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Files

**MEMORANDUM FOR THE DIRECTOR OF THE
FEDERAL BUREAU OF INVESTIGATION**

3 APR 1978

Re: FBI Undercover Practices

As you may already know, our Office has recently become involved in evaluating the legality of certain practices of FBI undercover investigative operations. Our inquiries have focused particularly on the obligations imposed by statutes relating to the handling of government funds and execution of contractual obligations, especially the leasing of property. Our conclusion has been that, while Congress most probably did not intend that these statutes circumscribe necessary FBI undercover efforts, the broad language and underlying purposes of some of the statutes raise substantial legal questions. The long-term solution to these problems is the enactment of corrective legislation. For the present, however, we believe that these matters should be brought to the attention of the appropriate Congressional committees. Our preliminary conversations with the Committee staffs suggest that the briefings should be handled by Department officials who are Presidential appointees, and the purpose of this memorandum is to suggest that you and I undertake this task together.

Problems have arisen in the following areas:

(1) Use of Funds: 31 U.S.C. § 494 provides that the gross amount of all funds received from whatever source be paid into the Treasury without any deduction whatever for costs or expenses. This statute raises questions regarding the FBI's practice of using income from undercover operations to defray expenses of those operations.

(2) Two statutes -- 31 U.S.C. § 665(a) and 41 U.S.C. § 11(a) -- have been construed to prohibit government agencies from entering into contractual obligations extending beyond the current fiscal year unless they are authorized by law to do so or appropriations are available to cover these obligations. See, e.g., Letter v. United States, 271 U.S. 204 (1926). This raises questions regarding the FBI practice, primarily in the foreign intelligence and counterintelligence area, of entering into leases extending beyond the current fiscal year. Our opinion on

this question is attached as tab "B."

(3) Another problem which arises in connection with leases is the restriction in 41 U.S.C. § 253 on advance payments without "adequate security." This restriction has posed problems with regard to at least one intelligence related lease where the FBI was asked to supply a large amount of funds in advance.

(4) The FBI's leases for intelligence or counter-intelligence purposes also encounter problems under 40 U.S.C. § 34. That statute prohibits leases in the District of Columbia unless an appropriation "in terms" has been made for this purpose.

(5) Several statutes prohibit public officials from depositing public moneys in banks unless authorized by law to do so. 18 U.S.C. § 648; 31 U.S.C. § 521. This prohibition bears on the practice in undercover operations of depositing funds in banks for either cover or support. 1/ We are currently addressing questions (3), (4) and (5) in separate opinion memoranda which we will provide to you when completed.

No suggestion has been raised that the FBI has entered into these practices with the intention of evading the law. Rather, these practices appear to have been adopted as a necessary part of performing functions vital to the fulfillment of the Bureau's law enforcement and intelligence responsibilities. It is only out of a concern for complying with all possibly relevant legal requirements that these practices were brought to our attention. Most of these practices are of recent vintage, and for this reason the legal questions are being raised now.

We have been advised in the strongest terms that these practices are necessary if the FBI is to perform effectively its undercover efforts and to achieve the goals which these undercover efforts are intended to meet. Due to the legal problems which the above statutes raise, however, I believe that we should contact the appropriate

1/ This listing is not intended to be exhaustive. Other statutes also bear on the FBI's undercover investigative efforts, e.g., 41 U.S.C. § 254(a) and (c) (relating to clauses required in government contracts), but we believe that we have legitimately resolved the applicability of such statutes to the FBI's needs. The statutes which we have specified are those which may most significantly affect the FBI's operations and which present the most substantial legal problems.

Congressional committees and advise them of the FBI's practices and raise with them these matters of possibly questionable legality. This approach will serve several purposes. First, it will serve to advise the Committees that legislation is being drafted to take care of these problems.^{2/} Second, particularly in the foreign intelligence and counterintelligence area, it will fulfil our commitment to the Congress to notify them of questions of legality or propriety. See Executive Order 12096, section 3-403.^{3/} Finally, Committee approval of these practices will give the Department greater confidence in the propriety of continuing these operations pending the passage of legislation.

I shall be happy to make the necessary arrangements whenever your schedule permits. We probably should count on sitting down together for an hour to discuss the basic issues before scheduling the briefings for the Committees.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

^{2/} In fact, the FBI is currently attempting to include in its fiscal year 1979 appropriations language which would alleviate certain of the problems mentioned above.

^{3/} All of the problems which involve intelligence activities must also be reported to the Intelligence Oversight Board. Section 1-709.