

REMARKS

BY

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TO THE

INTELLIGENCE COMMUNITY ATTORNEYS

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Most of you know Russ Bruemmer, who started clerking for me in St. Louis, then joined me at the FBI, and later returned to private practice, where he was a partner in Wilmer, Cutler and Pickering. Now I have lured him back to public service once again, and I hope he will find the process of being in and out of public service as interesting as I have.

Because you have had 19 speakers today, I will try to be like the deceased at an Irish wake: necessary to the party, but not expected to say very much.

I was back in St. Louis last week to deliver the Law Day address and to thank the Bar Association of Metropolitan St. Louis, which donated a portrait of me that will hang in the FBI Headquarters. While I was there, someone made what I thought was a very interesting and spirited defense of Shakespeare's attitude about lawyers -- an attitude summed up in the famous line: "First we kill all the lawyers." This individual explained that the story is really about a planned coup, and that those planning the coup said "First we kill all the lawyers" to signify the important role lawyers have in preserving order. That interpretation puts a slightly different spin on the work that you do and that I like to think that I still do. The significance of your role is one of the things I hope to cover tonight.

We have all had the experience of working in the executive branch of government, with people who exercise fairly fierce authority. These people have a somewhat different attitude about the advice they receive from their General Counsels than do company executives, who have been better conditioned to accept advice. And I know that there aren't many of us who haven't asked the question: "What do you mean I can't do it?" I know this because I have

asked the same question of [] and Russ Bruemmer. It's a question that we have to understand and come to grips with.

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I recall asking this question while serving in the Korean War. I was the executive officer of a tanker, and the captain came to me and said: "Four of our men have been arrested and are being interrogated. Will you represent them?" Well this was post-Escobedo but pre-Miranda, and the Uniform Code of Military Justice was being revised. We had something called naval courts and boards. So I went to the room where the men were being held and banged on the door, wanting to get in. The investigators said: "You can't come in now because we are questioning them." I said: "That's why I want to come in." We went through the whole Escobedo exercise, and finally I got inside the room and said: "I want to be sure that these men understand their rights. Have you advised them that they don't have to answer questions?" The investigators replied: "Well, we've told them that they have certain constitutional rights." And I said "Very good. Have you told them that includes the right not to answer your questions?" So I advised the men of their rights. A few weeks later when I was out at sea, I received a long military letter that had come through all the admirals from the Navy shipyard at Pearl Harbor where this incident occurred, to the Commandant of the Fourteenth Naval District, to the Commander Service Force Pacific Fleet. The key line of the letter was: "Due to Lieutenant Webster's interference we were unable to obtain a confession." Later, I did receive a very nice vindication saying that I had done no more than guarantee to these men their rights assured by the Constitution of the United States, and I have kept that letter.

But that incident taught me that lawyers play a very significant role that is not often understood or appreciated in goal-oriented organizations that are built upon "can do" or "must do" missions. Sometimes, it takes a lot of considered "stroking" for us to make executives understand that we are really there to help them do what they want to do -- and do it properly. We must make our executives see that our questions and our "as you go" advice is vitally important to the success of the mission. And lawyers are vital to the trust that the American people must have in secret organizations. The American people must believe that we are doing things right.

As we go about this business, I think it's very important for us to understand that nature of our mission, because it helps us understand the people with whom we are involved. How many of you -- may I see a show of hands -- have offices within 500 feet of the senior person to whom you report? That's impressive. How many have offices on the same floor? Now I'm not talking about the General Counsel, I'm talking about the senior person to whom you report. That's a much larger number than I expected. I wish I could say that were true of the Central Intelligence Agency. I think is more than 500 feet from Langley, but we're working on that, and we will bring the offices closer because I think easy access is very, very important. "Out of sight, out of mind" is often true. People tend not to want to take the time to involve you when you're not readily available and can't put in an appearance in five or ten minutes when you're needed. And you are needed.

I was going to talk about some of the differences that I found between the FBI and the CIA. These differences don't have to do with the agencies themselves as much as with the differences between the collection of

information for law-enforcement purposes and the collection of information for intelligence purposes. I could get into that, but seeing here, I suspect that you've already had an opportunity to hear about those differences from the real expert in the United States Government on this subject.

