Department of Justice

STATEMENT BY

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to the

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE SENATE COMMITTEE ON THE JUDICIARY

concerning

SIX ANTI-CRIME PROPOSALS
(S. 2187, S. 2188, S, 2189, S. 2190, S. 2191, and S. 2578)

Tuesday, March 22, 1966

Crime, historically a local problem and a local concern, has become, decidedly, a national problem and a national concern.

As President Johnson observed in his Crime Message two weeks ago, the fact and the fear of crime mark the life of every American. He called on the Congress and the nation to join in a national strategy to halt and eventually reverse the increasing rate of criminal activity across the country.

The measures being considered by this subcommittee relate closely to that national strategy in two ways:

First, three of the bills under consideration relate to organized crime -- racketeering which has mushroomed into an inter-city, inter-state network beyond the scope and power of local law enforcement.

Second, the other three measures relate to federal steps which, while important in their own rights, bear significantly on the capability of law enforcement generally.

Federal responsibility is not to control or dictate. Our historic insistence on local control over law enforcement is to be prized and protected. Rather, the responsibility of the federal government is to provide the most effective possible law enforcement in its own sphere and the most useful assistance and leadership in the more general areas of law enforcement that go beyond narrow federal jurisdiction.

I applaud the subcommittee's recognition of these needs and I am happy to have this opportunity to testify concerning these six measures.

ORGANIZED CRIME

The Congress of the United States has played a central role in awakening the nation to the power and the danger of the rackets.

The hearings conducted by Senator Kefauver and the later investigations conducted by Senator McClellan shone a clear, cold light on the nature of the methods of organized crime.

Those hearings demonstrated that there is no part of the country free of the grip of the rackets. They demonstrated how gambling, extortion, labor racketeering, prostitution, narcotics, and other manifestations of organized crime generate immense amounts of criminal capital.

The hearings demonstrated how that capital is used to develop still further racketeering enterprises, including the infection of areas of legitimate business through loan-sharking and bankruptcy fraud.

And the hearings demonstrated how the rackets preserve their first line of defense -- the conspiracy of silence.

This is silence secured most dramatically through terror. When the tortured body of an underling is found hanging from a hook in a meat freezer, he cannot talk and his associates are not likely to.

It is a silence secured even more damagingly through corruption. The corrosive impact of bribing a police captain or a mayor is not, plainly, limited to insuring their silence. It extends to the caliber and integrity of all their work.

Because of public concern aroused by Congressional hearings and because of the anti-racketeering statutes enacted at Attorney General Kennedy's request in 1961 and 1962, we have been able to develop an effective and accelerating organized crime drive in the federal government.

As only one indication of its scope, the number of organized crime prosecutions undertaken rose from 17 in 1960 to 331 in 1964 and to 491 last year.

Gains like this are the result of the cooperative efforts of the FBI, the Internal Revenue Service and of every federal law enforcement agency. We believe additional legislation can help us maintain and speed the pace.

Two of the measures before the committee, S. 2188 and S. 2190, would help us strike directly at the shield of silence which the rackets have erected around their operations.

1. S. 2188

The first, S. 2188, would dam a gaping hole in the protection the government can now provide to its own witnesses.

Under present law dealing with obstruction of justice, it is already a crime to threaten, intimidate, harass, or attack a witness in a court proceeding. But it is not a federal crime to intimidate, harass, or attack a witness who has divulged information to federal investigators, but before a case reaches court.

This is an omission that must be quickly and surely rectified.

Is there any justification for this present inconsistency? I can see none. The danger to an informant or a witness flows from whether he has talked to the government, not from whether the case is yet before the court. The federal government ought to be able to provide the same assurances and protection to a person willing to go to the FBI or other federal agency that it can at a later stage in prosecution.

The need for this authority is underscored in dozens of cases by witnesses beaten with baseball bats and tortured with acetylene torches. And for each identifiable case of intimidation or attack, there are many more cases of sudden, unexplained silence by witnesses.

2. S. 2190.

The use of explicit threats against individual witnesses is only one facet of the problem of silence. Another important facet relates to a witness who is intimidated without need for specific threats -- a witness already mortally afraid to break the code of silence.

S. 2190 is designed to help pierce this kind of silence. It would permit us to grant immunity from prosecution to a lesser criminal in order to obtain information from him about higher-ranking criminals who direct racketeering activity.

The strategy implicit in S. 2190 is based on recognition of the way modern racketeers work. Only rarely do the top men in an organized crime enterprise actually carry out the operations; customarily they direct the activities through a series of functionaries, often at a considerable distance.

