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UNITED STATES DEPARTMENT OF JUSTICE

ADDRESS

OF

THE HONORABLE BENJAMIN R. CIVILETTI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

THIRD CIRCUIT JUDICIAL CONFERENCE

TUESDAY, SEPTEMBER 11, 1979
7:30 P.M.
HERSHEY MOTOR LODGE AND CONVENTION CENTER
HERSHEY, PENNSYLVANIA

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MR. CIVILETTI: Thank you, Your Honor, for that introduction.

Mr. Devavoyce, Judge Gibbons, Mary Lacey, my friend, Judge Fred Lacey, Mrs. Devavoyce, and Jeane Gibbons; you could hardly have a more enticing dinner companion and to have Attorney Generals come to the Third Circuit than Jean Gibbons. We've had a marvelous time. The speech may not be too good, but I've had a lot of fun.

Chief Judge Lachen, Chief Judge Fisher, Chief Judge Joe Lord, Chief Judge Neylon, Chief Judge Webber, Chief Judge Christian, other distinguished jurists and judges, law professors, academicians, public officials and distinguished bar officials, ladies and gentlemen:

I think it is rather fitting that Ben Civiletti, as Attorney General, make his first public address to the Third Circuit. After all, Philadelphia, I think, is in the Third Circuit. I spent five months being confirmed as Deputy Attorney General, atoning for something that went wrong in Philadelphia.

I am pleased and honored to be here among lawyers --

(Pause for adjustment of microphone)

I think it is about time, since it is better, that I tell the story about the fellow who cranked him up and served him a dinner and out came the speech-- a lot like most Attorney

1 Generals. And I had finished the story except for the obser-
2 vations made about me. And that is to watch and hear Ben
3 Civiletti tell a joke is like watching a Swede eat, uh,
4 tortillas. Painful.

5 I am particularly pleased by the opportunity to
6 address this group this evening for two complementary reasons.
7 First, I consider it essential to communicate with the citi-
8 zenry of this nation on matters of law enforcement and judic-
9 ial administration which affect us all so vitally.

10 The reputation of the Third Judicial Circuit has it
11 that its annual conference sometimes, and perhaps usually,
12 shares the limelight with fifty of the most attractive members
13 of the citizenry, in a different venue. And I've found out
14 to my disappointment that this was not to be the case this
15 year. I guess I need better informants. But I have surpassed
16 that-- or supplanted it -- with the good time I've had since
17 I've been here.

18 The second serious reason is that the participants
19 in this conference are dedicated and distinguished jurists,
20 professionals and other contributors, as I am, I hope, to the
21 administration of justice and due process.

22 I would like to discuss with you this evening,
23 briefly, a subject which is close to your hearts and looms
24 large in any consideration of the present and future adminis-
25 tration of justice in the United States.

1 Per diems and judicial salaries. No, it is a matter
2 to which I've devoted a great deal of time and energy as
3 Deputy Attorney General, and one which enjoys a very high
4 place on the Justice Department's list of priorities. I am
5 referring to the proposed legislative charter for the Federal
6 Bureau of Investigation.

7 I had the opportunity just last week to give the
8 lead off testimony with respect to the charter proposal before
9 the House Judiciary's Subcommittee on Civil and Constitutional
10 rights, and some important points were discussed at that time
11 which I won't bore you with this evening.

12 But I need not dwell here on the many instances in
13 memory, judicial and otherwise, of the apparent collision be-
14 tween the requirements of criminal investigation and the
15 guarantees vouchsafed to every individual by the Constitution.

16 We presently live in an age of rapidly advancing
17 technology, with the natural and concomitant increase in the
18 sophistication of investigative techniques, as well as all
19 other scientific advances.

20 Indeed, if the law enforcement agencies of the
21 Government are to proceed effectively against white collar
22 criminals, terrorists criminals, organized crime and others
23 of such ilk, such highly sensitive investigative techniques
24 will be absolutely necessary, merely to keep pace.

25 Therein lies a substantial portion of the problem

1 with designing and reaching a consensus on a FBI charter.
2 I am sure that many of you are familiar with the ancient Greek
3 paradox of Achilles and the tortoise. That particular bit of
4 sophistry allegedly demonstrated that the slightest advantage
5 on the side of the relatively slow tortoise was sufficient to
6 insure that Achilles, the swiftest of the Greeks, would never
7 be able to overtake it.

