



Department of Justice

PS
668
.L34

ADDRESS

BY

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

BEFORE

THE ASSOCIATION OF AMERICAN LAW SCHOOLS

12:30 P.M.
SUNDAY, DECEMBER 28, 1975
WASHINGTON HILTON HOTEL
WASHINGTON, D.C.



It is an enormous pleasure and honor for me to be present at this occasion marking the 75th anniversary of the Association of Law Schools, in so many ways an association of law professors. I remember, with the partial deception of nostalgia, characteristic of so many areas of American life, when the Association was much smaller than it now is; when the papers given, sometimes seminal, were the basis for thoughtful and active discussion; when deans and professors could take part undiverted by all the other activities expected of a successful law school in flight. No matter that this picture is overdrawn; it has some truth. I note you have separated out for treatment elsewhere the job-getting aspects, a most important function not to be disregarded, but always diversionary. I hope this works. What has happened to this Association in its growth in size and in concerns -- some properly selfish, some managerial, some pro bono, some exploring relationships to other disciplines, some dealing more exclusively with the substance and procedure of the law -- is a paradigm of what has occurred generally to organized groups of academics and to governmental functions. We have to struggle now, as was the fact years ago but on a different scale, to focus attention on what is most important. Your program is full; it reflects the breadth of your concerns. I wish for you that serendipity which brings the rare seminal paper, the thoughtful and active discussion. You are an enormously important part of the legal profession in our country -- an importance unmatched by law teachers elsewhere. The importance is that you greatly influence the future course of legal history.

Over time, you have, in fact you cannot avoid having, a considerable and telling effect upon the rules and institutions which guide American life or respond to its needs.

At a time such as ours when the popular faith is uncertain, or is changing, and is susceptible to rescission or reaffirmation, the law teaching profession has much added to its strategic position. I do not mean to speak of you as the voice of the volkgeist. But in many ways the law teaching profession plays that role. In this, of course, law teachers are not alone, but they are among the opinion makers. I am not sure this aspect of influence is the most thoughtful or even intended. One aspect -- but only one -- of your influence is that students years from now -- and I think this can be documented -- will take for granted the observations they heard when at law school. All of us are likely to take for granted judgments and ideas we heard or once had long ago. This probably relates to some principle concerning the paucity or the economy of ideas. Having gotten one, we are likely to stay with it, thinking of it, indeed, in volkgeist terms as a felt need. I am not going to join those who blame or credit the schools, including the law schools, for what is found for praise or mainly blame in the society at large or the profession in particular. You may be in fact more influenced than influencing. And some law teachers, of course, have taken to the hills. But you are, for all of that, in an enviable position. If, as Max Weber taught, the lawyer has a special facility in political society because of the opportunity to arrange his time, this is much more true, although in different ways, of the

law teaching profession -- a process vastly helped not only because you have been picked as able and articulate, but also because of the ease of publication. Up to now I have been speaking of that kind of opinion making which is on the periphery of the emergence of legal doctrine in some official form -- a periphery which is as much the source of law as any we have. Beyond that, there is, of course, the interchange which goes on between official, semi-official and law teaching positions -- an interchange, which if it does not ruin scholarship, ought to be encouraged.

The position of the law teacher in the penumbra of law making is both enhanced and made more challenging by the companionship of the press with all the modern forms of instant and impressive communication, and again with that principle of economy which means that a thing once said is likely to be repeated as a kind of truism. Truisms come from all kinds of places -- at one time from the coffee houses of London or the salons of Paris. Participation in this part of the penumbra is not given to all law professors, but it is given to some who use it, and no doubt life will be duller without this exchange. The exchange not only involves truisms about felt needs, but also includes the labeling of work which goes on to find solutions. The labeling in turn serves to evoke or reinforce conceptions about governmental functions. The conceptions may or may not be correct, but what ultimately is frequently involved -- as it is in so many things we do -- is an assumption about the proper

role and ways of law in government. I can illustrate the point to some degree by two small fairly recent incidents with which I was somehow involved. The second of these incidents concerns some of my friends among you. The first, so far as I know, does not.