Consequently, the only persons who can link the leaders to the crimes are the subordinates. But they are themselves implicated and by adopting their protections against self-incrimination, they not only shield themselves but also the racketeering captains for whom they work. The effect, hence, is that the latter are effectively immunized from prosecution.

Under S. 2190, it would be possible for federal prosecutors to confer immunity on the underling and thus secure information that can be used against rackets leaders.

Immunity statutes are hardly new to federal law. The first, enacted 109 years ago, permitted grants of immunity to witnesses before Congressional committees. Since then, immunity provisions have been enacted in connection with more than 40 different statutes.

By attaching similar provisions to four other statutes, S. 2190 could give us necessary and significant new weapons against organized crime.

The measure would add immunity provisions to:

1. The Racketeering Travel Act (18 U.S.C. 1952), which makes it a federal crime to travel interstate in support of racketeering enterprises, one of the most useful anti-organized crime laws.

2. The Obstruction of Justice statute (18 U.S.C. 1503) enabling us better to secure information about the beating and murder of witnesses.

3. Bankruptcy Fraud (18 U.S.C. 9), giving us a much-needed wedge to drive into the rapidly increasing intrusions of racketeers into legitimate businesses. These customarily involve phony "fronts" removed from the racketeers who direct the operation.

4. Bribery and Graft (18 U.S.C. 11), providing capability to deal with one of the most important types of organized crime conduct and at the same time one of the most difficult to deal with.

Neither a briber nor a public official who receives a bribe will readily testify; each has committed a crime. An immunity provision here would allow the Department to determine which may be less culpable and then to proceed against the other.

This legislation is important--perhaps essential--if we are ever to pierce effectively the conspiracy of silence which is the prime protection of the leading gangsters in organized crime.

3. S. 2187

The third measure relating to organized crime contains findings and declarations of fact concerning the illegal activities of the Mafia. Based on these, the bill would make knowing and willful membership in the Mafia, Cosa Nostra, or any other racketeering organization a federal offense. It would be punishable up to twenty years imprisonment and a fine of up to $20,000.

Membership or participation in an outlawed organization or knowledge of the organization's purpose, would be determined by a jury on the basis of evidence relating to any one of six enumerated factors:

(1) Previous conviction for a racketeering offense; (2) financial contributions to the organization; (3) financial assistance in the form of gifts, loans, or bail bonds for any member of the organization; (4) carrying out organization instructions ordering the commission of a crime; (5) past participation in organization meetings at which matters relating to racketeering offenses were discussed; and (6) refusal to cooperate with law enforcement agencies or legislative bodies.

The Department of Justice is, of course, intensely interested in any legislative measure to curtail the operations of any interstate crime syndicate. We are of the view, however, that S. 2187 raises a number of constitutional questions of such substance that, at the very least, its effectiveness is very likely to be impaired by prolonged litigation.

These questions relate primarily to the Due Process Clause of the Fifth Amendment and the scope of the privilege against self-incrimination. Conceivably, First Amendment problems might also be raised, since that Amendment relates to freedom of association in non-political as well as in political organizations.

A principal purpose of S. 2187, as I understand it, is to deprive the leaders of the Mafia and of similar syndicates of the services of the underlings through whom they operate. That objective can, I hope be achieved through the continued use of such statutes as 18 U.S.C. 371, which makes it unlawful to conspire to violate any federal law, and 18 U.S.C. 1952, which outlaws interstate travel in aid of racketeering enterprises.

Passage of S. 2188 and of S. 2190, dealing with obstruction of justice and immunity, should further strengthen our ability to achieve the purposes intended by S. 2187.

In view of the constitutional problems involved in S. 2187, I would prefer to rely upon continued energetic use of existing authority and the new tools contained in S. 2188 and S. 2190. I am afraid S. 2187 would result in diverting our energies into channels that would, in the final analysis, be unproductive and slow down our current successes in the organized crime drive.

STATUTES BEARING ON LAW ENFORCEMENT GENERALLY

The three bills I have just discussed all relate to organized crime. The other three measures now before the committee, dealing with pre-arraignment procedures, wiretapping, and narcotics are significant not only because of their relevance to federal practice but because of the considerable bearing they have on the states.

4. S. 2578

The starting point for the approach taken by S. 2578 is the Mallory rule of the Supreme Court. Under this rule, confessions are inadmissible as evidence if they are obtained during a period of unnecessary delay between arrest and arraignment.

S. 2578 seeks to solve some of the warmly debated problems of pre-arraignment procedure by substituting for this rule a number of conditions to be met before a confession will be deemed admissible.

