Department of Justice

FOR RELEASE AT 3:00 P.M., E.S.T.
THURSDAY, NOVEMBER 18, 1976

ADDRESS

BY

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BEFORE

THE LOS ANGELES COUNTY BAR ASSOCIATION

12:00 NOON
THURSDAY, NOVEMBER 18, 1976
RENAISSANCE ROOM
BILTMORE HOTEL
LOS ANGELES, CALIFORNIA

I welcome the opportunity to talk with you briefly about some unfinished items on the Department of Justice agenda. It is the nature of a living system of law that there always is an unfinished agenda. The items change, of course; some problems do get solved; others perhaps always will remain. Reviewing the agenda--something we do in one sense every day in the Department--is a way of thinking about priorities for the future. In this talk I will be able to touch upon only a few such items, such as the development of electronic surveillance policy, the formulation of FBI guidelines, the reconsideration of prosecutorial discretion and the clarification of anti-discrimination law. There are many facets of these and other important items I will have to ignore. In my view one paramount concern must always guide our way. This is the keeping of the faith in the essential decency and even-handedness in the law, a faith which is the strength of the law and which must be continually renewed or else it is lost. This has been a central principle which my colleagues and I have kept as our first concern. In a society that too easily accepts the notion that everything can be manipulated, it is important to make clear that the administration of federal justice seeks to be impartial and fair and that these qualities are not inconsistent with being effective.

Related to this is a willingness to confront hard problems. Some of these problems relate to questions of administration of the law where discretionary limits have been inadequately defined or enforced. Others involve the evolution of a guiding legal theory where conflicting legal doctrines, ambiguously stated, respond inadequately to the solution of social problems. Still others may raise issues which must be explored in depth if our constitutional system is to receive the care it deserves. With respect to this last kind of issue, the Department, as you will recall, in the Buckley v. Valeo election case went to the extreme of filing in the United States Supreme Court two briefs - one which we termed a pure amicus brief discussing the issues on both sides. This move was not exactly unprecedented, but it was highly unusual. I like to think, however, that it was highly proper and in our best traditions, even in our adversary system.

One area in which the process of rethinking began very early concerns the standards and procedures by which intelligence agencies should operate. I vividly recall that quite late in the afternoon on my first day as Attorney General this issue arose immediately. Just as I was settling into my chair and observing the handsome wood paneling of the office, an FBI agent appeared at my door without announcement. He put before me a piece of paper asking my authorization for the installation

of a wiretap without court order and he waited for my approval. For close to 40 years the Department of Justice had been called upon to undertake electronic surveillance in certain cases without prior judicial approval. But I thought it was a bit unusual that I was expected to sign so automatically, if that really was the expectation. I asked the agent to leave the request with me--I think, perhaps, to his surprise--so that I could consult other officials in the Department.

This experience was one of many that led us to explore immediately the question of how procedures could be perfected in this world of inevitable secrecy. Important steps in the process of reconsidering electronic surveillance and other intrusions in foreign intelligence cases had already been taken before I became Attorney General. I want to stress that. But it has received a great deal of our attention ever since.

The Department of Justice undertakes electronic surveillance in this kind of case without a prior judicial warrant because the curious shape of the law as it reacted to necessities of our time includes an assumption that it will. The statute providing for judicial warrants for electronic surveillance in criminal cases--the Omnibus Crime Control and Safe Streets

Act of 1968 -- expressly reserves from its requirements surveillances conducted pursuant to the constitutional power of the President to collect foreign intelligence information. The Supreme Court and the United States Courts of Appeals which have considered the matter have either held that the Fourth Amendment does not require a warrant for electronic surveillance instituted to collect foreign intelligence or have reserved the question. In the leading Supreme Court case -- the Keith case decided in 1972,which held that the Fourth Amendment required a warrant in cases in which there was no significant foreign involvement -- Justice Powell emphasized that "this case involved 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." Justice Powell's statement was set against a background in which such surveillances were undertaken, were known - I would say expected - to have taken place over many years. Shortly after the Keith decision Attorney General Elliot Richardson reaffirmed the practice. In a September 12, 1973, letter to Chairman J. W. Fulbright of the Senate Foreign Relations Committee, Attorney General Richardson wrote: "I believe there will continue to be situations which justify the conduct of electronic surveillance for the purposes of national security. This surveillance is carried out to meet the

obligations of the President as both Commander-in-Chief and as the Nation's instrument for foreign affairs. I will continue to attempt to ensure that a genuine national security interest is, in fact, involved whenever we invoke this power and that we operate within the limits set by Congress and the courts."

