laughter.]

Yes, sir.

Q: What was the Foreign Intelligence Court? Could you tell me more about that?

ATTORNEY GENERAL BELL: The Foreign Intelligence Surveillance Act was something that was -- legislation that was introduced by President Ford and Attorney General Levy. It never passed in that Congress, and we reintroduced and were able to get it through the last Congress. And what we do there is in counterintelligence activity, which now ends at the Attorney General level, or the President's level, as the case may be, now goes one step further. And we go to this special court and get a court order before doing certain things in counter-intelligence.

This has two effects. One is it places another safeguard in the line which reassures the American people that the system's operating within the framework of the law. It also renders everyone immune down the line.

We never -- we never said a whole lot about the immunity, because the law of immunity changes pretty fast.

But it is true that judges are absolutely immune. And while we don't have a legal opinion on it yet, I would think anyone on down the line, unless you could prove they acted in bad faith, also would pick up that immunity.

But we have the tort claims amendment going on right now where if an agent is sued, we would substitute the United States as a party defendant, and the agent would get out. And then we wouldn't have a problem about representation or who was going to pay damages, if damages had to be paid. That's another thing that we're doing.

Yes, sir.

Q: Yes. On that very point, in the proposed charter, there was special language in there the protection that the Attorney General could give to intelligence people if they acted on the order of their general counsel or their agency chief was not provided in the case of electronic surveillance, so that everybody mixed up with electronic surveillance was not only out on their own, but they couldn't get the legal protection, and all this sort of stuff. Is that going to stay in the charter?

ATTORNEY GENERAL BELL: We haven't gotten that far in the charter we're drafting. We're not -- without disparaging this S-2525, we're getting up a charter of our own. And I would not agree to that, unless they included electronic surveillance in it. After all, there're the people who engage in the greatest risk and who are most often sued. So that's nothing. That's like giving you a tip to put that in there and leave the other people out. I wouldn't agree to that. Not that I could prevent, but I could try.

[Laughter.]

I can try always.

Yes, sir.

Q: Do you have any hope for doing anything about the Freedom of Information Act?

ATTORNEY GENERAL BELL: Yes. Yes. Well, I'm embarrassed to tell you that we've been studying this for a good while at the Justice Department. We study a lot of things. And we are -- just today, I was talking to the Admiral and to the Deputy, and I promise when I get back to the Department, I'll see why it's taking us so long to do this.

I've said, though, that I think we've lived now

For a good while now with the Freedom of Information Act. It's become very obvious to me and to a many others that we need some changes. Judge Webster frequently speaks out on this subject. And it's time for us to go forward with suggested changes.

Whether we'll get them through this Congress or not remains to be seen. It may take one more Congress. But we will get some of the necessary changes. We're spending a good portion of our time giving information to people in the penitentiaries and organized crime, who are trying to find out what we're doing to keep up with them, and those sort of things. And this is -- I don't have a great deal of patience hardly ever. But it reminds me of being -- I think we're in the silly season in this country.

[Laughter and applause.]

So maybe we can do something. Maybe somebody else will think the same thing.

Yes, sir.

Q: Sir, it seems that every time we pick up a newspaper and there's some new exposure of classified information in the media. I realize this is a sensitive area. But could you tell us what is being done to plug these leaks, and what are the problems that you face in trying to do so?

ATTORNEY GENERAL BELL: Well, this is a difficult area of government. When I first came to the Justice Department, we had an investigation of a leak of grand jury information. I required all the lawyers on the case to sign affidavits as to whether they'd talked to the reporter. And I found out who did the leaking in that way. I could not, didn't feel like asking anyone besides the lawyers, besides the secretaries, whatnot, were not bound by the same ethical restraints as were the lawyers, although they ought to be, because they're sort of an extension of the lawyers.

I then had a press conference and announced what I had done, because I knew it would get out any way. [Laughter.] And I told the press that I was going to do everything I could to control leaking, but that I recognized that they had a constitutional right to obtain leaks. So we would just be in an adversary relationship with each other. I'd try to hold down leaking; they could decide to do everything they could to find people who would leak. And then I asked all of my employees to be very careful. If they felt a compulsion to leak anything to please be accurate.

[Laughter.]

And I think that brought a sense of shame to the Justice Department, and the leaking sort of stopped. And there's been some leaking, of course, since then, but nothing like it was when I came here. It was just rampant at that time. It was the way most news got out was by the leak method. There was hardly any need of having a press conference.

