Department of Justice

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ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NINTH CIRCUIT JUDICIAL CONFERENCE

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During the last year and a half, for various reasons, I have often recalled a statement made by Lord Devlin in his book which came out some years ago on "The Criminal Prosecution in England." In defending some lack of judicial control over pre-trial criminal investigations in England, Lord Devlin wrote: "What is beyond argument is that whatever the powers of the investigator may be the ideal is that he should exercise them judicially." "It does not necessarily follow," he went on to say, "that the job should be handed over to the judiciary. For while it is desirable that the investigator should act judicially, it is essential for the safety of the realm and of its citizens that he should have at his disposal all the powers and resources of the executive arm." Then he added the axiom: "It would not be good for judges to act executively; it is better to expect executives to act judicially." And as to this he said, "It is not at all an impracticable ideal."

As a way of discussing a small segment of the Department of Justice's work, I would like to discuss three clusters of problems which in different ways concern the administration of justice, and where the Department in the implementation of executive authority is attempting "to act judicially." The ideal is not impracticable. Of course, there are tensions.

The first cluster: The 1972 decision in Branzburg v. Hayes held that newsmen had no absolute right under the First Amendment

to refuse to testify before federal or state grand juries with respect to information given them in confidence or with respect to their confidential sources of information. The decision was by a 5-4 vote with Justices Douglas, Stewart, Brennan, and Marshall dissenting.

In his majority opinion, Justice White began by distinguishing those situations where the confidential sources of the newsmen were themselves implicated in the crime from those instances where the source not so involved would refuse to talk to newsmen if the source feared his identity would be later revealed. But having made such a distinction, Justice White refused to recognize a privilege in either case. To recognize such a privilege, he pointed out, would involve the Court in defining categories of newsmen or writers, lecturers, academic researchers or dramatists who could be said to be eligible. If the privilege were to be a qualified one, as had been urged, this would in turn enmesh the Court in complicated considerations of what constituted a compelling governmental interest suggesting a differential treatment among various criminal laws. He pointed out that newsmen were not helpless; they had powerful means of influencing public opinion to protect themselves from harassment or substantial harm. For this and perhaps other reasons, prosecutors might be expected to act with discretion. Indeed the Attorney General had already fashioned a set of rules for federal officials in connection with subpoenaing members of the press. These rules were a major step and they might be sufficient to resolve the disagreements and

controversies.

The tone of Justice Powell's concurring opinion was somewhat different. He emphasized the continuing role of the courts to quash a subpoena or to issue a protective order so that the asserted claim to privilege could be judged on its facts by striking a proper balance--the tried and traditional way of adjudicating such questions. So too the dissent recognized that if the privilege were conferred, the courts would have to make some delicate judgments, but that "after all," the dissenters said, "is the function of courts of law."

Against this background the Department of Justice has operated on the basis of revised guidelines issued in 1973. The guidelines provide that no such subpoena may be issued without the approval of the Attorney General and state that if a subpoena is obtained without authorization, the Department will move to quash it. During my tenure we have construed the term "news media" broadly. For example, in a case in this circuit in which a group of documentary filmmakers were subpoenaed with respect to a film they were making about various fugitives, we had the subpoena, which had been obtained without approval, quashed.

The guidelines provide standards which call upon the Department itself to strike the balance Justice Powell's opinion in Branzburg discussed. They require that before the issuance of a subpoena to any newsman is authorized, all reasonable efforts

to secure the information in question from non-media sources must first be exhausted and negotiations with the person to be subpoenaed must be undertaken with a view toward securing voluntary compliance. If negotiations fail, subpoenas are issued to newsmen unwilling to appear only when the information sought is essential to the successful conduct of a criminal investigation, and every effort is made to limit the scope of the subpoena to that information which is necessary to verify the accuracy of published reports. The guidelines finally provide that "(e)ven subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment."

In the six years since the original guidelines were announced, an average of fewer than 20 subpoenas per year have been issued to newsmen at the request of the Department of Justice. The majority of these subpoenas simply called for the production and authentication of photographs, films, tape recordings or other evidence of guilt or innocence in the possession of a news organization. In most cases, agreements with the newsmen were reached; the subpoenas were issued at the request of the newsmen as a matter of personal convenience or professional practice.