Foreign intelligence warrantless electronic surveillance has been a matter touched upon by legislation, passed upon or avoided by courts, and has been the responsibility of the Executive. Our belief was that a more coherent policy, expressed in judicial decisions, legislation, executive regulation or some better combination of these elements, was required. An understanding of the use of Presidential power in this area and the development of procedures to direct its use have been made more difficult because of the secrecy which has prevailed about the practice for 35 years. Open and informed public discussion has been difficult. Much of the secrecy is necessary. Against this background we consciously took every available opportunity to the extent proper to discuss publicly our policies with respect to electronic surveillance. It may be useful to reiterate them now. Under the standards and procedures established by President Ford, 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. It is the policy of the Department that all requests now come to the attention of the Attorney General only after they have been extensively reviewed by the FBI, an official in the Criminal Division, and a special review group established within the Office of the Attorney General. In addition, a committee composed of four Presidential appointees in the Department is consulted on cases which present new factual situations. Each request, before authorization or denial, receives my personal attention. Under no circumstances are warrantless wiretaps or electronic surveillance directed against any individual without probable cause to believe he is a conscious agent or collaborator of a foreign power. The probable cause must exist before the electronic surveillance is used. A year and one-half ago I publicly stated that there were no outstanding instances of warrantless taps or electronic surveillance directed against American citizens. There is still none today, although if the proper showing were made such a surveillance would be possible.

As discussions with interested congressional committees continued and as our own thinking developed, it was determined that legislation providing a warrant mechanism shaped to meet the particular problems of foreign intelligence, fitting constitutional standards and offering a measure of reassurance to the public could be drafted. The President, after consultation with members of Congress, proposed legislation early this year to provide a procedure for the issuance of warrants for foreign intelligence electronic surveillance. This legislation, after considerable negotiation and alteration by the Department of Justice and Senate leaders, overwhelmingly passed both the Senate Judiciary Committee and the Senate Intelligence Committee. The Congress adjourned before enacting this significant legislation. Of course I don't know whether it will ever be enacted or not.

There is not time today to describe the bill in detail, but let me sketch briefly its basic features. It provides a mechanism by which the Attorney General can apply for an electronic surveillance warrant to one of seven district court judges designated by the Chief Justice. The judge may grant the order if he finds first that there is probable cause to believe the target of the surveillance is a foreign power or an agent of a foreign power and second that a named Presidential

appointee confirmed by the Senate has certified that the information sought is foreign intelligence information that cannot feasibly be obtained by less intrusive techniques. The judge must also be satisfied with minimization procedures, and the surveillance can continue no longer than 90 days without his renewed approval.

During the course of negotiations between the Department and the two Senate Committees and between the Department and intelligence agencies in the executive branch, several specific concerns were worked out by revision of the bill. While it had been argued that no electronic surveillance of citizens or permanent resident aliens should be undertaken without a showing of probable cause of a criminal violation, the committees ultimately recognized that this notion was unworkable. Foreign spying such as espionage to obtain trade secrets or information about industrial processes may not be a federal criminal violation under the espionage law. Foreign terrorism directed at private individuals or property might not, under current law, be federal crimes. Yet these acts vitally affect the nation's interests when they are undertaken here pursuant to the direction of a foreign power.

The ultimate form of the bill, like its original draft, follows the implied suggestions of Justice Powell in the Almeida-Sanchez and Keith cases that special procedures and probable cause standards can be fashioned to meet unique circumstances. The judge is given the responsibility for determining whether there is probable cause to believe the subject of the surveillance is a foreign power or agent. The appropriate executive official is given the responsibility of certifying that the information sought is foreign intelligence information. This distinction is based on a regard for whether a judge or an executive official with responsibility for foreign relations or foreign intelligence ought to be held accountable for the decision. The bill provides for executive accountability where judicial determination would be inappropriate, but it gives the judge the duty to determine whether the executive certification has been given, and it always places upon the judge the determination that there is probable cause to find the existence of the requisite foreign agency.

In the version which was reported to the Senate, the bill contained provisions which come very close to requiring probable cause of a crime before electronic surveillance can be directed against an American citizen or permanent resident alien. But the standard adopted avoids the risk to basic human liberties that would exist if the espionage laws were broadened to meet the need for electronic surveillance.