The first concerns the guidelines which a committee in the Department of Justice at my direction have been preparing to set forth the jurisdiction and procedures to be followed by the Federal Bureau of Investigation, which, as you know, while having considerable autonomy, is part of the Department of Justice. The committee, chaired by Mary Lawton, Deputy Assistant Attorney General

in the Office of Legal Counsel, is composed of representatives of my office, the Criminal and the Civil Rights Divisions, the Office of Policy and Planning, and the FBI. The origin of the present venture is a commitment which I made to the Senate Judiciary Committee at my confirmation hearing. I then said that, if confirmed, I would assume the responsibility for having such guidelines prepared, presented and discussed with the relevant congressional committees. This assumption of responsibility was taken because, as I said to the Committee, I did not want merely to say to the Committee that such controls were the Committee's problem which "indeed, in many ways it is."

The guidelines are not finished. Four of the guidelines in tentative form have been furnished to the members of the Church Committee. They have been shown to Chairman Edwards of the Subcommittee on Civil Rights and Constitutional Rights of the House Judiciary Committee. The most important guidelines dealing with domestic security investigations have been made public. The guidelines are extremely controversial, as is to be expected if they are to mean anything. They speak directly to many issues on which people disagree. For example, they attempt to set forth the standard of evidence required before there can be a limited preliminary investigation, using the term "likelihood of the commission of a Federal crime;" before there can be a full investigation, using the term "specific and articulable facts giving reason to believe," and when

there can be preventive action, strictly circumscribed, using the term "probable cause."

Speaking of the guidelines last August before the American Bar Association, I said "the guidelines obviously are not in final form. Some might be most appropriate as statutes or executive orders. Others could be put into effect by regulation." I was somewhat surprised last December 7th to see repeated in the New York Times, and also elsewhere, the idea, as the Times said, that "the guidelines were apparently designed to ward off restrictive legislation." When I testified before the Church Committee on December 11, I said, "... In any event the problem of proper controls, supervision and accountability goes beyond the Director of the Bureau and the Attorney General. ... I think that better controls and performance can be achieved through statutory means, executive orders, guidelines, and reporting to appropriate congressional committees." I expressed the hope that "the Department's guidelines committee's efforts at articulation will be of use to this (Congressional) committee and others as it considers drafting legislation." Undaunted, the New York Times returned to the theme which it had bought, saying: "Unfortunately, the guidelines unveiled by Attorney General Levi go far beyond the limited purpose (of insuring Attorney General control over the Bureau) to encompass an effort to define the Bureau's jurisdiction and its mode of operation. Such a definition is

urgently needed; but it is up to Congress, not the Justice Department, to provide it ...".

The consequence is that a task which began with a pledge to a Congressional committee to have it performed so that it could be the basis for statutes, executive orders and regulations, is now cast into a competition between an executive agency and the legislature. I assume this fits the notion of an adversary system, but in fact it belittles an enormously difficult task which can be performed only through our cooperation and with great skill and care.

The second incident, which concerns some of you, involved a dispute between the Secretary of Commerce and a House Subcommittee chaired by Representative John E. Moss, which subpoenaed the list of American corporations reporting to the Secretary of Commerce information concerning a "request for boycott (meaning Arab boycott) compliance." The corporations' reports to the Secretary were made under a statutory provision which provided in part, that "no department ... or official exercising any functions under this Act shall publish or disclose information hereunder which is deemed confidential ... unless the head of such Department ... determines that the withholding thereof is contrary to the national interest." The Secretary of Commerce, relying on an Attorney General's opinion that the confidential material should not be turned over unless he made the

requisite finding, refused to comply with the subpoena. As you know, he later agreed to provide the material to the subcommittee under some circumstances of possible safeguards.