So that I think, you know, we went through Water-gate and the Vietnamese war, and we were in a low period. And I think -- I really think we're working out of that. I think the mood of the people is better; the mood of the press is even better. And the mood of the government employee is better and of the American people. So I think we're in a better mood. And I think people now are fairly careful about leaking. And I've made two or three speeches on what people accomplish by leaking and to try to explain that I understand the game. If somebody can leak something that I'm not going to do, they leak that I am going to do it, and they think I don't have enough backbone to change the course. But that doesn't bother me any to change. I don't pay any attention to things like that.

And there's all sorts of leaking going on. There was a study done on leaking at Brookings, and it describes -- I once put this in a speech. I think it was to the American Society of Newspaper Editors. It describes leaking, and the double leak and the daring triple leak. The triple leak is one of the great things.

[Laughter.]

But once you get to put all this on the table with your employees, things pick up a little bit.

Now leaking classified information, prosecuting people that do that is quite a problem. The law is complex. It's narrow. And it depends on whether it has anything to do with defense, nuclear energy. Often you run into First Amendment problems. And I have somebody studying that. And we'll have something to say on that in the next two or three days. But we're trying to get some relief in that area, some relief more than what we have now.

The Admiral knows about it. And we'll be having something to say on it.

Yes, sir.

Q: Judge Bell, in some of the recent cases brought by private citizens involving constitutional issues against defendants in both private and official capacities, this has

led to this necessity to separate suits so that the government defends the suits and then hires private attorneys to defend the privately sued individual.

Do you think that federal tort act change, or any of the various measures that are in progress, will do anything to solve that?

ATTORNEY GENERAL BELL: It will solve it. That's why we're pushing that legislation. I'm the person who thought that legislation up. When I first came here to Washington, every few days somebody would bring me in a paper to sign where I would substitute the United States as a party defendant in the swine flu serum suits. And I found out that the Congress, when they passed that law, had passed a law to indemnify and hold drug companies harmless if they would make this serum. And they did it by substituting the drug houses as a party defendant -- I mean the government as a party defendant. That means the government defends the suit and pays the damages.

And it occurred to me that if the government would do that for the drug houses, surely they'd do it for the CIA and the FBI. And I've been preaching that for two years now, and I haven't got the legislation through, but I believe we'll get it through before it's over with. That will solve it.

Q: Judge Bell, do you favor repeal or renovation of the Hughes-Ryan Amendment? And if so, do you favor it now or as part of a larger charter legislation package?

ATTORNEY GENERAL BELL: Well, on Hughes-Ryan, I have said privately -- I don't think I've ever said it publicly -- that I favor -- I don't mind leaving it like it is. I favor giving it a literal interpretation, which is you report, you report after the fact, not before, because the President has the authority under the Constitution to run the foreign policy. He does not have to go get clearance in advance. But reporting is not unreasonable.

The second thing that I favor is that you report only to the intelligence committees, the House Intelligence Committee and the Senate Intelligence Committee. Now, I have had some experience in the past in reporting, not Hughes-Ryan reporting, but reporting on matters that involve the national security. And I have, on two occasions, reported things to the leadership and the two intelligence committees. And they've said "What can we do with this?" And I said "It's in your judgment. It's in your judgment what you do with it. But I'm not reporting it to anyone else."

That kind of an approach, plus stemming off any effort to make your report in advance, anyone unwittingly filing or reporting in advance, it seems to me, would make Hughes-Ryan livable. We can live under it. And being realistic, I doubt that you could do any more.

Congress -- you know, the founding fathers designed government on the basis of tension. And this tension between the Congress and the executive: that was intended. And the Congress is constantly trying to get some of the power from the executive, and the executive probably -- I'll exclude the present administration -- but there might be someone in the executive who'd be trying to get some power from the Congress. And occasionally people have been known to say that the courts exercise too much power.

So this is tension, and we have to expect that. So what I have just described probably wouldn't be a bad system. Now, you may find others who disagree with that, but, just as an observer, that'll work it out pretty well.

In the back.

Q: Judge Bell, perhaps you could clarify a constitutional problem for me. As I understand it, under the "gray mail" provision of classified material that was not relevant to the case might be suppressed, that you would suppress that material in a pre-trial hearing so neither the government nor defense could use it. Is that correct?

ATTORNEY GENERAL BELL: All right. What we'd do, to put it in a simple way, if some secret was discovered, was about to be discovered, you could go to the judge and disclose it to the judge -- in camera, we call that -- not to anyone else. And you could get a ruling on whether it's relevant to the defense. If it's relevant to the defense, you might have to then consider either dropping the case or appealing the ruling, if you thought it was incorrect under our legislation. If it was not relevant, you'd put it back in the vault, and that'd be the end of it.

