



Department of Justice

STATEMENT

OF

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BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FBI CHARTER

SEPTEMBER 6, 1979

Mr. Chairman:

It is a pleasure to appear before the Subcommittee on Civil and Constitutional Rights this morning to endorse H.R. 5030, the proposed charter for the FBI. The proposal submitted by this Administration and introduced by Chairman Rodino for himself, Mr. Clory, Mr. Hyde and Mr. Sensenbrenner, was the product of extensive work over a long period of time. We believe it is a sound charter which will enhance civil and constitutional rights and, at the same time, strengthen law enforcement. We hope that it will receive favorable consideration before this Committee and ultimately the full Senate and House of Representatives.

The Charter is intended to be a constitution for the FBI. Its main purpose is to define the jurisdiction and duties of the FBI. It is not and should not be a rigid encyclopedia of do's and don't's, nor an exhaustive code of incomprehensible regulations.

The charter is a comprehensive charter, for it deals with the fundamental authority and responsibility of the FBI in every important part of the Bureau's work. But it will not stand alone. There are also other important statutes, Attorney General guidelines, manuals and other regulations

which govern the work of the FBI. For example, the full range of the federal criminal laws, as well as state and local laws, apply to all Department of Justice and Bureau personnel.

Second, the body of constitutional and other case law, both civil and criminal, continues in full force and effect. These civil and criminal remedies supplement the provisions within the charter itself to ensure that the FBI enforces the law within the law. In addition, there are existing mechanisms and practices for congressional oversight, Department review, and internal disciplinary investigations and compliance audits.

The charter is intended to be the foundational statement of the basic duties and responsibilities of the FBI and also its general investigative powers and the principal minimum limitations on those powers. But it need not and should not contain exhaustive, detailed and lengthy provisions on all these matters. After all, the charter will be supplemented by several other provisions, not in statutory form. First, the charter will be interpreted, as all statutes are, by reference to legislative history which this committee will carefully develop. In this regard, our proposal was accompanied by an extensive section-by-section analysis or commentary designed to explain and interpret the intent behind various provisions of the charter and to make clear the meaning of the charter language. It is expected that this commentary would serve as one key

source for the development of legislative history, together with the series of hearings which start today and other materials which will be developed in the normal legislative process. Second, the charter expressly requires the Attorney General to promulgate guidelines in some eight major areas of FBI activity.

As you know, guidelines were promulgated by former Attorney General Levi in 1976 concerning three areas:

- (1) Domestic Security Investigations
- (2) Informants
- (3) Civil Disturbances

These guidelines will be supplemented by additional provisions and by new guidelines in each of the other areas required by the charter.

I believe that the experience in the past three years with the Levi guidelines has been highly encouraging. It has demonstrated that guidelines can be drawn which are well understood by Bureau personnel and by the public and which can be filed and reviewed by the appropriate Congressional committees. It has also shown that guidelines can be successfully applied to particular kinds of investigative activity and even to certain specific decisions made on a case-by-case basis. The reasonable conclusion which can be drawn from the success of these guidelines is that the charter need not detail every limitation or

safeguard by express statutory terms. Such details are better covered in guidelines, with the charter setting forth the obligatory principles and objectives which the guidelines must meet and achieve.

I would like to assure the committee that the guidelines to be written will be thorough, that they will be drafted in consultation with appropriate members and staff of the oversight committees, that they will be promulgated at the earliest possible time, and that they will fully meet the objectives set forth in the charter. I can report to the Committee that the initial work on guidelines has already begun by teams of selected lawyers in the Department and appropriate officials in the Bureau. A review group will make recommendations to the Attorney General once the initial process of drafting and revision has been completed.

Please bear in mind that in promulgating guidelines, the Attorney General can and may choose on the basis of advice and contemporaneous information and developments to impose additional or even higher standards or levels of authorization and review than those minimum levels contained in the charter itself.

Turning to the charter itself, I would like to point out that it is an integrated document, that is, various provisions located in different sections work together. Recognizing this inter-relationship is critical to understanding the purposes and effects of the charter, both in terms of what it authorizes the FBI to do and what it prevents the FBI from doing. In a very overly simplified way, the charter consists essentially of four types of provisions:

- (1) Provisions containing general principles by which all criminal investigations must be conducted;
- (2) Provisions which limit who and what can be investigated and establish threshold requirements which must be met before an investigation can even be started;
- (3) Provisions which authorize and limit the use of the various sensitive investigative techniques; and
- (4) Provisions which limit retention of information collected during investigations and the specific purposes and parties for which investigative information can be disseminated outside the FBI.