The development of the legislation has, I believe, helped to clarify the Department's own policy. By its safeguards, the legislation would give to our citizens the assurance that electronic surveillance activities in the United States would not be conducted unless an independent magistrate were to find that the application submitted by executive officials met strict legislative standards. I hope another legislative effort will go forward.

In a different area there is under way, as you know, a unique effort to articulate guidelines for the investigative activities of the Federal Bureau of Investigation. This is a major effort, to which Director Kelley and the Bureau have given the utmost cooperation, to guide investigative conduct, to be realistic about the exercise of discretion and to impose special controls to guide sensitive decisions. As a consequence, the Bureau is now operating under detailed guidelines in its domestic security and foreign intelligence and counterintelligence investigations. As a result of the guidelines and of the Bureau's own reassessments, the number of domestic security investigations has dramatically dropped in the past few years. In July, 1973, the FBI had more than 21,000 open domestic security cases. By September of this year that number had been reduced to 626. Guidelines concerning background employment investigations done at the request of the White House and at the request of congressional committees and

judges have not yet been formally put into effect, but are already being substantially followed by the Bureau. As a protection against abuses of the past, these guidelines require that the person investigated must give his permission. Currently, a committee within the department is working on guidelines concerning cooperation with foreign police and other overseas aspects of the Bureau's work, organized crime, the handling of informants, and the government loyalty-security or, as it is sometimes called, employment suitability program. Because of the unprecedented nature of this effort to establish articulate standards to shape such crucial decisions as under what circumstances an investigation may be opened, the process has taken a great deal of time and work. But I hope that this important task will continue to move forward within the Department and in cooperation with Congress as it begins to attempt to clarify the Bureau's intelligence jurisdiction.

Like the important decisions about when and how to investigate a criminal allegation, prosecutorial decisions such as when to charge an accused, when to bargain for a guilty plea, when the federal government will prosecute an individual already prosecuted in state court for a related offense, and when to grant immunity in exchange for testimony have been largely uncontrolled by articulated standards

and procedures. It is, I believe, time for a reconsideration of the practice in these areas. It is a highly controversial area subject to considerable misunderstanding. The Department, through task forces, has begun to look into this issue. A thorough revision of the U.S. Attorneys' Manual, the first complete revision in more than 20 years, is nearing completion. The manual sets forth the allocation of duties between U.S. Attorneys' offices and the Department's litigating divisions and describes the procedures that control the federal prosecutor's work. The revision of the manual will soon be completed and is a major achievement. But much remains to be done before the reformulation of policy is completed.

I turn now to a different area of the Department's concern, one in which the Department shares with other legal institutions and the society as a whole the most difficult responsibility. The law against discrimination has matured in a period marked by recognition of scarcity and complexity as the dominant economic and social facts. Some have perceived in its evolution a movement from the principle of equality of opportunity to a requirement of equality of result. This, like all capsule descriptions, distorts a complicated reality.

In principle the law demands, not equality of result, but equality of treatment, without regard to race, color,

religion, national origin and sex. This I take to be the point of the Supreme Court's continued adherence to the de jure - de facto distinction in Keyes and other school desegregation cases; of its statements in those cases that the existence of schools attended predominantly by persons of one race is not in itself unconstitutional racial discrimination; and of the Court's recent holding in Washington v. Davis that intent to discriminate remains a necessary element to a claim of unconstitutional employment discrimination by government. Indeed, although the Court in Davis suggested the possibility of a distinction between constitutional and statutory claims, this also appears to be the point of the language of the Civil Rights Act. Title VII, for example, makes it an "unlawful employment practice . . . to discriminate against any individual . . . because of . . . race, color, or national origin . . .," a form of language that looks, in its ultimate legal standard, to causation and purpose, and not to effect alone.

But this seemingly fixed principle rides in both theory and practice on a world of ambiguity. On the point of principle itself, on the one side, some courts have held, both as a constitutional and statutory matter, that persons cannot be given preferences, simply because they are members of a minority group that has suffered injustices in the past, over

others who are not. On the other side, there are those who have argued with the greatest conviction that neutral action, against a background of injustice in the past, can itself be a form of discrimination -- that the Constitution and laws can recognize no distinction between action purposefully designed to achieve and enforce discrimination, and ostensibly neutral action that knows, accepts, and fails to act to avoid the consequences in the operation of the schools or in the granting of jobs, of a long history of discrimination by all parts of our society.