Difficult fact situations do arise and when they do, we have given considerable weight to whether the information to be elicited by the subpoena was given to the newsman in confidence and whether the newsman would be asked to reveal confidential sources. Though these factors do not appear explicitly in the guidelines, they

are, as the Branzburg case makes clear, properly the center of the press' First Amendment concerns.

Last year I was asked to issue a subpoena of a newsman who had written a series of articles purporting to expose misconduct on the part of government officials. There was some suspicion that a "source" quoted in the article was either mythical or was dissembling with the reporter. Despite these suspicions, I decided not to authorize the subpoena. My decision was reached in part because of the issue of confidentiality of sources. But I was concerned also that there would have been the appearance of harassment. The articles in question had gained considerable attention and had purported to uncover government wrongdoing. I should add that later, the reporter agreed to testify voluntarily. I was about to say that my view is that our practice is working fairly well in this area, which is so close to constitutionally protected rights, and then to go on to admit I had not had to face the case where the compelling circumstance was that without the testimony a prosecution would not be possible. One reason the hard compelling circumstance issue has not had to be confronted is because the practical inhibitions which prosecutors feel have simply kept some cases from progressing to that point.

The second cluster: Another area close to the reach of policy of constitutional protection is the question of dual prosecutions by federal and state prosecutors.

In 1959 in Abbate v. United States, the Supreme Court reaffirmed its holding of more than three decades earlier in United States v. Lanza that the Fifth Amendment's Double Jeopardy Clause does not bar federal prosecution of a defendant previously tried in state court for the same act or acts. In the Abbate case, the previous state court trial for conspiracy to destroy the property of telephone companies had resulted in a sentence of three months imprisonment. The Court reasoned that the federal and state governments are separate sovereigns; each can punish, independently of the other, offenses against its laws. Justice Black, joined by Chief Justice Warren and Justice Douglas, dissented. Justice Black observed that the possibilities of unfairness to defendants, which the double jeopardy bar is intended to prevent, are implicated quite as much by seriatim prosecutions by different sovereigns as they are by such prosecutions by the same sovereign. "Most free countries," he wrote, "have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction." "It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two governments to throw him in prison twice for the same offense."

Shortly after the Abbate decision, Attorney General Rogers issued a memorandum to United States Attorneys concerning the

exercise of the dual prosecution power which Abbate had reaffirmed. The memorandum perhaps was the product in part of an apprehension, based on the forcefulness of Justice Black's dissent and warnings against abuses voiced in the majority opinion in Abbate and its companion case, Bartkus v. Illinois, (which involved a prior acquittal), that unless the power was exercised wisely and with restraint, the Court's decision might prove unstable. Undoubtedly also influential was Justice Brennan's dissenting opinion in Bartkus, which charged the federal officers with having engineered the second-- this time a state --prosecution.

In the memorandum Attorney General Rogers announced the Justice Department's policy that "there should be no federal trial for the same act or acts unless the reasons are compelling." At the same time, however, Attorney General Rogers doubted it was "wise or practical to attempt to formulate detailed rules to deal" with the wide variety of situations that might arise. Instead, to ensure that the general policy was enforced, and enforced even-handedly, he required that no federal case should be tried when there has already been a state prosecution for the same act or acts without approval by the appropriate Assistant Attorney General with review by the Attorney General.

The requirement announced by Attorney General Rogers remains in effect. Along the way, however, "compelling reasons" was changed in the U.S. Attorneys' manual to read "compelling federal interests involved," which conceivably narrowed the focus. The

application of the standard, at least in my tenure, has proved, both as to substance and procedure, to be difficult and puzzling. So far as one can tell, the Department does not have much of a memory on the cases which have gone through the process.

Very few of these dual prosecution problems come to the Attorney General's attention each year, in some years fewer than twenty--a very modest number compared to the volume of federal prosecutions. But they are important both as an effort to achieve fairness and also because of the necessity of adequately vindicating the federal interest.

Let me describe a few of the recent cases. In one case the complaining witness in a Mann Act prosecution was found murdered shortly before the federal defendant was to go to trial. The federal defendant was indicted for murder in the state court. On the same evidence, the defendant could have been tried in federal court for obstruction of justice. The federal prosecutor deferred to the State, because of the greater penalties that would attach to a murder conviction. The defendant was then tried in state court and acquitted. There was no indication that the state prosecutors had been disabled from presenting all available evidence of defendant's guilt, or that the trial was anything but fair. There seemed to be no factual difference which would be relevant to the prosecution for obstruction of justice. There is of course a great federal interest in ensuring that a defendant guilty of obstruction of federal justice be punished, and moreover the federal interest is distinct from that of the State.