Under this bill delay between arrest and arraignment would not necessarily result in the exclusion of a confession. A confession could be admissible if before any questioning, the arrested person was (1) informed of the nature of the offense which he was believed to have committed, (2) advised of his privilege against self-incrimination, and (3) accorded reasonable opportunity to retain and to consult with counsel.

As the Committee knows, the Supreme Court has recently heard a number of cases, including Westover v. United States, which raise questions as to the scope of the privilege against self-incrimination and the right to counsel. The Court can be expected to define some of the standards which any scheme of pre-arraignment procedure must meet, and legislation in this area may thus be subject to change in the next few months.

Nevertheless, I believe that substantial improvement in the present situation can be made by legislation. Court decisions cannot, ordinarily, provide law enforcement officers with the precise, comprehensive instructions they require to carry out their duties in an orderly manner.

As the Department stated in its brief before the Court in Westover, we believe that a warning is an important protection of the privilege against self-incrimination. I would endorse a requirement of law that warning be given as soon as reasonably possible after arrest.

Second, I also believe that a period of time between arrest and charge should be provided. This period allows the decision as to whether and what to charge to be made on a rational basis, and gives an opportunity for the prosecutor to participate.

Third, I think that careful protection should be provided against the dangers of incommunicado detention. S. 2578 points in all three directions.

However, these ends are best achieved by making delay between arrest and arraignment relevant only to the issue of the voluntariness of confessions or statements. If Mallory is interpreted as equating the arrest decision with the charge decision, it thus eliminates any opportunity for pre-charge screening. That, in my opinion, would be unrealistic.

But if Mallory is taken as a recognition of the dangers of prolonged incommunicado detention, then it is a good rule. Limiting the time a person is held by law enforcement officers is important, both to insure effectuation of rights and to avoid unnecessary detention. I believe that legislation should attempt to give guidance to police on how long they may detain, as well as under what conditions.

Any legislation in this area should prescribe a system of federal criminal procedure which will guide law enforcement officers in their observance of constitutional protections for individuals.

With respect to S. 2578, specifically, I would suggest two clarifications. First, while an arrested person should be informed what offense he is believed to have committed, that requirement should not exclude the use of statements he may make about other crimes during questioning.

Second, it should be made clear that statements made pending the arrival of a lawyer -- at the scene of a crime, for example, or en route to the station house, or even at the station house -- should not be excluded.

Any legislation should, in my view, explicitly limit the period of time between the law enforcement decision to arrest and the administrative decision to prosecute. It also should provide for warnings, for access by counsel and others, and for limitations upon detention.

It should also provide for means to heighten the visibility of the investigatory process and the accuracy of testimony regarding it, such as sound-recording and other records. These points are elaborated in the American Law Institute's Tentative Draft of a Model Code of Pre-Arraignment Procedure, which represents a useful example of one form which legislation might take.

5. S. 2189

I come now to legislation regulating wiretapping. There are many strongly held, divergent views on this subject, and legislation dealing with it has been introduced in virtually every session of Congress for more than 20 years.

The present federal law was enacted in 1934 and is contained in section 605 of the Federal Communications Act. It prohibits the interception and disclosure of the contents of any wire communication without the consent of one of the parties.

Since 1940, every Attorney General has construed the act as not prohibiting wiretapping as such, but as prohibiting the interception and disclosure or use for personal benefit of the information so obtained. Because of the prohibition on disclosure, information obtained as a result of a wiretap cannot be used by state or federal authorities for the purpose of prosecution.

I agree with my predecessor that the present law regarding wiretapping is intolerable. In fact, I would go so far as to state that it would be difficult to devise a law more totally unsatisfactory in its consequences than that which has evolved from section 605.

First, it adequately protects the privacy of no one. To prosecute successfully, the Government now must prove both interception and disclosure. Under these circumstances there is a good deal of illicit wiretapping. Estimates as to how much vary greatly, but since the technique is relatively simple, it is safe to assume that considerable private tapping goes on.

Second, under present law, use of wiretapping for potentially justifiable prosecutive purposes is impossible. A number of state laws authorize wiretapping by police officials under certain circumstances and procedures. But the federal law has been interpreted by the courts to prevent the use of this information in prosecution.

Within the federal government, wiretapping is strictly regulated. The FBI uses wiretaps only for intelligence purposes in national security matters, and then only with the express approval of the Attorney General. This has been true since 1940. President Johnson has extended this rule to all agencies of the federal government.

I think there is general agreement that:

--the President should be permitted to authorize wiretapping for national security purposes so long as this procedure is strictly controlled;

--that wiretapping should not be permitted by private individuals and that the law should be strengthened to insure that such abuses do not take place;

--that if wiretapping is to be permitted at all, it should be by law enforcement officials, under strict controls.