8 The alarmist observing the scene today, like their
9 ancient counterparts, would maintain that even the most sincere
10 and zealous concern for the protection of our civil and con-
11 stitutional rights will never be able to keep pace with the
12 risks which inhere in evermore sophisticated and intrusive
13 investigative techniques.

14 On the contrary, it is my strong belief that the FBI
15 charter currently under consideration will help guarantee that
16 just as surely as Achilles actually drew even with the tortoise,
17 we will be able to satisfy the demands of justice, while main-
18 taining a reverence for all of the freedoms and protections
19 embodied in the Constitution and, more particularly, in the
20 Bill of Rights.

21 I welcomed the opportunity to testify before that
22 House Committee because I believe that a principal, if not the
23 principal, job of the Justice Department is to conduct itself
24 in all manner and in such a way as to demonstrate and prove
25 to the American public that effective law enforcement is

1 compatible with the preservation of civil and constitutional
2 rights, which are so fragile, and in a profound sense is its
3 sine qua non.

4 This is not to say -- I don't pause frequently
5 enough. My timing is a little off. I'll have to pause
6 and give a little signal. Jean, give them a little signal.

7 (applause)

8 This is not to say that broad investigative author-
9 ity cannot lead to abuses. It is to say that efforts to pre-
10 vent such abuses made in good faith, practiced and diligently
11 followed, can succeed. This is the real importance of the FBI
12 charter, for it will, if enacted in due course, provide the
13 American public with the checks and balances required to in-
14 sure that Federal laws will be enforced, within the law.

15 The charter which we have proposed will, for the
16 first time, provide a comprehensive constitution for the
17 Bureau. I use the term "constitution" quite deliberately,
18 for I intend to call attention to the fact that this charter
19 is no more a self-contained document than is the United
20 States Constitution itself. Rather, its purpose is to define
21 and to delimit the fundamental authority and responsibility
22 for the work of the FBI, its general investigative powers
23 and the principal minimum limitations on those powers.

24 It is, in other words, not a detailed, finely
25 tuned handbook of procedure, applicable to every possible

1 contingency. It must, and will, be supplemented by guidelines
2 to be promulgated by the Attorney General, and in addition it
3 will undergo the same process of interpretation and adaptation
4 which prevails in the case of all legislative acts by the
5 judiciary.

6 This is the best way to insure that this charter
7 will be able to undergird the workings of a Bureau which of
8 necessity must grow, develop, adapt to the changing conditions
9 under which it is mandated to function and meet the challenges
10 from whichever source they may come.

11 It is important to note here that, in the formulation
12 and promulgation of Attorney General guidelines which will
13 complement and supplement the provisions of the charter, these
14 will be, and are, designed to allow enforcement, as well as to
15 protect civil liberties.

16 This is so for several specific reasons, within the
17 terms of the charter itself. First, as I have mentioned, the
18 charter specifically sets minimum standards and limitations on
19 the investigative powers of the FBI. That being the case, the
20 Departmental guidelines may result in even higher standards, in
21 specific instances, of review and control.

22 Second, the charter depends on a variety of checks
23 on the Bureau's powers, and among these are congressional
24 oversight, as dreadful as that may sound and be in practice,
25 -- that's a light touch-- Departmental review and internal

1 disciplinary procedures within the Bureau. Third, the
2 Department has already had several years of experience with
3 guidelines, which were promulgated by Attorney General Levi in
4 1976, with respect to the handling of domestic security in-
5 vestigations, informants and civil disturbances.

6 Far from frustrating the intentions which underlay
7 those guidelines, their application has insured that those
8 intentions were brought to bear on some very sensitive deci-
9 sions on a case by case basis.

10 With the legislative charter in place, additional
11 guidelines will continue to perform that vital function,
12 without hamstringing in a legislative process the power and
13 effectiveness of the FBI.

14 The charter, as proposed, consists of four general
15 type of provisions. First, it states general principles which
16 apply to all criminal investigations. Second, it sets limits
17 on who, and what, can be investigated and under what circum-
18 stances.

19 Third, it authorizes and provides limits for the use
20 of certain sensitive investigative techniques. I love that
21 phrase. Sensitive investigative techniques. What in the
22 world is that? I thought the first time I saw it that people
23 were using euphemisms, and I guess it is a euphemism. But it
24 relates to the use of informants, to undercover agents, to
25 wiretaps, to microphones, to overhears, to interceptions and

1 things of that kind. All of which, because they are rela-
2 tively covert, and because they intrude unknowingly into
3 citizens conduct and behavior in the ordinary course, require
4 particular sensitivity, particular restraints, and particular
5 certainty before they are exercised.