In another case a defendant was convicted in state court for embezzlement of funds, a portion of which he had transported in interstate commerce. The state court imposed what federal prosecutors regarded as an absurdly light sentence -- a brief period of probation. Again, there was no indication of corruption or any unfairness in the state court proceeding.

In a third case, a man stopped by state police for a minor traffic offense was discovered in possession of a sawed-off shotgun -- a federal crime carrying a possible ten-year penalty. He was taken by police to municipal court and arraigned. On advice of counsel, he entered a guilty plea to a state offense and received the maximum sentence: one month. Counsel in that case was quite astute. Counsel in other cases have shown a similar awareness of the Department's policy against dual prosecution to their client's great advantage. There apparently was an agreement between the federal and state authorities. State authorities had agreed to defer to federal prosecution, but had failed to inform the law enforcement officers involved.

As one struggles with these and other cases, one reaches for what meaning to give "compelling reasons" or "compelling federal interests." Overall one has to have a direction. Is it to be assumed that dual prosecutions are always suspect as unfair in the absence of compelling circumstances because inherently, if not technically, they involve double jeopardy? This could be taken as the warning of the dissent in Abbate. But there might be a different standard which would find unfairness presumptively only when there is reason to suspect that prosecutors who lost or were dissatisfied with their first attempt have in fact taken part in and brought about the second prosecution. Against these general alternative standards, one may then seek additional touchstones. An acquittal in the first case emphasizes the double jeopardy point. On the other hand if the result of

the state prosecution, no matter what its outcome, could not reach the federally mandated penalty, this suggests the possibility of an overriding reason or federal interest. Even absent such disparate maximum sentences, it is possible that the same circumstances may speak to a different federal concern. Overall there is the problem of how to go about getting effective reinforcement for an agreed upon division of labor between United States Attorneys and State and local prosecutors -- each agreeing to defer prosecutorial responsibilities to the other where the law under which the other operates carries the greater sanction. Attorney General Rogers' 1959 memorandum stated:

"Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise."

In some jurisdictions, there are formal and informal cooperative arrangements to this effect; and in most jurisdictions, perhaps, ad hoc adjustments are made. The precise content of such arrangements and adjustments necessarily must vary from jurisdiction to jurisdiction, depending on the content of state law. The great virtue of such arrangements is that they deal with both sides of the problems -- that is, state following

federal prosecution, as well as federal following state -- while the Department's policy, unilaterally enforced, can deal only with the latter. But such arrangements and adjustments have an inevitable instability over time, with changes in personnel, in prosecutorial emphasis -- indeed, with changes in law. In addition, there is occasional laxity in application and the slip-ups common to law enforcement as to any human institution.

The Department of Justice is now engaged in an effort -- an effort long past due -- to bring some stability and coherence to the decisions as to dual prosecutions. One part of the effort, through revision and clear statement in the United States Attorneys' Manual, is simply to ensure that the United States Attorneys are clearly aware of Department policy and will act accordingly. In several cases, the Solicitor General has moved the Supreme Court for an order to vacate a court of appeals judgment affirming conviction and to remand to allow a motion to dismiss, where the United States Attorney has failed to obtain permission for dual prosecution and where permission would not have been granted had it been sought.

In one such case in 1975, Watts v. United States, Chief Justice Burger along with Justice White and Justice Rehnquist dissented from the Court's acceptance of the Solicitor General's recommendation. "[A]ssuming as I do," wrote Chief Justice Burger, "that Abbate and Bartkus remain good law, there is no reason for the Court to lend its aid to the implementation of an internal prosecutorial policy applicable only by speculation on our part, and there are abundant reasons for not doing so."

This dissenting assertion of judicial independence, with which I have no doubt many of you have much sympathy, perhaps raises questions as to what kinds of problems can be handled either by the guidelines approach or the cases by case elaboration of prosecutorial discretion. The Solicitor General's motion to vacate seems to us to be an indispensable tool if a consistent policy within the Department and among the United States Attorneys is to be maintained.