The present law gives us the worst of all possible solutions. The time has long since passed for Congress to take action to curtail continuing abuses in this field.

S. 2189 seeks to strengthen the law by making possible successful prosecution of private wiretapping. At the same time, it would authorize law enforcement officials to wiretap where permitted by state law, authorized by an appropriate court order, and under rigid procedural safeguards. In this way, it seeks to protect privacy on the one hand and recognize strongly felt law enforcement objectives on the other.

State and local law enforcement officials throughout the country support the need for wiretapping, under appropriate safeguards, as a tool for law enforcement. There is great merit in their views, particularly with respect to those crimes which most often involve the use of the telephone, notably extortion, bribery, narcotics, and organized gambling activities.

Should this committee agree that a strong case can be made out for limited wiretapping authority on the part of law enforcement officials, I believe nevertheless that it should go even further than S. 2189 in circumscribing that authority.

In particular, I believe that any such legislation should specify the crimes against which wiretapping may be authorized. The states should be required to enact affirmative laws to take advantage of the federal legislation and should be permitted to avail themselves of only so much of the maximum authority as is required to meet local needs and conditions.

At the same time, the needs of law enforcement must, obviously, be weighed against the inevitable invasion of privacy which any wiretapping entails. And it has been my experience that efforts at compromises of the sort involved in S. 2189--despite the fact that they would greatly curtail present intrusions--gain little support from those who are opposed to all wiretapping.

If a compromise such as that embodied in S. 2189 is impossible of legislative achievement, then I would urge that section 605 be amended to prohibit all wiretapping, except that authorized by the President for national security purposes.

In terms of the protection of privacy, such legislation would be clearly preferable to the present situation.

Law enforcement now is denied the use of wiretap information for prosecution, so we could scarcely be worse off in this respect than under present law. And such action would serve the purpose of decisively preventing illicit wiretapping which now exists.

6. S. 2191

The nature of federal efforts to deal with addiction sets a significant example to state and local jurisdictions. A creative approach by the federal government can stimulate similar efforts across the country.

That is the precept of S. 2191, proposed by Senator McClellan -- seeking to cure addiction rather than merely to punish it. It seeks to do so through use of civil commitment of addicts to hospitals for treatment rather than to prisons simply to serve time. This also is the approach of S. 2152, the Administration proposal.

S. 2191 is a good bill and most of its salient features are entirely acceptable to the Department of Justice. Based on our experience, however, I would offer these suggestions:

First, we believe Title II of S. 2191, dealing with voluntary civil commitment of addicts should be eliminated. All systems in which addicts have had the right to leave a rehabilitation program at will have failed; most addicts leave the hospital too soon unless treatment is compulsory.

Second, S. 2191 is limited to persons convicted of a federal law relating to narcotics. But Bureau of Prisons figures for fiscal 1965 show that more than half of the offenders with histories of addiction had been convicted for non-narcotic offenses. Legislation of maximum effectiveness should deal with all addicts, not only those who happen to be convicted for narcotics offenses.

Finally, safeguards are necessary against abuse of civil commitment. As a guide to those who should be excluded from civil commitment, let me offer the following list from S. 2152:

(1) The small class of addicts charged with crimes of violence;

(2) Traffickers in narcotics -- those who sell narcotics for reasons other than to support their own habits;

(3) Persons convicted of at least two felonies;

(4) Persons who have already been civilly committed twice, to no avail; and

(5) Persons against whom a felony charge is already pending.

S. 2152 and S. 2191 will embody what is the most important concept in narcotics control: that is an approach which seeks to capitalize on the new avenues opened by science and medicine.

CONCLUSION

Just as I appreciate the opportunity to come before you today to discuss these six measures, I invite the attention of the committee to three other measures, in the President's anti-crime program, which Senator McClellan has recently introduced.

One of these measures, S. 3064, provides for the establishment of a distinguished body to review and revise the whole body of federal criminal laws.

The second, S. 3065, would recognize the inseparability of corrections on the one hand and probation on the other. By consolidating both functions within the Department of Justice, this measure can make a major contribution to a career corrections service and to maximum rehabilitation of prisoners.

Finally, S. 3063 would amend the statute central in our accelerating effort to assist state and local authorities, the Law Enforcement Assistance Act of 1965.

In only six months, this Act has shown such great promise that we propose to extend it for an additional two years and to expand its coverage. We would increase appropriations under the Act from $7.2 million to $13.7 million.

None of these measures -- nor all of them -- will insure victory in the war against crime or even in particular battles. But they all can have an important part in the national strategy the President has advanced.

I look forward to the consideration this committee will give these measures and I hope they will win your earnest support.