



Department of Justice

ADDRESS

OF

THE HONORABLE BENJAMIN R. CIVILETTI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

THIRD CIRCUIT JUDICIAL CONFERENCE

TUESDAY, SEPTEMBER 11, 1979

7:30 P.M.

HERSHEY MOTOR LODGE AND CONVENTION CENTER
HERSHEY, PENNSYLVANIA

I am particularly pleased by the opportunity to address this group this evening, for two complementary reasons. First, I consider it essential to communicate with the citizenry of this nation on matters of law enforcement which affect us all. The reputation of the Third Judicial Circuit has it that its annual conference usually shares the limelight with fifty of the most attractive members of the citizenry in a different venue, and I found out to my disappointment that this was not to be the case this year. I need better informants. The second reason is that the participants in this conference are dedicated and distinguished jurists, professionals, and other contributors to the administration of justice.

I should like to discuss briefly a subject which looms large in any consideration of the present and future state of law enforcement in the United States. It is a matter to which I devoted a great deal of time and energy as Deputy Attorney General, and one which enjoys a very high place on the Justice Department's list of priorities. I am referring, of course, to the proposed legislative charter for the Federal Bureau of Investigation. I had the opportunity last week to give testimony

with respect to the charter proposal before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, and some important points were discussed at that time. I need not dwell here on the many instances in memory of the apparent collision between the requirements of criminal investigation and the guarantees vouchsafed every individual by the Constitution. We presently live in an age of rapidly advancing technology, with the natural and concomitant increase in the sophistication of investigative techniques. Indeed, if the law enforcement agencies of the government are to proceed effectively against white-collar criminals, terrorist organizations, and organized crime, such highly sensitive investigative techniques will be necessary. And therein lies part of the problem.

I am sure that many of you are familiar with the ancient Greek paradox of Achilles and the Tortoise. That particular bit of sophistry allegedly demonstrated that the slightest advantage on the side of the relatively slow tortoise was sufficient to insure that Achilles, the swiftest of the Greeks, would never be able to overtake it. The alarmists observing the scene today, like their ancient counterparts, would maintain that even the most sincere and zealous concern for the protection

of our civil and constitutional rights will never be able to keep pace with the risks which inhere in ever more sophisticated investigative techniques. It is my belief that the FBI charter currently under consideration will help guarantee that, just as surely as Achilles actually drew even with the tortoise, we will be able to satisfy the demands of justice while maintaining a reverence for the freedoms embodied in the Bill of Rights.

I welcomed the opportunity to testify before that House committee because I believe that a principal job of the Justice Department is to conduct itself in such a way as to demonstrate to the American public that effective law enforcement is compatible with the preservation of civil and constitutional rights, and in a profound sense is its sine qua non. This is not to say that broad investigative authority cannot lead to abuses; it is to say that efforts to prevent such abuses made in good faith can succeed. This is the real importance of the proposed FBI charter, for it will, if enacted, provide the American public with the checks and balances required to insure that federal laws will be enforced within the law. The charter which we have proposed will, for the first time, provide a comprehensive constitution for the Bureau. I use the term

"constitution" quite deliberately, for I intend to call attention to the fact that this charter is no more a self-contained document than is the United States Constitution itself. Rather, its purpose is to define and delimit the fundamental authority and responsibility of the work of the FBI, its general investigative powers, and the principal minimum limitations on those powers. It is, in other words, not a detailed, finely tuned handbook of procedure applicable to every possible contingency. It must, and will, be supplemented by guidelines to be promulgated by the Attorney General, and in addition it will undergo the same process of interpretation and adaptation which prevails in the case of all legislative acts. This is the best way to insure that this charter will be able to undergird the workings of a bureau which of necessity must grow, develop, and adapt to the changing conditions under which it is mandated to function.

It is important to note here that there is little danger lurking in the formulation and promulgation of Attorney General's guidelines to complement the charter. This is so for several reasons: first, as I have mentioned, the charter specifically sets minimum limitations on the investigative powers allotted the FBI. That being the case, the departmental guidelines may

result in even higher standards of review and control. Second, the charter depends on a variety of checks on the Bureau's powers: among these are congressional oversight, department review, and internal disciplinary procedures within the Bureau. Third, the Department has already had several years of experience with guidelines which were promulgated by Attorney General Levi in 1976 with respect to the handling of domestic security investigations, informants, and civil disturbances. Far from frustrating the intentions which underlay those guidelines, their application has insured that those intentions were brought to bear on some very sensitive decisions on a case-by-case basis. With a legislative charter in place, additional guidelines will continue to perform that vital function.