The charter is intended as an exclusive statement of jurisdiction. Accordingly, if authority for a particular kind of investigative activity is not found in the charter, there is no authority. Therefore, for example, activity of the type associated with COINTELPRO is not authorized in the charter; therefore, it is precluded absolutely as outside the jurisdiction of the FBI.^{1/}

The broad purpose and intention of the charter is aimed at criminal activity under criminal standards. Specifically, before an investigation can be initiated, there must be "facts" indicating a criminal violation, and the purpose of the investigation and the manner of carrying out the investigation must be directed toward and limited to three purposes:

- (1) The detection of crime;
- (2) The prevention of crime; and
- (3) The prosecution of criminal offenders.

Nevertheless, in order to remove any doubt whatever, the charter explicitly commands that there shall be no investigation by the FBI of the lawful exercise of the right to dissent -- the right to peaceably assemble and petition the government, or of any other right guaranteed by the Constitution and laws of the United States.

^{1/} In addition, Exhibit 1, attached hereto, lists the Charter provisions which by their terms or necessary effects prohibit the improper activities commonly referred to as COINTELPRO.

The heart of the charter is Subchapter III which contains the basic authorization for the FBI to conduct criminal investigations. The key section is Section 533 which contemplates investigation on two levels:

- (1) Preliminary investigations which are called "inquiries"
- (2) Full investigations which are called simply "investigations"

The purpose of inquiries is limited to determining rationally whether there is a basis for conducting an investigation. The purpose of an investigation, of course, is to collect evidence on which to base a prosecution as well as to seize evidence, fruits and tools of crime and to apprehend perpetrators.

We believe it is essential for the FBI to have specific authority to conduct brief preliminary activities called "inquiries", which are far more limited in duration and scope than investigations. Otherwise, the government would be powerless to act even tentatively on specific allegations of crime which did not meet the requirement of "facts or circumstances" that would reasonably indicate criminal activity. This is the standard that must be met before an "investigation" could be initiated. However, such allegations frequently contain sufficient information to demonstrate a substantial risk and to make it clear as a matter of common sense that some effort should be made to determine if there is some substance to the allegation.

It is important to emphasize that the inquiries ordinarily are of very short duration. Frequently, they can be completed in a matter of a few weeks. Also, their purpose is limited to making an initial assessment of the validity of the allegation or general information; they are not a means for attempting to secure evidence for prosecution. Moreover, in most inquiries it is not necessary to resort to sensitive investigative techniques. Generally, inquiries are limited to interviewing persons, checking existing law enforcement files and reviewing other publicly available information.

Section 533 which contemplates two levels of investigation also specifically identifies two different kinds of investigation:

- (1) Investigation of a specific criminal act;
- (2) Investigation of an ongoing criminal enterprise engaged in either racketeering or terrorist activities.

The investigation of a specific criminal act, such as an interstate theft, ordinarily does not involve great issues of sensitivity from either a legal or a policy standpoint. Moreover, the scope of such investigations is self-defining since the essential purpose of the investigation is plainly limited to identifying and apprehending the criminal and proving the elements of the particular crime. The duration of such a criminal investigation cannot be projected because it depends on circumstances which vary enormously from one case to another, but what can be

said with confidence is that such an investigation ordinarily ends with the indictment of the subject.

The second type of investigation concerns ongoing criminal enterprises engaged either in racketeering or terrorist activities. Special and broader investigative authority is necessary in these two narrowly defined areas because the ongoing nature and the organizational strength of these criminal groups poses real and special problems for society and for law enforcement. In order to effectively combat these threats, we believe it is necessary that that FBI be authorized to conduct investigations which are substantially greater as to scope, duration and emphasis on future criminal acts than the investigations authorized in section 533(b)(1). To be effective, racketeering and terrorist investigations need to focus not only on particular criminal acts, whether past, present or future, but also on the overall membership of the criminal group, its financing, its capabilities for various kinds of harm, its plans, its relationship to other criminal groups, its possible targets, etc. These considerations are generally outside the scope of a regular criminal investigation of a specific act because that investigation is limited to collecting evidence to approve the specific elements of the offense involved. Similarly, it is necessary to continue to investigate racketeering and terrorist groups as long as they retain vitality, even though a particular member, or members may have been

apprehended, prosecuted and sent to prison. Thus, enterprise investigations will continue as long as the group continues its criminal enterprise activity.