6 They all must be exercised, but they do require that
7 they are not abused and that we use the greatest care in the
8 authority in their use.

9 Finally, it limits the purposes and duration of the
10 retention of information obtained in the course of legitimate
11 investigation. With respect to the second point, I would point
12 out here, as I've done repeatedly, that there is no authoriza-
13 tion implied anywhere in this charter for COINTELPRO, which
14 is a big symbolic and significant word in Washington particu-
15 larly and perhaps in other areas of the country. COINTELPRO
16 type activity. Such activities are repeatedly prohibited
17 within the charter. COINTELPRO type activities are those
18 activities which were, some legal, some questionable, and
19 some certainly to be condemned, which went essentially to an
20 aggressive kind of program to infiltrate and, worse, from time
21 to time, to discredit citizens who were associated with activi-
22 ties which were sought to be subject, by formerly promoting
23 wrongful information very substantially detrimental to their
24 reputations, with the misguided legitimate intent to diffuse
25 or deescalate a perceived risk to the country.

1 This charter prohibits such type activities. I
2 prefer, however, not to dwell on limitations, as important as
3 they may be, or on restrictions within the charter, as impor-
4 tant as they are. I prefer to dwell on the positive aspects
5 of this charter, that is, those provisions which provide
6 authorization, albeit with careful limits, for the FBI to
7 pursue the investigative activity which is essential in today's
8 world, with the effective investigation and prosecution of
9 criminals, and the prevention of true crime.

10 On taking office, I indicated that I would be
11 assigning high priority to the expedition of investigations,
12 and in line with my very firm belief, as all of you share, that
13 justice delayed is justice denied, in every way, and in no way
14 is it sound.

15 The implementation of such a program would be
16 irreparably hampered were the chief investigative arm of the
17 Justice Department not to have the authorization to vigorously,
18 and without fear or favor, pursue investigations to their
19 rightful conclusion. I trust that no one would seriously
20 dispute the claim that an ineffective FBI could only impede
21 the protection of the rights of all our citizens.

22 I am determined that the FBI will have clear sight
23 of the goals and priorities of the Department of Justice in
24 its entirety, and that it will have the authority to open
25 investigations where indicated by the facts and the law, and

1 to vigorously pursue them, or promptly close them, as is
2 necessary and deemed meritorious.

3 There are several key provisions in this charter
4 which will make this possible. For example, Section 533
5 authorizes, with appropriate checks, the broad powers required
6 for full-scale investigations. The most important of these
7 are those directed at on-going criminal enterprises, specific-
8 ally organized crime and terrorist organizations. Here, it
9 is simply the case that the public interest cannot be ade-
10 quately served unless there is authority to extend investiga-
11 tions beyond the traditional mode of specific criminal acts
12 committed by specific or unknown subjects. In many cases of
13 on-going criminal enterprises, the membership and financing
14 of the organization must be probed, as well as its probable
15 future intentions.

16 Recognizing the difficulty of drawing a sharp line
17 between such essential investigative powers in these two
18 fairly limited areas, criminal enterprises of an organized or
19 racketeering nature, and terrorism on the other hand, and
20 those which may infringe on activities which are legally and
21 constitutionally protected associations to criticize and
22 condemn and to act forthrightly, not only in words but in
23 action, the charter grants these extended powers in these
24 two criminal areas, subject to certain tightly defined limi-
25 tations.

1 There must, for example, be clear evidence of the
2 existence of the organization which currently, at the time
3 of the investigation, has a clear criminal nature and purpose.
4 These and other stipulations distinguish these critical in-
5 vestigations from the much simpler case of investigations of
6 singular criminal acts by individuals.

7 A further distinction is drawn between investigations
8 of racketeering, on the one hand, which is not normally associ-
9 ated with protected behavior by groups or organizations, and
10 terrorist activities, on the other hand. The latter, because
11 of their very sensitive political overtones, require the in-
12 volvement of FBI officials at the highest level, and in addi-
13 tion to that notice and review by the Attorney General's office
14 of the continuation of any such terrorist investigation, be-
15 yond one year.

16 These multiple requirements will be sufficient to
17 guarantee that this area of limited authorization will not
18 jeopardize the exercise of the right and privilege to engage
19 in every means of lawful political activity in expression of
20 the right of assembly and speech.

21 The other important positive aspect of this charter
22 is the authorization again, within carefully drawn boundaries,
23 of specific investigative tools, some of which I mentioned
24 earlier. One of these, the issuance of the so-called "investi-
25 gative demands" parallels the use of administrative subpoenas

1 by other Government agencies, particularly regulatory bodies.