The charter, as proposed, consists of four general types of provisions: first, it states general principles which apply to all criminal investigations. Second, it sets limits on who and what can be investigated, and under what circumstances. Third, it authorizes and provides limits for the use of certain sensitive investigative techniques. Finally, it limits the purposes and duration of retention of information obtained in the course of a legitimate investigation. With respect to the second point, I would point out here, as I have done repeatedly,

that there is no authorization implied anywhere in this charter for COINTELPRO-type activities; such activities are repeatedly prohibited.

I prefer, however, to dwell more on the positive aspects of the charter, that is, those provisions which provide authorization, albeit within careful limits, for the FBI to pursue the investigative activity which is essential to the effective prosecution of criminals and the prevention of future crime. On taking office, I indicated that I would be assigning high priority to the expediting of investigations, in line with my very firm belief that justice delayed is justice denied. The implementation of such a program would be irreparably hampered were the chief investigative arm of the Justice Department not to have the authorization to vigorously pursue investigations to their conclusion. I trust that no one would seriously dispute the claim that an ineffective FBI could only impede the protection of the rights of our citizens. I am determined that the FBI will have clear sight of the goals and priorities of the Department, and that it will have the authority to open investigations where indicated, and to vigorously pursue them or promptly close them, as necessary. There are several key provisions in the charter which will make this possible.

Section 533 authorizes, with appropriate checks, the broad powers required for full-scale investigations. The most important of these are those directed at ongoing criminal enterprises, specifically, organized crime and terrorist organizations. Here it is simply the case that the public interest cannot be adequately served unless there is authority to extend investigations beyond specific criminal acts. In many cases of ongoing criminal enterprises, the membership and financing of the organization must be probed, as well as its probable future intentions. Recognizing the difficulty of drawing a sharp line between such essential investigative powers, and those which may infringe on activities which are legally and Constitutionally protected, the charter grants these extended powers subject to certain tightly defined limitations. There must, for example, be clear evidence of the existence of an organization which currently has a clear criminal nature and purpose. These and other stipulations distinguish these critical investigations from the much simpler case of investigations of singular criminal acts by individuals.

A further distinction is drawn between investigations of racketeering on the one hand, and terrorist activities on the other. The latter, because of their very sensitive political overtones, require the involvement of FBI officials at the

highest level, and notice to the Attorney General's office of the continuation of any terrorist investigation beyond one year. These requirements will be sufficient to guarantee that this area of authorization will never jeopardize the exercise of the right to engage in lawful political activity.

The other important positive aspect of the charter is the authorization, again within carefully drawn boundaries, of specific investigative tools. One of these, the issuance of so-called investigative demands, parallels the use of administrative subpoenas by other government agencies. By the terms of the charter, FBI investigations would be furthered by the ability to gain access, through such investigative demands, to the toll records of communications common carriers, insurance records, and records of banks and credit institutions. The granting of this power to the FBI will insure that federal criminal investigations will not be hopelessly bogged down by the reluctance of the holders of such records to risk legal liability from their release. Again, the prime consideration here is the necessity of enabling investigations to proceed with as much speed and thoroughness as is consistent with the protection of privacy and lawful activity.

Perhaps the most sensitive of all investigative tools is the use of informants. The charter has therefore been carefully designed so as to insure that all potential informants are screened with the utmost care and their activity carefully monitored, especially in the case of terrorist organizations. A key provision is that informants are not exempt from prosecution for criminal acts unless a high FBI official determines in writing that participation in the specific criminal activity under investigation is essential to the investigation, and that this clearly overshadows the seriousness of the act itself. It cannot be overemphasized that this does not constitute in any sense a blanket authority for informants to commit crimes. Rather, passage of the charter by the legislature would provide that under the very strict, and well controlled, terms of the charter, certain narrowly defined activities by informants are not to be construed as criminal acts. The provisions of all existing criminal law would apply to any departure from those strict constraints.

I daresay there is not a person here who has not had to agonize at some point over the unavoidable tensions between the effective enforcement of the federal criminal laws and the safeguarding of Constitutionally granted liberties. Because I strongly believe that these two crucial objectives can and must

be integrated, I have chosen to highlight just a few of the provisions of a document which, if and when it is approved by the Congress, will go a long way towards effecting that synthesis. I would simply close by reminding you of the words of Abraham Lincoln who, in 1838, exhorted everyone to "remember that to violate the law is ... to tear the charter of his own and his children's liberty." The charter now before the Congress is one which, I am confident, will protect our cherished liberties in every sense for future generations.

Thank you.

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