The Attorney General's opinion was not a popular one, nor did I believe it would be popular when I signed it. By Anthony Lewis and others it was labeled as showing a predilection for executive secrecy, rather than one of principle, scholarship and independence. My friend Philip Kurland hinted that this was a claim of executive privilege, and that in any event an opinion of the Attorney General, even though he is bound by statute to give the opinion to the head of an executive department on request, is only "partisan advocacy." It obviously did not have the objectivity, I gather, (and of course I regret) of professorial views. Since

Mr. Bork and I had previously been criticized as acting too much like professors and not partisan advocates in filing an amicus brief, along with our defense brief in the voting election law case, this perhaps was a welcome charge.

Some interesting things happened in the heated controversy that followed the Secretary's initial refusal. The subcommittee chairman demanded that the Department of Justice attorneys who had written or worked on the draft of the opinion should submit to questioning by committee investigators -- an interesting proposal with all kinds of recollections, for those who can recall beyond a single decade. Then a group of 36 eminent law professors signed a letter with Professor Kurland laying down the proper standard for statutory construction. The rule was as follows: "Congress can surrender its constitutionally mandated duties in a statute only by express language, not by implication or silence." The letter did state that it assumed that "once subpoenaed reports have been received, that you will handle them in a responsible way consistent with the Rules of the House of Representatives, your oath of office, and with respect to the rights of the affected parties." The letter did not mention that the House of Representatives Rule (X1(e)(2)) which requires that all Members shall have access to all information obtained by a committee. Nor does it refer to the Gravel case which effectively shields any member of Congress from external sanctions for making any information public. But it is the proposed rule of statutory construction which I find, I must say, of interest.

It does not go as far as that advanced by your adjunct member of Harvard University who would find that a congressional act banning the disclosure of information to Congress would be unconstitutional.

The rule which is advanced is a pleasant one since it certainly would simplify matters. There are more than a hundred congressional statutes which pledge confidentiality to information which citizens are required to give. I must confess that at the time of the opinion to Secretary Morton and shortly thereafter, I knew of no statute which completely banned the disclosure of confidential information thus obtained to Congress although there were some statutes which provided for disclosure to particular committees, and thus implied non-disclosure to others. Since then further research has disclosed two additional statutes which in the pledge of confidentiality refer, along with other bodies, to legislative proceedings. The vast majority of statutes -- practically all -- state no such explicit prohibition. This is true with respect to intimate details involved in census data, drug treatment records, research on runaway youths and many more. Is it to be the conception of good government that the Congress, which passes the law and states that the items are to be kept confidential, is free itself to ignore that confidentiality? The problem has nothing to do with Executive Privilege or the division of powers. It has to do with the trust which should exist and should be lived up to, between a government and its masters, who are the citizens. With all due deference -- which I mean -- the presumption or rule of statutory construction set forth by the

worthy band of your members is in fact an unenacted legislative amendment to one hundred or more statutes, which in particular cases Congress would never pass, and in its present form if effective would work a deception, not on the Executive, but on the citizens who provide the information. My own view is that it would be appropriate to review each one of these statutes -- each with its own special history, which we took into account in the Morton case, and then propose an explicit amendment with each. It would be a major task. Knowing of the research institutes and the interest in legislation which law schools have, possibly this is a task which you could help accomplish.

I have ventured to describe these two incidents because I know something about them, because at least one of them involves some of you, but more importantly because they are not at all unusual. They are part of the working out of governmental problems, with all the misunderstandings, and a great deal left to be done. Each of the incidents involves in some way or another conflicting values strongly held. I think it is also fair to say that many of us share within ourselves the conflicting values. It is not enough to say, I think -- and in fact I reject the view -- that the conflicting values line up for us because of the adversary side we happen to be on. I do not regard the proper jurisdictional scope and base and the procedures to be used by the Federal Bureau of Investigation as an adversary matter. On the contrary, I think these are matters -- and I assume you share this view -- of deep concern to the security

