The FBI in the 21st Century

Howard M. Shapiro

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cilj/vol28/iss1/5

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
The FBI in the 21st Century

The following is a revised transcript of informal remarks delivered by Mr. Shapiro on October 18, 1994, at a Cornell Law School forum sponsored by the Criminal Justice Society.

I would like to speak to you today about the evolving role of the FBI and the direction in which we are headed. I intend to offer a survey of the most pressing challenges facing the FBI in the years ahead. Allow me to begin by briefly explaining where the FBI is now.

There are FBI Agents spread throughout the country in fifty-six different field offices, and in 400 smaller satellite offices of those field offices. Cornell, for instance, is within the jurisdiction of the Albany Office of the FBI. There are approximately sixty Agents assigned to Albany, three of whom are assigned to the Ithaca Resident Agency. There are also twenty-one FBI offices located abroad, which I will discuss later. In total, there are approximately 10,000 Agents in the FBI. That sounds like a lot, and in some respects it is a lot, particularly for those who fear a national police force, but you have to place it in the context of the responsibilities of the FBI. The FBI’s geographic jurisdiction is coast-to-coast, and overseas in some places. The FBI has wide-ranging responsibilities. Just for point of comparison, the New York Police Department has 30,000 police officers just for New York City, and there are another 10,000 police officers in the housing and the transit divisions.

In terms of investigative jurisdiction, the FBI is responsible for approximately 270 criminal violations. Some of these are the ones you know: drug trafficking, organized crime prosecutions—using statutes like RICO and interstate travel in aid of racketeering, bank fraud, assault on federal officers, money laundering, and many others. I confess that some of the 270 violations are not quite as weighty. Some of my favorites: Title 18, United States Code (U.S.C.), section 711a, addresses the unauthorized use of the “Woodsy Owl” emblem and slogan. So next time you are

* General Counsel, Federal Bureau of Investigation; presently on leave of absence as Associate Professor of Law, Cornell Law School. The opinions expressed are those of Mr. Shapiro and not necessarily of the Federal Bureau of Investigation or the United States Department of Justice.

inclined to say "Give a Hoot, Don't Pollute!" think twice. There is also Title 18, U.S.C., section 710, the unauthorized use, manufacture, or sale of a military cremation urn. However, my personal favorite is the crime of interstate transportation of a defective refrigerator. As you can see, the FBI is responsible for quite a wide range of crimes.

As you know, while we don't see a lot of "Woodsy Owl" prosecutions, there is an abundant amount of real crime out there, and the FBI's 10,000 Agents are spread quite thin. We are just now, for the first time in about three years, being given the authority to hire new Agents. This will bring us back up to our full strength, which is just over 10,000 Agents, after enduring several years of tight budgets which resulted in a hiring freeze. Director Freeh is also starting a number of initiatives to get more Agents out doing what Agents should be doing: investigating crimes and performing counterintelligence work, rather than sitting behind desks at Headquarters. In the year since Director Freeh was sworn in, the number of Agents in Headquarters has been reduced from 850 to 500. Those 350 Agents are being sent out to do investigative work in the field. This has had a direct impact on my life because forty of those Agents who departed were in what was the Legal Counsel Division, and is now the General Counsel's Office, the group that I head.

Similarly, in the Laboratory, the FBI is converting from Agents to non-Agent professionals in the various scientific and technical jobs. These might not seem like significant moves, but they presage a breakdown of the previous and enduring culture of the FBI, which was to some extent shaped during the years of J. Edgar Hoover, when all positions of authority were handled by FBI Agents. The lawyers were FBI Agents, the lab examiners were FBI Agents, the people in the personnel, contracting, and finance divisions were all Agents. The effect was to keep the FBI a particularly closed and tight-knit society. Though there are some benefits to that, we no longer have the luxury to use our limited Agent resources that way in the face of the FBI's expanding responsibilities. Consequently, more and more room is being made for non-Agent professionals, who, for the most part, have been very well received.