The confusion on principle is fueled by the reality of the law in practice. Justice Stevens made the point in his concurring opinion in the Davis case that the continued insistence on the element of intent could, in practice, have no consequence at all, that everything would depend on the proof required to establish the forbidden purpose. He was speaking to a problem pervasive in this area of the law. Thus, in the Keyes case, the Supreme Court held that, once the plaintiff in a school desegregation suit proves that there has been intentional discrimination as to some schools in a district, a rebuttable presumption arises that it has affected the district as a whole. In litigation under Title VII, concerning unlawful discrimination in employment, the plaintiff makes out a prima facie case by showing that the proportion of

minority persons hired varies from their proportion in the work force, or that employment tests have a disproportionate effect on minority members, thus casting on the defendant the burden of proving absence of discrimination or that tests are job-related, burdens that, in fact, are seldom overcome. The result can be, in practice, that to avoid a prima facie case, the employer must seek to attain a statistical parity that Title VII expressly states it does not require, by means of preferences that Title VII itself forbids. As Justice Stevens pointed out, these evidentiary rules derive from the difficulty, common in the law, of proving intent and purpose directly, rather than by inference from effect. But the willingness to infer intent rests as well, I think, on a suspicion that discriminatory purpose often may be concealed by appearances of neutrality, and a conviction that indifference to effect and discriminatory purpose are not very far apart.

The same problems have operated in the efforts to remedy school segregation. In the Swann case, the Supreme Court stated the goal: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." The command is addressed to the necessity not only of preventing present acts of discrimination

but also of eliminating present consequences of past discrimination -- the patterns of racially identifiable schools that resulted from past unlawful acts. The problem, however, is complicated by the recognition that, to some extent and in some, particularly urban, areas, such patterns may have stimulated the growth of racially identifiable neighborhoods; use of the neutral principle of neighborhood school assignment -- the national norm -- would, where discrimination had been practiced, merely perpetuate its effects for some indefinite future time. Moreoever, there is the conviction that if the segregation that exists was not entirely caused by official acts with respect to the schools, it is in any event the product in major part of the whole history of public and private acts that have occurred in our society, and that the impact on the schools, whatever its origin, requires remedy. This complex of factors has led a number of courts to cut through the knot, to convert the Keyes presumption as to intent into an assumption that all racial imbalance among the schools in a district is the consequence of unlawful acts and to order, as a remedy, that all schools reflect the racial balance of the district as a whole.

This form of remedy, like the remedy of goals or quotas in the employment discrimination context, has attractions:

it necessarily ensures that all vestiges of discrimination have been removed, and that, for the duration of the order, discrimination will be impossible. But it also has costs -- in the operation of the schools, in the disruption of neighborhood responsibilities and community building, and in the view of the child as a member of a group rather than as an individual.

In the past two years, the Department of Justice has attempted, through both litigation and proposed legislation, to address this disunion between principle and practical effect. The positions taken in the litigation and in the central design of the legislation are identical. If the purpose of a school desegregation decree, as the Court repeatedly has said, is to remove the consequences of official acts intended to achieve and to enforce segregation in the schools, then the effort must be made to determine as precisely as possible what these effects have been. The assumption is that, in the separation of races, other factors may have been at work that may or may not have been illegal, and if illegal, perhaps can be better dealt with through remedies directed specifically at them. In particular, to the extent that separation results from discrimination in housing, remedies must be provided to deal with that problem directly. As the Supreme Court said, schools cannot bear the burden of

remedying all of the racial injustice in our society. Instead, the remedy in school desegregation cases must be to recreate, as nearly as possible, the situation that would have existed had unlawful segregation of the schools not occurred.

In both litigation and the legislative proposal, the Department has tried to suggest procedures of adjudication and review to ensure that the remedy will at once be rightly limited to the violation found and yet, within the limitation, be effective. The Department's position recognizes that transportation of students to schools distant from their homes can be proper and, in some instances, a constitutionally mandated remedy for unlawful acts. But the legislation and the Department's brief in Pasadena also make the point that our society cannot in the long run rely on artificial arrangements created and maintained only by judicial decree. The drastic remedies necessary in this area must be designed to allow a transition, as soon as possible, to more permanent and natural arrangements, and the decree should provide necessary minimum standards that give as much room as possible to voluntary action.

