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INTELLIGENCE UNDER THE LAW

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INTELLIGENCE UNDER THE LAW

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MY TOPIC TODAY is “Intelligence Under the Law.” I want to divide my remarks into two parts: First, I’d like to start with a plug for lawyers, in a way you may not expect. Let’s call the first part: “Intelligence Under the Law – The Value of a Legal Education.” In the second part, I’d like to talk about the hardest thing lawyers, acting as lawyers, do in the intelligence community – say “no.”



Now, on to the unappreciated value of a legal education. I have read a lot of intelligence products over the last four years, both finished pieces and so-called “raw” intelligence. As a beginner, like a beginner in anything, I assumed that those who did this for a living – those who analyzed and wrote about intelligence – were so trained, so steeped, so talented, that I couldn’t possibly run with them.

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James B. Comey

Much that I read and heard was indeed extremely well done. But much of what I read was sloppy, loose, and imprecise – all things I can do. And much of what I read was inconsistent, lacking in rigor, and unimpressive – all things I can be. I must confess that the sense of intimidation went away quite quickly and I realized that much of my education and experience and yours, lawyers, was well-suited to intelligence.

Intelligence – and by that I mean intelligence analysis, not collection – wasn't physics, it wasn't advanced calculus, it wasn't Greek (although it sometimes seemed that way). Intelligence analysis was, at bottom, grouping facts, sorting those facts, and then reasoning from those facts. Intelligence was understanding motives, looking for biases, comparing new facts with known facts, new conclusions with old conclusions. Intelligence was confronting other conclusions, understanding unspoken assumptions, looking for alternative explanations, knowing how certain you were about something. Word choices were critical; words could convey meaning and nuance, or conceal meaning and nuance.

What I discovered is that I had been learning the skills of intelligence analysis since college, where I was a chemistry and religion major. The religion major taught me important analytic skills in two senses. Biblical exegesis – the study of texts – is about comparing wording, comparing accounts, taking known texts and comparing to other sources; it involves a maniacal focus on the meaning of words, the history of words, the biases of historical observers, the biases of contemporary scholars. I also studied Applied Ethics, things like medical ethics, the ethics of warfare, business ethics. That also taught me that words carry great freight; words telegraph outcomes and often foreclose discussion. To use an obvious example, choosing whether to call the product of human conception a “fetus” or “unborn child,” even when adopting a posture of apparent neutrality in a discussion about abortion, is a hugely important choice, a choice that largely ends neutral discussion.

But I learned most of my intelligence skills in law school and as a practicing trial lawyer. What is the first thing you do in law school? You read a case and decipher two things: relevant facts, and the

Intelligence Under the Law

holding of the case. You find the conclusion and examine that which supports it. You then spend three years expanding on that skill, examining what other cases and other facts mean to the holding and relevance of earlier cases. You are drilled on your reasoning, challenged by other interpretations, other facts, other language. You learn that clear writing matters, that facts matter, and that the conclusions drawn matter a great deal. (Those of you who spent law school in a pub learned other things.)

As a practicing lawyer, I took those skills – the ability to find key facts and to scrutinize the conclusions drawn from them – and applied them to real life, applied them to witnesses telling a story, people with all the biases and imperfections of all humans. I learned that everybody lies, everybody forgets, and that all people perceive and recall events differently. I learned that human memory is the most imperfect of tools, sliding and slipping in ways that are hard to fathom. I learned that two very different reports could be honestly written by two people reporting the same interview. I learned that a bias or predisposition imposed a screen that affected the facts reported and conclusions drawn.

And most importantly, I learned all those things in the crucible of the adversary process. Everything I did would be tested by a worthy adversary – distorted, picked apart, mischaracterized, criticized, ridiculed. And that the attack on my reasoning would take place before a fact finder – judge or jury – that would offer its own scrutiny, skepticism. And as a prosecutor, I learned to organize my facts to meet a very high burden, beyond a reasonable doubt. The crucible of the adversary process, with defense lawyer and fact finder, forced me instinctively to organize and examine facts, claims, assertions in the courtroom of my mind: How will that play? What could be said about that claim? What facts are consistent? What facts hurt and will buttress the defense claims? What can be claimed about the bias of the observer or the limitations of the observation? How sure am I of my conclusion: probable cause? By a preponderance? Clear and convincing? Beyond a reasonable doubt?