We recognize that the ongoing nature of such groups requires us to investigate broadly into past acts, current activity and potential for future criminal acts. While demonstrably necessary in order to protect the society from very great harm, enterprise investigations, we acknowledge, may create apprehension of danger to lawful activities, privacy interests, and constitutionally protected free speech and association. To guard against this potential threat, we have fashioned these provisions far more tightly than those concerning ordinary investigation of specific offenses.

First, we have limited the investigation to circumstances where there is "reasonable indication" of crime so that the same level of certainty is required to open a racketeering or terrorist enterprise investigation as to open more conventional investigation focusing on particular acts. Secondly, we have very deliberately limited the basis of the investigation to activities which are clearly criminal and serious. This plainly precludes FBI from investigating all forms of non-criminal activities. Third, in both the case of racketeering and terrorism, we have specifically required that there be information indicating

that the enterprise presently exists, that it is a continuing enterprise, and that its essential nature and purpose is criminal. Thus, we have excluded circumstances which involve little more than speculation that a group that is now lawful may later adopt a criminal philosophy.

Terrorism enterprise investigations are generally believed to be more sensitive than racketeering enterprise investigations since the former avowedly involve some political purposes and motivations while the latter ordinarily do not. We felt that the necessities and realities of modern day society requires us to authorize FBI to conduct terrorism investigations on the same standard as organized crime investigations. That is, we require the same standard of reasonableness; facts or circumstances which reasonably indicate the criminal enterprise. However, in recognition of their greater sensitivity and for protection for all lawful political activities, we have provided special safeguards which apply to only terrorism enterprise investigations. These include special standards and limitations on informant infiltration, extra report requirements for opening and the continuation of terrorist enterprise

investigations, the involvement of high level FBI officials, including the Director, and notice to the Attorney General or his or his designee of investigations which continue beyond one year.

It must be emphasized that the group which can be investigated under this subsection is only the actual criminal enterprise. Where that group is a subgroup of a larger organization which is engaged in lawful political activity, the larger group itself cannot be investigated. Finally, the investigation must be conducted pursuant to Attorney General Guidelines. As you know, we presently are governed by the Levi Domestic Security Guidelines for terrorist investigations. These Guidelines will be continued and, if amended at all, will be strengthened.

Another most important part of the charter is section 533(b) which contains limitations on the use of the more sensitive investigative techniques. The section mandates that the Attorney General issue guidelines concerning the sensitive techniques covered by the section which are:

- (1) Informants and Undercover Agents
- (2) Physical Surveillance
- (3) Mail Surveillance
- (4) Electronic Surveillance
- (5) Access to Third Party Records
- (6) Access to Tax Records
- (7) Miscellaneous investigative techniques
(including trash covers, pen registers,
consensual monitoring, electronic location
detectors, covert photographic surveillance
and pretext interviews)

Of course, mail and electronic surveillance are already covered by explicit statutes and court decisions and require judicial warrants. The others are discussed in some detail in the charter itself, particularly informants and access to third-party records pursuant to the new investigative demand authority which the charter would give to the FBI.

The section requires that the guidelines meet three important and express limiting purposes:

- (1) To ensure that the investigative techniques are used in such a way as to keep intrusion into privacy to a minimum;

- (2) To require that the greater the potential intrusion into a true area of privacy, the more formalized and higher level the review and authorization procedures must be;
- (3) To ensure that information obtained through the use of sensitive techniques is used by the FBI only for lawful and authorized purposes as set forth in the charter itself.

This section also authorizes the FBI to issue investigative demands, which are similar to administrative subpoenas, for specific categories of records:

- (1) Toll records of communications common carriers, such as the phone company;
- (2) Insurance records maintained by insurance companies or agencies;
- (3) Records of credit institutions not covered by the Financial Right to Privacy Act of 1978;
- (4) Banking and other financial records that are covered by that Act.

Concerning bank records and other records covered by the Right to Financial Privacy Act, the charter simply grants the FBI authority to issue an investigative demand which is

contemplated by that Act and specifies that every procedural requirement of the Act must be followed to the letter.