The purpose of these efforts has been, not a reversal in the law, but its elaboration and clarification. No one in the Department believes that its approach is an easy, or

easily implemented, answer for a problem that continues after two decades. Its presentation at least gives a focus to thought and discussion about the reality of what we are doing as a society and about what we want to do. A thinking society, struggling for racial justice, requires that that effort be made. In the short and in the long run community involvement and understanding are the most important ingredients to a solution.

There are other unfinished items that deserve attention. Our criminal justice system cannot be truly strong, effective and just until we rebuild the foundation on which it rests -- the penal law itself. Our present federal criminal law is riddled with inconsistencies and uncertainties. Similar conduct is often treated with gross disparity, offending the precept of fairness and equality. To cite but one example, robbery of a post office carries a maximum term of 10 years while robbery of the federally insured bank next door renders the offender liable to a 20-year maximum sentence. Many of the most important features of our penal law are not adequately codified; for example, the law of defenses, the requisite state of mind for culpability and for conspiracy offenses.

These gaps in the code assume the existence of a kind of common law. But the development of this common law has never been complete. The inevitable result is that our penal law is defined by the discretion of the prosecutor. The treatment can be uneven and uncertain. As Professor Wechsler has written, the promise of the penal law "as an instrument of safety is matched only by its power to destroy . . .. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual."

The significant effort to codify the federal criminal code made progress during the last session of Congress. We have frequently expressed the view that the provisions relating to the disclosure of government information were too restrictive. Compromises were reached on this and other issues which had caused controversy. We must not assume that this project of restatement of law, which is in one of the most important traditions in the evolution of our law, is an impossible task. It is, instead, an opportunity for testing and reevaluating those elements of the criminal law that trouble us and in some instances recodifying existing law where our efforts to improve it are stymied either by our lack of knowledge or our philosophical differences. In this spirit, I believe, with

the continued cooperation of the organized bar, the project can be completed to the lasting benefit of our society and its legal system.

Similarly, the question of sentencing practices and the device of parole need to be reconsidered. The element of chance must, to the extent it is possible, be removed from the system both because our sense of decency demands it and because the deterrent force of the criminal justice system depends upon such a reform. The deterrent theory of punishment does not require severe punishment. It requires a certainty that punishment will follow the crime, a certainty that has been greatly eroded. It has also been argued that the rehabilitative function of imprisonment will be enhanced by a sense of certainty about the term to be served. In such a situation entry into rehabilitative programs would truly be voluntary and the chances of success increased. In the past year the Department of Justice has taken the first step toward sentence reform by suggesting the creation of a sentencing commission to draft standards to control the discretion of judges in the sentencing decision. We have also proposed the imposition of mandatory minimum sentences for certain heinous crimes, with exceptions from the requirement made in certain mitigating circumstances.

We have also suggested that it is time to discuss whether the parole device has outlived its usefulness.

Other serious problems confront us, such as the strategy for controlling illegal immigration while at the same time protecting the rights of individuals in our richly multi-ethnic society. I know this has been an issue of considerable importance to your association. As we proceed in reformulating our policy we must recognize that there is some limit to the number of immigrants we should accept and, above all, as your report on the subject emphasizes, that our immigration law should be fair and enforceable. The emphasis should be placed upon prevention of illegal entries rather than on finding and expelling those who have already entered and made a life in this country. The integrity of the immigration law depends upon strong and decent preventive measures. We must remember that we face the problem of unlawful immigration because we remain the world's best hope. Unauthorized immigrants are responding to the same human impulses that motivated each of our forebears. We must address the illegal alien issue in a manner compatible with our democratic values and our tradition as a nation of nations.

As the agenda of the Department is inevitably unfinished, I suppose it is also always boundless. There are so many other issues -- the problem of gun violence, terrorism, the overloaded criminal justice system -- that demand attention.

And there are other imperfections that will take their place on the agenda in the future.

As I have indicated we have felt that part of the restoration of faith in the administration of federal justice involves the willingness to confront difficult problems, both of administration and of law, and to seek out for discussion and resolution those areas in which the law was ambiguous or in conflict. The preservation and renewal of our basic national values requires of all of us this openness to discussion and this duty of inquiry as well as impartiality of administration. It is the responsibility and joy of the Bar, of all of us as lawyers, to continue the essential work of the evolving unfinished agenda of the law.