Sometimes the judge will want to bring the lawyer in, the defense lawyer. That may mean getting clearance for the defense lawyer. Sometimes they won't. When I was a judge, I had a case where the court, the district court looked at some foreign intelligence and said it was not relevant, resealed the envelope. Then when it came to appeal -- I was on the court of appeals -- it came there sealed. Everybody had his initials, so you knew it hadn't been opened. Three of us looked at it. And we decided it was not relevant, and we put in the opinion that we had examined it and it was not relevant.

We had a case here in Washington recently where we have to drop some cases because the judge said he didn't have authority to examine anything in camera. Well, for generations courts have examined trade secrets, for example, in camera. So it's nothing new. But we appealed, or we tried to. We filed a mandamus proceeding, and the court of appeals denied it. And we had to dismiss two prosecutions.

We think this is a simple solution and will solve most of the problems.

Yes.

Q: I'd like to follow up on that question. In other words, you're saying that in a pre-trial suppression here, you could avoid confrontation problems if the defense lawyer there wanted to use the evidence, wanted to confront a witness with that evidence.

ATTORNEY GENERAL BELL: Yeah. Yeah. I think that. I don't think that you could confront anybody. I don't think you have a right to be confronted with something that might not be relevant. But most judges will let the lawyer in. But the next argument, if you want to put it under the confrontation clause, would mean that you had to let the client in; the defendant would have to get in and look at it. Then we might as well put in the paper. And I'm not planning on doing that.

But what we are trying to do is have a public trial. I've never worried so much about confrontation. We're trying to have public trials. I talked to the Canadians and I talked to the British. And they have secret trials. I was in New York last summer with the Attorney General of England and Wales. We were both on the same program. He had just finished a secret trial in England. Nobody gets excited about it over there. They had an espionage case, tried it in secret. We can't do that. There's no reason; it's idle to discuss it, because our Constitution guarantees you a right to a public trial.

And what we're trying to do is work out a system where we have a public trial in every respect, except pulling in material which is not relevant. And understand, a defendant, when his time comes to appeal, he can get a new trial if it was relevant.

So I think you get a fair trial that way. I believe you do. And actually there've been some cases like this. I can give you one that I wrote the opinion in called H. Rap Brown, the United States v. H. Rap Brown. That was the case I was referring to about the intelligence, the foreign intelligence in it. And there's been one in the District, and



there's been one in the Third Circuit Court of Appeals. And they're some pending, as you know, in the pipeline right now.

Q: Judge Bell, my question is about legalisms surrounding intelligence activities against U. S. persons. I was struck by a recent report issued by the State Department on events in Guyana. And a reading of that report would indicate that bureaucratic concerns about activities of a contentious U. S. religious group had so constrained the Embassy that when they asked if they could raise the problem with the Guyanese government, they put it in such a low key fashion that the State Department said, no, you may not.

And translating that into our concerns, I could see possibly a chief of station somewhere dealing with a situation where U. S. persons were involved in seemingly subversive matters, who might similarly have his instincts constrained. And I wonder if you're satisfied with the current balance of law in this field.

ATTORNEY GENERAL BELL: Well, I don't have a specific example before me. But intelligence activity, like law enforcement, involves common sense.

Now we certainly want to be careful not to interfere with anyone's rights to religious freedom under the First Amendment. But if there's evidence of a crime, you're investigating crime, not religion. And I think people have to have that in mind. I think you just can't hide from the fact that there might be some criminal activity going on.

But I don't want to look on that matter as being widespread. This was a religious group in this country that had gone over there saying they were fleeing persecution, that sort of thing. And you'd be naturally reluctant to keep up with them too closely. And I would prefer to think about that as being an aberration.

We have been in prosecutions against religious groups who violate the law, and we will be in the future. And of course, I don't control the whole government, so I don't know what the policy of other agencies might be. But I think it would be a sound policy to be careful about intruding on religious groups. But if you get reports that they're committing crimes, then you ought to investigate. And we will and do. We do and we will.

Somebody in the back. All right.

Q: I wonder if you would comment on the legal implications of trying to deal with people like Phil Agee and "Covert Action Information Bulletin," which allegedly identified CIA personnel abroad.

ATTORNEY GENERAL BELL: Yeah, that's one of the hardest problems we have, the Agee problem. He doesn't return to this country, and therefore we're unable to take a civil action against him. I suppose if we did, he'd leave, go back again, if he could get out. If we prosecute, we'll immediately be into the gray mail area.

So we've got to -- we've got to come up with some different approach to the matter that we've not yet come up with. I know you're worried about the Agee -- when I say "the Agee," I call it the Agee problem, because there're others in it too; seems to be. And I worry about. And there's nothing I'd like more than to be able to do something about it.