The third cluster: Since at least 1940, the Department of Justice has had special responsibilities for the conduct of warrantless electronic surveillance. In 1965 there were 233 telephone wiretaps under this program and 67 microphones; in 1975 there were 122 telephones and 24 microphones. Lord Devlin in his book records that for England, where such interceptions are authorized by the Home Secretary, for the year 1956 the total number of interceptions for police, customs and security amounted to 159.

As you know, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 established detailed procedures regarding the interception of wire and oral communications. It requires the issuance of a warrant by a judge upon a probable cause finding of the commission of a crime, with notice to the subject of the surveillance after a certain period unless this is waived by the judge. It is not exactly the procedure one would use for the continuing detection of the foreign intelligence activities of foreign powers and their agents. Title III contains a savings clause which states that the Act does not limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against the actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

In the Keith Case in 1972 the Supreme Court said of this savings clause "Congress simply left Presidential powers where it found them."

In Keith, the Supreme Court held that in the field of internal security, where there is no significant foreign involvement, electronic surveillance may not be undertaken in the absence of a judicial warrant. Justice Powell emphasized that "this case involves only the domestic aspects of national security. We have expressed no opinion as to the issues which may be involved with respect to the activities of foreign powers or their agents." Since Keith, the Third Circuit and the Fifth Circuit have each held that the Fourth Amendment does not require a warrant for electronic surveillance instituted to obtain foreign intelligence. The District of Columbia Circuit's holding in Zweibon v. Mitchell is consistent with these results, although Judge Wright's opinion for four of the nine judges contains much dicta suggesting that some kind of judicial warrant must be obtained for any nonconsensual electronic surveillance.

Under the standards and procedures established by the President, the personal approval of the Attorney General is required before any non-consensual electronic surveillance may be instituted within the United States without a judicial warrant. All requests for surveillance must be made in writing by the Director of the FBI and must set forth the relevant justifying circumstances. Both the agency and the Presidential

appointee initiating the request must be identified. The requests come to the attention of the Attorney General only after they have been extensively reviewed by the FBI, by a designated Department official, and by a special review group established within the Office of the Attorney General. Each request, before authorization or denial, receives my personal attention. Under no circumstances are warrantless wiretaps or electronic surveillance directed against any individual who is not a conscious agent or collaborator of a foreign power. A year ago I publicly stated that there were no outstanding instances of warrantless taps or electronic surveillance directed against American citizens. There are no such instances now.

Although there is a strong and essential legal basis for continuing warrantless telephone and microphone surveillance for foreign intelligence and foreign counterintelligence purposes, the President has proposed legislation providing a procedure for the issuance of warrants in these cases. The proposal follows the implied suggestions of Justice Lewis Powell in the Almeida-Sanchez and Keith cases that special warrant procedures can be fashioned to meet unique circumstances. We have not asked the judges to act executively. The warrant could be issued by any one of seven federal district judges, designated by the Chief Justice, only if, on the basis of the submitted facts, there is probable cause to believe that the target of the surveillance is a foreign power or an agent of

a foreign power and the facilities or place at which the electronic surveillance is directed are being used, or about to be used, by a foreign power or an agent of a foreign power. The President's initiative in this matter was to the Congress and particularly to a bipartisan group of leaders in both houses. The bill has been reported out favorably with a vote of eleven to one by the Senate Judiciary Committee, and it is now before the new Intelligence Committee.

While this initiative by the President, when seen in the context of the history of our country for the last thirty-six years, is a major move for the protection of both individual rights and for essential protection for the country, there has been opposition to the proposed measure. Part of that opposition comes from those who, like Mr. Wicker of the New York Times, believe the proposed legislation is full of loopholes, booby traps and provisions that extend rather than restrict the Government's surveillance powers. Another part apparently, if one is to believe Mr. Evans and Mr. Novak, comes from those who believe the bill, on the contrary, will cripple our intelligence effort. It is said that in my advocacy of the bill I have been moved more by constitutional safeguards than demands of national security. That really is not a dichotomy I accept. I am concerned that a step long overdue, fashioned to protect constitutional rights and national interests, may be delayed and perhaps never put into place.

In the meantime I trust the Department will continue to try to act judicially, for this is an area of extreme importance.

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