Briefly, the need for the investigative demand power arises from the following circumstances. First, the FBI has been giving increased priority recently to investigation of white collar crime, public corruption, fraud against government programs, financing of organized crime groups and other similar areas. In each of these areas, ability to obtain financial records is important to success, and indeed it is hard to make real progress in such an investigation without access to these kinds of records. Second, the FBI previously obtained many of these kinds of records on a voluntary basis from the custodians. But it has recently encountered a growing reluctance of custodians to turn over such records for fear of possible legal liability or loss of trade from favored customers. As a result, the FBI in most places has recently lost the capacity to get these records.

Rules governing issuance of investigative demands would be covered by guidelines which the charter requires the Attorney General to issue. As I mentioned earlier, the initial work on producing the guidelines in this and all the other areas has

already begun. I would expect that the use of investigative demands would be limited to cases where there was a demonstration of need, where there was a substantiated allegation, and where a grand jury was not already involved in obtaining records on the matter. However, more detailed rules must await the completion of the study, review, and drafting that is now underway.

The limitations in this section of use of informants, particularly their use to infiltrate groups under investigation for terrorism, is of special concern to many, including some on this Committee. First, the charter seeks to prevent unreliable or truly uncontrollable persons from becoming regular informants in the first place by requiring a background investigation of each potential informant. Second, written approval must be given by a supervisory level FBI official before the informant can be used on a continuing basis to provide information on a particular person. Such approval must include findings that, based on the background investigation, the person is "suitable" for use as an informant, and that he is likely to have information pertinent to matters which the charter authorizes the FBI to investigate. Third, these findings must be reviewed on a regular basis by the Director or his designee. Fourth, the informant must be told that under no circumstances may he

instigate or initiate a plan to commit criminal acts or use illegal techniques such as break-ins or wiretaps without court warrant, to obtain information or evidence on behalf of the FBI. He must also be warned not to engage in violence. Finally, he is told that his working as an informant for the FBI will not protect him from prosecution for participating in criminal activity except the activity which is under investigation and even then only if a supervisory official determines in writing that such participation is justified because it is necessary to getting information or saving lives and this need outweighs the seriousness of the conduct the informant is to participate in. Moreover, these determinations must be reviewed annually by the Director or his designee.

In addition to all this, before an informant may infiltrate a terrorist group, the group itself must be properly under investigation for violent crimes and the infiltration must have been found "necessary" under the circumstances in a written finding by a supervisory official.

The charter provides for enforcement in a number of ways. First, the charter, as I mentioned before, relies on the existing criminal law which applies to FBI agents, justice department attorneys and everybody else. As you know, the

law is plain on matters such as wiretapping without court warrant and breaking into homes without warrants, and prosecutions have been brought in such cases. Secondly, there is the full range of civil suits which can be brought against government officials who act illegally and without authority. Thirdly, the charter depends for enforcement on the internal disciplinary system of the FBI. This is highlighted by the requirement under Duties of the Director, that the Director must maintain an "effective" internal disciplinary system. Moreover, the charter adds further sanctions by authorizing the Director to impose fines for up to \$5,000 for willful violations of the section of the charter governing the use of sensitive investigative techniques. Accordingly, we believe that the charter is enforceable and will be complied with. There is simply no need to create new civil suits, new criminal offenses, or new procedural rights for defendants.

With this brief summary of some of the charter's key provisions, I would like to conclude my remarks by saying simply that we look forward to discussing the specific terms of the charter with the Committee at future hearings. I would be pleased to answer any questions on the main thrust of the proposal.

EXHIBIT 1

Provisions Barring COINTELPRO

- 1 Section 531 a General Principles
Subsection (c) Investigation of Criminal Conduct only (p. 4)
Subsection (d) Limitations
 - No investigation of
 - political views
 - peaceable assembly
 - exercise of other rights
- 2 Section 531 a(b) Investigations must be conducted with minimal intrusion (p. 4)
- 3 Section 533(b) (3) Terrorist Enterprise (p. 11)
 - Investigation only if
 - significant criminal violence for purpose of political intimidation, and
 - facts or circumstances reasonably indicate
- 4 Section 533 a Attorney General Guidelines for Investigation of Criminal Matters (p. 13)
Subsection (a) (1) Investigation must "focus" on criminal activity; purposes of investigation must be limited to
 - detection
 - prevention
 - prosecution
5. Section 533b(a) (3) General Restrictions
Information may be used "only for lawful government purposes" (p. 14)
6. Section 533 c Retention, dissemination and destruction of information (p. 26)
Subsection (a) - retain only what's pertinent to investigations authorized by charter
(b) - disseminate only for proper official uses, e.g., to local police on a matter within their investigative jurisdiction