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Unlike the FBI, the Agency and the various components of the Intelligence Community hope and expect that the information they collect will not find its way into the courts. We hope and expect that the information we supply will not be discovered in the process of leading to the origins of evidence to question its admissibility. We hope and expect that you will help us do our work in such a way that even those cases that go to trial will not be subject to "gray mail" or to the so-called "CIA defense" -- both of which defense counsels have learned to use with great skill. We also recognize that there is a tendency for law-enforcement components to utilize investigative opportunities through foreign counterintelligence guidelines or statutes designed for intelligence collection. These statutes can be legitimately employed as long as there is an intelligence purpose in the collection process. The problem, based on regulations, guidelines, and court decisions, occurs when we cross that line which presents major evidentiary problems for the prosecutor and major heartburn if any intelligence agencies are concerned with the collection of the information.

We have to be aware of the differences between law enforcement and intelligence collection, but there are substantial similarities and many common purposes. I think that counterterrorism, counternarcotics, counterintelligence, and technology transfer are the principal areas in which we all have a significant role to play. How well we play that role -- and how

successfully we balance the difference between one agency trying to get into court and another trying to stay out of court -- will be reflected in some of our long-term successes and long-term failures.

I found when I got to the Agency that there were a lot of requirements that have to do with working with witting United States citizens. As best I can generalize, when we are recruiting or when we are utilizing U.S. businesses and proprietaries, the rules require that U.S. citizens be witting of CIA involvement. I'm sure there are exceptions, and Russ and can point them out to you. But if we want to conduct surveillance on a U.S. citizen in Europe, special approval is required from the Attorney General. So we are accountable, just as the FBI in this country is accountable for the way in which it conducts investigations of U.S. citizens.

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There are a great many statutes and regulations, such as the Hughes-Ryan Amendment and Executive Order 12333, that impose some significant responsibilities on intelligence agencies. But, in my view, the internal process by which we send proposals forward is of equal importance to the external regulations. These internal procedures are generally overlooked by the Congress and the American people because we don't talk about them enough. Clearly, the Office of General Counsel and the Office of Inspector General in the CIA play a significant role in examining covert action proposals and other techniques that could implicate laws or regulations. And we look at a proposal not only from the standpoint of whether it offends any particular law, rule, or constitutional provision, but also whether it would make sense to the American people if it became public. That is a very important consideration, because so little is known about what we do that when our

actions do become public, the American people must believe our actions make sense -- that they're not silly or sinister. And that kind of examination was one of the things that would have been helpful in the Iran-Contra matter. Someone should have taken the trouble to ask whether the covert action, with respect to the arms sale, was consistent with the foreign policy of this country. The very inconsistency of that policy held it up to ridicule and scorn and caused all the actions that followed. We ask those questions in the CARG, the Covert Action Review Group, even before a proposal advances up the line to the National Security Council, where the same questions will be asked again. The proposal is then reviewed by senior policymakers on the National Security Council; the Secretaries of Defense, State, and Treasury; and the Attorney General. This review is done in the presence of the President, so that any flaws in the proposal will surface and the President will realize the risks and the problems before he makes the final judgment. The public may not be aware of this process, but they should be.

I think the FBI has made a success of enlisting public support. It's vital to the FBI to be able to ring a doorbell and have somebody answer and say: "Come in, how can I help you?" In covert organizations, achieving public support is very, very difficult, because the CIA often must insist that its role be hidden, and because it is not possible for us to reach out and explain what we do and why we do it. Because we cannot trumpet our successes on the intelligence side of the house, the American people must develop confidence and trust in what we are doing -- and that we are doing it right.

I am always being asked: "is it true that the FBI is all lawyers and accountants?" When I say no, they ask: "Well why isn't it?" They like the

idea that there are lawyers working in the FBI. I like the idea too, but I have found that their numbers are shrinking. There were less than 1,000 lawyers in the FBI when I came on board, and I built that number back up to something like 1,400, aside from the General Counsel's office and the principal legal advisers in each of the field offices. I believe that the influence of law-trained people in that organization is bound to have a positive effect on every action that takes place. In planning these actions, lawyers would be more certain to take into account what our society demands of us in terms of maintaining the balance between preserving individual liberties and keeping our society safe and free.