Most of you think of FBI Agents as cops, and that's basically what most Agents are. But in addition to the traditional law enforcement responsibilities, the FBI also has significant counterintelligence responsibilities. We are the lead counterintelligence agency in the United States. We are responsible for safeguarding our nation against the threat posed by foreign intelligence services, who send people here to spy on the United States. It is the FBI's job to thwart those efforts through a variety of means, such as identifying the threat, stopping such operations through court-authorized electronic surveillances or physical surveillances, and by trying

2. The General Counsel's Office is responsible for providing legal advice and counsel to the Director, other Bureau executives, and to the FBI Field Offices, litigating claims brought against the FBI, and, often, representing the FBI to other agencies of the United States Government.
to recruit members of foreign intelligence services as double agents. Those are things which were entirely new to me when I joined the FBI. The only preparation I had for it was reading a couple of John LeCarré novels, which I actually recommend because it’s pretty good preparation.

The world has changed quite a bit over the past five to ten years, and the foreign counterintelligence area has been forced to change with the times. The Cold War has ended. The communist governments of Eastern Europe and the former Soviet Union have collapsed. We no longer face the obvious challenge between one set of countries and another, locked in perpetual ideologically-driven combat. It is harder to identify who the enemies are and who the targets are. That being said, the counterintelligence world has also changed, but not quite as dramatically as one might think. The best illustration of that is the case of Aldrich Ames. Rick Ames, as you all probably know, was a CIA officer for many years, who was recruited by and worked for the KGB. When the Soviet Union’s KGB was transformed into the SVR in post-communist Russia, they didn’t miss a beat. Ames continued to work for them, continued to supply classified information, and continued to do great damage to American national security issues. It is probably the single-most damaging penetration of the United States Government ever, and it continued unabated until early 1994.

As the Ames case illustrates, the classic type of espionage activity is not entirely a relic of the past, despite the tendency to think of it that way. The motivations are slightly different. It is not ideologically-driven as such, but there remains a substantial market for sensitive political, economic, and defense information. Perhaps ironically, the end of the Cold War has actually greatly expanded the number of espionage cases we are working because of our greater access to certain types of information. We now have some access to the files of the Stasi, the East German secret police, and to some of the files of the other Eastern European secret police agencies, as archives are opened and documents eventually find their way to us. In addition, former operatives in some of these countries, now that the ideological conflict is over, are willing to come and talk to the FBI and other agencies. As a result, the end of the Cold War brought us a tremendous increase in the number of leads in traditional espionage cases, and revitalized others that had been dormant for years. However, to some extent, this is a function of the transition from the former communist governments and will not continue forever.

What may be more enduring is a shift in what espionage is all about. We see more and more of an interest in economic espionage, and this is problematic for a number of reasons. First of all, it is difficult to define what constitutes economic espionage with any specificity. In general, the term refers to gathering by clandestine means confidential proprietary economic information, trade secrets, or intellectual property. It was fairly clear in the old days that when you had someone trying to steal the plans for the stealth bomber or some nuclear missile, you had an espionage case. However, it is far less clear whether or not you have an espionage
case when someone is trying to obtain an unfair competitive advantage, even if they are doing so on behalf of a foreign power. There are no statutes that directly address the issue. There is no specific economic espionage statute.

At the same time there is a deeper question, which we are not yet prepared to answer. The question is: to what extent should the FBI be involved in that type of law enforcement activity, since it puts the federal government in the position of supporting and protecting private interests and private corporations. There are obviously strategic dimensions to such espionage, and our government certainly has a strong interest in international competitiveness issues. The years spent negotiating bilateral trade agreements, not to mention the General Agreement on Tariffs and Trade, are ample testament to the governmental interest. Also, most other countries draw a less clear division between their public and private realms, so these are not issues which can be left entirely to the marketplace. Still, the questions remain.