The point of all this is not that I am great. My experience, to one degree or another, is widely shared. My point is also not that the

training I described does not also bring challenges for the world of intelligence, like a too-cautious attitude borne of a high burden of proof. My point instead, is that on this Law Day, I wanted to take a moment to praise legal training, because it is an extraordinarily valuable tool in the world of intelligence.

Too few lawyers realize this. Too few non-lawyers appreciate what a legal education is all about. Instead, they see blood-sucking divorce lawyers, greedy class-action lawyers, weasel ACLU lawyers, and timid DOJ lawyers. But beneath those blood sucking, greedy, weasel, frightened exteriors, beat the hearts of some of the finest intelligence analysts in the world.



Now that I have told you why lawyers are some of the finest analysts in the world, let me get closer to the core value of good lawyering and the rule of law. I'd like to call this part: "Intelligence Under the Law – The Value of No."

It can be very, very hard to be a conscientious attorney working in the intelligence community, particularly for those whose work touches on counter-terrorism and war-fighting. It is not because we don't work with great people. We do. We work with people who have dedicated their lives to protecting this great country and all it stands for.

It can be hard, instead, because the stakes couldn't be higher. Hard because we are likely to hear the words: "If we don't do *this*, people will die." You can all supply your own *this*: "If we don't collect this type of information," or "If we don't use this technique," or "If we don't extend this authority." It is extraordinarily difficult to be the attorney standing in front of the freight train that is the need for "this." Because we don't want people to die. In fact, we have chosen to devote our lives to institutions whose sworn duty it is to prevent that, whose sworn duty it is to protect our country, our fellow Americans.

But it's not that simple, although during crises, at times of great threat, it can surely seem that simple, certainly to the policy maker

Intelligence Under the Law

and operator, and even to the lawyer. We lawyers know – or should know – better than anyone, that it is not that simple.

At the outset, we know that we are a nation of laws, not men. We have chosen a profession that internalizes that truth. We know that the rule of law sets this nation apart and is its foundation. We also know that we took an oath to support the constitution of the United States. We know that there may be agonizing collisions between our duty to protect and our duty to that constitution and the rule of law.

When we encounter those moments of collision, I hope we are aided by a uniquely lawyerly ability: the ability to transport ourselves to another time and place; and the ability to present facts to an imaginary future fact-finder, in an environment very different from the one in which we face current crisis and decision. We know that the setting will not be a late-night command center, thick with the tension of threat and danger. We know that our actions, and those of the agencies we support, will be held up in a quiet, dignified, well-lit room, where they can be viewed with the perfect, and brutally unfair, vision of hindsight. We know they will be reviewed in hearing rooms or courtrooms where it is impossible to capture even a piece of the urgency and exigency felt during a crisis.

We also know – at the risk of sounding parochial – that once we give our legal blessing, the individual policymakers, the operators – good people though they may be – won't be there. In fact, if the stuff has really hit the fan, we know what will be said: "We never told the lawyer what to say." And: "We simply asked him/her what was permissible."

But we also know that we won't be alone in that imaginary calm, well-lit room – blazingly lit by hindsight. With us will be the reputation of our great institutions, the institutions we love because they do so much good over so many years. We know that damage to the reputation of that institution will cause harm for years to come, as our institution recovers from scandal or allegations of abuse of authority. We know the damage that comes from the pendulum swings of American public life, the pendulum swings that pushed us

James B. Comey

so far backwards in the late 1970s, again in the late 1980s, and surely will again.

The lawyer is the custodian of so much. The custodian of our own personal reputations, surely. But more importantly, the custodian of our institutional reputations. And most importantly of all, the custodian of our constitution and the rule of law.

It is the job of a good lawyer to say “yes.” It is as much the job of a good lawyer to say “no.” “No” is much, much harder. “No” must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. “No” is often the undoing of a career. And often, “no” must be spoken in competition with the voices of other lawyers who do not have the courage to echo it.

For all those reasons, it takes far more than a sharp legal mind to say “no” when it matters most. It takes moral character. It takes an ability to see the future. It takes an appreciation of the damage that will flow from an unjustified “yes.” It takes an understanding that, in the long-run, intelligence under law is the only sustainable intelligence in this country.

Thank you for your commitment to the rule of law, to “yes” when it can be, to “no” when it must be.

Thank you for your commitment to Intelligence Under the Law.

JB