of our country and to the liberty of our citizens. I do not myself like boycotts from whatever quarter they may come. The problem of confidentiality of information secured from citizens is surely a matter in which you have some interest. I did not feel in the least instructed -- in fact I had no instructions -- as to the Administration position with respect to the individual company information supplied to Secretary Morton. I don't know if there was an Administration position. Statutes of this kind, it seems to me, have to be interpreted primarily on the basis of the justified reliance upon them, and this, in the absence of the new doctrine announced by the thirty-seven professors, involves an analysis of the words used, the history of interpretation, and such legislative history as there is. Nor do I think that correctness of interpretation is always to be expected. What I think

to be more significant is the alacrity with which the working out of such problems is immediately cast into the model of a dispute between the Executive and the Congress. Watergate and what went with it dramatized that issue. We are in a post Watergate era. We are doing the usual thing of reliving the past where the lines of argument are set forth and they are easy to pick up. But the lessons of history are much more complicated than this assumes, and surely it is to the academic world one would hope to turn for the second and third thoughts on what we have learned, the corrective steps to be taken, and the problems which face us today. We know we are a country prone to cycles. Each branch of the government at times has abused its power, and all, unless memories are very short -- which I am afraid they are -- have done so in recent times. But the academic memory should be longer. For one thing you have time to think, a most precious asset which our country needs.

I do not deny, indeed I would emphasize, that, as so many of you have reason to know, things look different dependent upon the particular responsibilities or worries you have. The nice thing about the rule of law is that we are all in it together; decisions, judgments and acts are catching. If confidential material from one part has to be turned over, I suggest it has to be turned over from another part, as well. Decisions, judgments and acts flow from one field into another. I do not think the adversary model when removed from its protective courtroom setting is a help when it is used to attack these larger issues. Indeed I should think this is one of the lessons of Watergate itself. Because

things do look different depending on where one stands, it is particularly important that there be an interchange and a sharing of knowledge and views among us. An enormous barrier in the way of such an exchange, of course, occurs in areas of secrecy. This is one reason the Department of Justice has endeavored to use, and has been greatly aided by the use, of consultants among you. It is the reason we have tried to make public in as candid a fashion as possible the kinds of problems and issues we believe must be faced. The guidelines are such an example. The controversy about them is a good thing. We knew the issue of preventive action would raise something of a storm. The guidelines as written permit preventive action using non-violent and lawful measures only when there is probable cause to believe force and violence in violation of Federal law with real and immediate threat to life or the essential functioning of government is present, and where the action is necessary to minimize the danger because other alternatives are not available. The specific authorization of the Attorney General is required, as is a subsequent report to the Congress. We have been asked in the discussions of this guideline why mass arrests might not be better. I suggest that makes a very interesting question, which ought to be pursued. I have not heard of many people who favor mass arrests. We could have the guidelines silent on the point entirely, or we could have legislation prohibiting any preventive action. Whatever the result, the questions are real, and they should be looked at.

In so many areas where the law attempts to control or influence behavior, we not only have unanswered questions, but we avoid asking the questions. In the past the failure to ask the

questions and to confront them led eventually to judicial intervention where legislative enactment would have been more appropriate. In the past general statutes, without the help of prior guidelines setting forth the problems, as only an attempt to show what the solutions might look like and do, has led to subsequent executive orders and departmental rules at a considerable distance, and sometimes in contradiction to the statutes which were passed.

The past is full of grave abuses and they have been uncovered. I do not wish to belittle these abuses of the past when I call to mind that they are not so limited in time as to be only contemporary. When I was recently asked whether J. Edgar Hoover, if he were alive, might be indictable, the thought passed through my mind, and was of course immediately suppressed, that Thomas Jefferson might have been subject to impeachment because of the Louisiana Purchase. This is not said to condone but to suggest that the writing of history by picking and choosing is likely to be an unfair and inaccurate business. We do have much to rectify but we must also live in this day and for tomorrow. The quality of that living calls for an awareness of the problems as they now are, a deeper inquiry into the meaning and implications of the values we hold dear, and the special skills for working out problems which we are willing honestly to confront.

Sometimes in this talk I have spoken of professors and of you. I do not think -- at least I hope I have not -- lost my union card. There is much work for all of us to do. The services

of the most scholarly branch of the legal profession are
needed now as never before.

#