2 The terms of the charter provide that FBI investi-
3 gations would be furthered by the ability to gain access,
4 through such written documents, investigative demands for,
5 for example, the total records of communications of common
6 carriers, insurance records and records of banks and credit
7 institutions.

8 The granting of this power to the FBI, which it
9 has never had, will insure that Federal criminal investigations
10 will not be hopelessly bogged down by the reluctance of the
11 holders of such records to risk legal liability for their
12 release. But again, the prime consideration here is the neces-
13 sity of enabling investigations to proceed with as much
14 thoroughness, care, but expedition, as is consistent with
15 the protection of privacy and lawful activity.

16 In that regard, those investigative demands will be
17 subject to the same notice provisions, standing provisions,
18 an opportunity to be heard provisions, which now apply as the
19 result of the 1978 Financial Privacy Act, which was
20 supported by the Justice Department, and which gave for the
21 first time to all citizens, third-party, interested persons,
22 the right to notice, an opportunity to be heard and standing,
23 plus a record of the investigative probing of their records
24 in the hands of banks, particularly, but savings and loan
25 institutions and other such financial organizations. Those

1 same protections would provide, with certain few exceptions,
2 with regard to this, in effect, the civil investigative demand
3 to the Bureau.

4 Perhaps the most sensitive of all investigative
5 tools, because of its difficulty, is the use of informants.
6 The charter has, therefore, been carefully designed so as to
7 insure that all potential informants are screened with the
8 utmost care and their activity monitored, especially in the
9 case of terrorist organizations.

10 A key provision of the charter is that informants
11 are not exempt or immune from prosecution for criminal acts
12 which they commit, unless it is determined in writing that
13 participation by going along, or observation, or whatever,
14 in the specific criminal activity under direct investigation
15 by the FBI, is essential to that investigation, and that this
16 clearly overshadows the seriousness of the act itself. It
17 cannot be overemphasized that this provision, and like pro-
18 visions which surround it, do not constitute, in any sense, a
19 blanket authority for informants to commit crimes. We get
20 the circumstances where informants in connection with a
21 terrorist activity, with a gambling activity, in order to
22 provide the evidence necessary for leads or evidence for
23 prosecutions, must, of course, be present at or during the
24 course of the criminal act itself.

25 Well, under the Criminal Law, but for the fact that

1 they were acting in furtherance of providing information,
2 they would be guilty of aiding and abetting in the commission
3 of the crime. In that instance and with written approval
4 and authority, balancing the participation against the risk
5 and the harm by the act itself against the need to prosecute
6 those intentionally committing the act, that would not be
7 prosecutable. Any other crimes which they are committing in
8 the course of their own activities, or beyond the scope of
9 the investigation, are and will be specifically subject to
10 prosecution under the charter.

11 Passage of the charter by the legislature would
12 provide that under very strict, well-controlled specific
13 terms of the charter certain narrowly defined activities
14 by informants are not to be construed as such criminal acts.

15 The provisions of all other existing criminal law
16 would apply to any departure from those strict constraints.

17 I dare say that there is not a person here who has
18 not had to agonize, at some point, over the unavoidable ten-
19 sions between the effective enforcement of the Federal
20 criminal laws or the State criminal laws, and the safeguarding
21 of constitutionally granted liberties, whether they were ex-
22 pressed in those terms or more personal terms between individ-
23 uals.

24 Because I strongly believe that these two crucial
25 objectives can and must be integrated, I have chosen to

1 highlight just a few of the provisions of a proposal and a
2 document which, if and when it is approved by the Congress,
3 will go a long way toward effecting that synthesis.

4 I would simply close by reminding you of the words
5 of Lincoln, who exhorted everyone to, quote, "Remember,
6 that to violate the law is to tear the charter of his own and
7 his children's liberty."

8 The charter now before the Congress, and which you
9 will read about and hear about and debate and inform your
10 congressman and your representatives, whether you are a member
11 of the judiciary or a member of the bar, or others, is one
12 which I am confident will protect cherished liberties in every
13 sense of that quote, now and for future generations.

14 I am very pleased to be with you tonight. I have
15 enjoyed it, and I hope that you will have me back again.
16 I think there is no higher service the Attorney General can
17 perform, among his many duties, than to be honored by address-
18 ing and participating in one of the marvelous conferences of
19 our circuits. And among the ten of them, I know of none which
20 is more distinguished than this, the Third Circuit.

21 Thank you, very much.

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