One other aspect of the shift to economic espionage is the change in the people who are involved in it. It used to be clear who our adversaries were. Now, many people who otherwise are friends and colleagues of the United States in other activities are spying on us for economic matters. As just one example, the FBI investigated a case in 1993 against two individuals, one of whom was French, the other Italian, for stealing sensitive economic information from Owens-Corning Fiberglass. They attempted to sell the stolen information to an FBI undercover Agent for $10 million. There is a market for closely held economic information, and we at the FBI are moving to get ahead of the curve on it, but it is much more amorphous and much less defined than the old-fashioned threats of espionage between the warring sides of the Cold War.

There has also been, as some of you have probably read, occasional tension between the FBI and the CIA. Some of that, I am happy to tell you, is overblown and hyped. In some areas, such as counterterrorism, there is a very constructive working relationship between the two agencies. There have indeed been some problems in the relationship in other areas, and some of them surfaced in connection with the Ames investigation. President Clinton ordered a series of reviews to try and make the relationship work better, and then issued a Presidential Directive in May creating a national counterintelligence center that is staffed jointly by FBI, CIA, and Department of Defense personnel. That order, along with several other provisions, was codified in the recently passed intelligence bill. One of the intelligence bill provisions mandates quick handoffs from agencies working internal investigations to the FBI, which handles any criminal investigation on espionage matters. These changes are designed to ensure

that any future case, unlike the Ames case, quickly receives the proper attention of trained criminal investigators.

As the Ames case illustrates, counterintelligence work sometimes shifts into the criminal area. At some point, if people are taking substantial steps towards stealing or acquiring defense information or some other types of classified information, that activity may end up as an espionage case. So the line between counterintelligence and law enforcement is not a bright one, but nonetheless, to some extent, they are distinct missions. A related area is counterterrorism, where the FBI also has the primary responsibility in the United States. Again, sometimes those become criminal matters, but we prefer to deal with terrorism as a preventive matter rather than as a reactive one. It is obviously preferable to identify and break up terrorist cells, possibly expel or prevent the entry of individual terrorists and thwart their plans, than to respond after the World Trade Center has been blown up. We do both sides of that, and have been successful in the criminal prosecutions. For the most part, the FBI’s counterterrorism efforts are classified, which means you don’t know about them, and I can’t tell you about them. However, you should be glad the FBI’s counterterrorist strategies are in place. Our record is actually very impressive and the World Trade Center bombing is a rare exception as compared to the high incidence of terrorist acts in many other countries of the world.

Despite all of the activity that is ongoing in the espionage world, the FBI’s counterintelligence efforts have simply not been continued at the same level of priority as they were during the Cold War. We are not pretending that the world has not changed. In fact, we recognize that it has. We further recognize that the FBI does not have enough people to do everything it wants or needs to because of a finite number of Agents and other resources. Consequently, we transferred a large number of Agents from counterintelligence investigations to counterterrorism investigations, which is, regrettably, still a growth field. As the Middle East peace process yields tangible results, groups that are opposed to peace are stepping up some of their activities to derail that process. In response, the FBI, here, and to some extent overseas in liaison with foreign services, is working to identify potential threats and prevent any further terrorist events in the United States. There has been some success in this area: in 1982 there were fifty-one terrorist incidents in the United States. In 1993 there were only twelve, but unfortunately one of them was the World Trade Center bombing.

The FBI also has jurisdiction overseas when there are terrorist acts that victimize Americans. Pursuant to these authorities, the FBI investigated and solved the Pan Am 103 bombing, although no prosecutions have yet been possible. In the area of terrorism, the FBI acts within very strict guidelines from the Attorney General, as well as internal guidelines, to insure that there is no interference with activity protected by the First

---

Amendment, even where such activity is in support of terrorist organizations. The bottom line on terrorism is that it is unpredictable, it is not going away, and it is important that we retain our vigilance as we focus more and more resources in that area.