We have discussed this with all of your top people, and we're still discussing it. In fact, we discussed it today before we came down here to the auditorium. And I don't know what we'll be able to do. But I think with a little imagination, dedication, maybe we can do something. I'll say to you that it's on mind, just as it's on your minds and on your people's minds everywhere in the world, I suppose. It's not a good thing.

It's not a good answer, but the best I can give you right now.

In the back.

Q: There's a practical intelligence problem of the type that you addressed partially. When this agency collects intelligence through clandestine means, let's say on narcotic matters, and they're giving information or providing information on foreign narcotics trafficking, at a certain point that information may lead to identifying the U. S. connection, the Americans involved in bringing the drugs across the frontier or selling them in Chicago, or what have you. That information, according to regulations, we cannot disseminate.

Now this is frustrating to DEA and various other enforcement agencies. And I'm just wondering what the solution is. How can we....?

ATTORNEY GENERAL BELL: This is one of the first things I learned after I got to Washington, that the intelligence agencies would not tell me about a crime. And I had a big argument one day with the head of an agency about this. And I was trying to get some information, and he said he was in the intelligence business, not in the business of prosecuting people. So I started using examples. If he found out that somebody, we'll say that the President had committed some terrible crime of the highest order, would he tell me? He said no; wouldn't tell me. And I said, "Well, this can't be the law. We couldn't -- can't have a government operating on this basis."

So I finally got him to give me the information on the basis that he'd give it to the President. He said he'd give it to the President, but he wouldn't give it to me. And I finally worked it out on that basis.

I don't know what -- there's no flat answer to this sort of thing. I can't believe, though, that people in the intelligence community wouldn't call it to someone's attention if they saw clear evidence of a crime by an American citizen, particularly by -- well, by any American citizen. I think you'd want to tell somebody.

I think the way to handle it is like it channel up, and then whoever's at the head of an agency ought to make a judgment about it. The reason you don't want to tell it is, number one, you think you're intruding on the rights of American citizens, but, number two, you're afraid you'll give away sources and methods if we find it out. Well, we're not that bad. We're in the intelligence business ourselves at the Justice Department. After all, we do have the FBI over there running counterintelligence. So we understand the problem. And we're not the enemies of the intelligence community. And I really don't think you have a right to have this kind of information without giving it to somebody. I wouldn't want it myself.

If somebody -- as high as my office is, if I got some information I couldn't give out, I don't know what I'd do with it. I think I'd want to tell the President. I know I'd write a memorandum of some sort about it.

But this is a traditional law in the intelligence business. I mean if you think about Coventry being destroyed to save the secrets of Britain in World War II, then you know that you just don't give out everything. But when you run across something like that, particularly if it was against a public official, you ought to let it come up to the top of your agency; move it up the line, and then we'll all make a judgment about what to do with it.

That's about the best answer I can give you. This is a very difficult thing, the question you ask. Intelligence is difficult. Let's face it.

Q: ...when it comes to court, when it comes to trial, there's the fear not that the FBI or the Justice Department learns about our sources and methods, but it comes out in court. I mean the defense attorney insists on knowing how this information was obtained.

ATTORNEY GENERAL BELL: Yeah. Well, That's gray mail. That is gray mail. But you see, you've got to trust the Attorney

General enough. You've got to say that he is not a traitor and he's not an idiot, and he's not going to give away the secrets of the nation. And I've had to sell that. And we've prosecuted a lot of people since I've been here. But every time it's been trouble, because the intelligence community naturally -- and I don't blame them; they want to protect the sources and the methods. But we're finding now by working together that we can prosecute. We can prosecute sometimes where we ought to prosecute. If we can't prosecute, we just don't go forward. But we do work it out together. And this is a good thing. This is one thing I'm very proud that we have accomplished. Most of us did not know each other when we got here. Career people were already here, and they thought probably somebody from Atlanta was a dangerous character. But we're working it out pretty well now. We're doing it with a sense of responsibility, tilting to the interests of the defense -- of the intelligence community. And gray mail legislation will make it even better, if we can get that through. And I think we have a good chance of getting the gray mail legislation through.

In some places, we do fabulously well in court. The gray mail system has worked out. We even had a mandamus granted in New York in the Second Court of Appeals where I was in contempt of court for not giving the names of the informants. The Second Circuit Court of Appeals stayed the judge's order and granted a writ of mandamus, which meant they heard a case; it was not appealable, ordinarily.

But you can't depend on that. You can't depend on the vagaries of the courts of America. You've got to have a statute that says to all of them: "Here is a procedure to follow." But without a statute, remember, we've done pretty well. And this case here in Washington, over in Washington, was the only one that we've had to dismiss so far. Since I've been here I believe it's the only one.

Admiral, I believe that's it.

[Applause.]