Legislation that affects the Intelligence Community is contained in FISA. I think FISA has been a good thing. In 1978, when I first came to the FBI, the bill was just going through the Congress, and frankly, I was uncomfortable with it. I hadn't worked in intelligence, and I wasn't sure that the bill wouldn't give away the store somehow; I thought that it would require the executive branch to seek a court order to collect intelligence on hostile foreign activities. But Griffin Bell pressed the issue. He had problems getting the bill confirmed in the Alexandria Court, and I went along to give what little sincere support I could. But all during the confirmation proceedings, I reserved judgment. Finally, I said: "O.K., let's go," and I supported the bill. It has turned out to be an enormously useful tool. Why? Because prior to FISA, the Attorney Generals -- out of fear of getting caught up in some kind of Watergate problem -- had created staffs who kept building and refining all the requirements needed for a special Attorney General's order to conduct electronic surveillance. As soon as we had FISA, our

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problems in this area largely ceased. Of course, [redacted] in-box grew, but our problems largely ceased. The judges were informed, the court decision was and is very secure, and we had no problems. In fact at one point one of the judges said, "Shouldn't you give us a wiretap request we can reject? There's going to be some question about whether or not we are patsies for all of you." We finally did give them one they wanted to reject. We were trying to use FISA for searches as well as for electronic surveillance, and there wasn't much you could find in the statute that supported this. Ben Civiletti, who by that time was Attorney General, said: "Well, we'll do sort of a 'reverse Solomon.' We'll both sign the request, and either the President has the authority or the court has the authority." But the court didn't like that, so they rejected the case.

So we see a situation in which legislation -- even though viewed with great question by the executive branch, which has never yet conceded the constitutionality of the statute but has agreed to abide by it -- has worked very well for us. And I think it will continue to serve the best interests of our national security. That legislation deals with public confidence, because the public believes we must be accountable in the gathering of foreign counterintelligence information. They want us to do our job, but they believe we must be held accountable. Often, the public believes that we think we are above the law, and that's bad.

I have tried to emphasize and will continue to emphasize the need for absolute fidelity to our Constitution and our laws -- and I underline the word our. Obviously, clandestine intelligence operatives working around the world are going to run afoul of local laws and local statutes. That fact is taken

into account in the process by which our proposals are reviewed and approved. But the activities in which we engage must be consistent with our foreign mission and our own laws, and they must reflect what the American people expect of us. We must find ways to get that message known and understood. The American public is very responsive when it believes that there is some order in this elusive world of cloak and dagger.

Clearly, we can't cut into the initiatives of our agents and assets, who do not have the support systems that exist here in the United States for the FBI. They are out there on their own, and we have to give them some breathing room. On the other hand, they must know what is required of them under our laws. And I hope that in deciding whether Presidential findings are required, you will avoid saying: "Well, let's get a finding, it's the easy way out." A finding not only affects the people out in the field, it involves the time and energies of the President of the United States and his chief advisers. And I really don't think we need findings for some of the actions that Congress is now suggesting may require findings. We have to take a firm, informed, and articulate position on this subject.

Before I conclude, I want to again stress one important point. From my conversations around the country, I know that people are very reassured to hear about the role of lawyers in the law enforcement and intelligence collecting agencies of our government. It is very reassuring for them to know that you are giving advice to our principal managers and to the directors of intelligence agencies. You have a dual responsibility. Internally, you must guide anyone in an intelligence agency who is involved with operational activities. I earnestly ask you not to let the operations people speak for

you. In many cases, representatives from your offices are going to have to work closely with the operations people and other branches of your agency. Don't let your representatives develop "clientitis." They must always report back to you; they must take advice from you. It is not their job to be popular with the people to whom they have been assigned. And you must not settle for the quick answer to the difficult question. If an issue will require more study, you must insist that you have sufficient time, and you must tell your people who are out in the trenches with the operations people that this issue is important, and you need to be sure your advice is right. Do not allow "the lawyers say" syndrome to develop. As Russ may have told you, I take issue when I hear the words "the lawyers say" because I would rather read the opinion or see something attached to the package that reflects the approval of the General Counsel or another authorized official, than to have a very able operations officer tell me what "the lawyers say." I've had too many years of experience with skilled Special Agents in Charge who mumbled at me as I passed them in the hall, and I found out later that they claimed they ran it by the Director and he said it was fine.

Externally, I would like to see you become more visible than I think you are. It's great that you are here together and particularly great that you have a chance to get to know each other because you're on the phone talking to each other all the time. But I would also like to see you at seminars, and I would like to see you accept speaking invitations. I'd like to see you become more visible because the American people recognize your independence, your sworn duty to uphold the law, and your understanding of the law. The public needs to know that you are very much involved in the decisionmaking process on

tough and complicated issues involving our Constitution. It is tremendously reassuring to them, and when we develop their trust, we will get more "green lights" than "red lights," and we badly need more green lights these days.

So I didn't come down here just to say "I'm glad I'm here." I wanted to share my sense of your role. If I can support you in your efforts, I'd appreciate the chance to do it. Thank you for letting me come here -- even as the deceased at the wake. I've enjoyed the opportunity to talk to you.