This leads me to a second area of change in the FBI mission that I want to talk about—our growing international focus. For many years, criminals have thought in international terms, but law enforcement did not. In limited incremental steps, law enforcement has begun to recognize and respond to international crime. Drug enforcement got the message pretty quickly, since, except for marijuana, the other major drugs consumed domestically are grown almost exclusively outside this country and are imported. Accordingly, the focus of drug enforcement quickly went to international approaches and coordination with police activities of other countries. The FBI has likewise worked cooperatively with foreign police agencies, especially those in the Italian government, to combat traditional organized crime. This international focus has taken longer in other fields, and we are only now really catching up, but crime has very much expanded beyond national borders. With expanding world markets and the world economy, financial crimes now extend from one end of the globe to the other. If you combine criminals who do not respect international borders, with law enforcement that is entirely hemmed within them, then you inevitably play at a disadvantage.

One step taken in order to address this disparity is a concerted effort to think more globally at the FBI. In furtherance of this, the Director of the FBI undertook an unprecedented visit in June and July to Eastern Europe and the states of the former Soviet Union. This trip was designed to assess first-hand the situations in these emerging democracies, what the needs are, and to determine what, if anything, we can do to assist. This is not just a program of charity, which concentrates on what we can do to help these countries with their crime problem. The focus, instead, is on what we can do overseas to help our own crime problem, since much of it is generated overseas, where criminals have safe havens to plan their crimes and reap the benefits well beyond the reach of domestic law enforcement. The FBI already operates in twenty-one countries around the world in a liaison capacity. We don’t have Agents running around the streets of Paris or London with guns and badges, arresting people. What we have are Agents who will make contact with Scotland Yard or with the French police and work collaboratively to try to focus on some of the international criminals that both countries are investigating.

Let me tell you a little something about this trip to Eastern Europe. I was privileged to go on this trip with the Director, along with the Administrator of the DEA, the Undersecretary of Treasury for Law Enforcement, the Assistant Secretary of State for International Narcotics Matters, and a small support staff. We met with representatives from eleven countries in nine days. We started in Germany, and went through Slovakia, the Czech Republic, Hungary, Poland, Ukraine, met with the Lithuanians, Latvians, and Estonians all in Vilnius, and then spent two and one-half days in Rus-
sia before ending in Austria. It was a grueling pace, but it was extremely informative and educational. There are critical problems for law enforcement in most of these countries. It is not just, as I said, a problem for them, but it is really a problem for us as well. In these countries, the escalating crime problem directly affects the ability of their governments to build stable democracies—something which the United States Government has been supporting both diplomatically and financially, through fairly significant contributions of cash. Much of the progress we have seen in these emerging democracies is threatened by the emerging chaos caused by criminal activity. As the borders have opened, and more trade has commenced between these countries and the United States, the crime rates have soared and reached our own borders, as criminals in these countries have learned to take advantage of the new opportunities created by free trade and open markets.

The criminal issues in most of these places are pretty much the same as they are here. There is concern about terrorism. There is concern about drug trafficking, organized crime, financial fraud, and newly developing concerns regarding nuclear materials, which I will discuss later. The ability of these countries to respond to any of these threats is quite questionable. There is a need, a basic need, in all of the former Eastern European countries and states of the Soviet Union to learn how to develop and administer effective law enforcement agencies in a democratic society. It is a lot easier to be a cop in a totalitarian regime than it is in a democracy where law enforcement must respect constitutional rights and procedural protections, yet still be able to accomplish its mission.

Everywhere we went, we were asked how government can balance those competing interests. Now, we made no pretense of having solved our own crime problem, or having stopped the flow of illegal drugs. Nevertheless, we did have something to offer. On the law enforcement side, many of these countries have absolutely no relevant experience. The countries have tended to take one of two approaches, epitomized by, say, the Czech Republic on one side and the Russians or Latvians on another. The Czech Republic, because of years of being subject to the repression of their internal police forces, purged these forces entirely. The police forces, the counterintelligence services, and the foreign intelligence services were entirely overhauled, and they now have law enforcement officials they can trust. The head of the national police was a rock drummer during the former regime. The Minister of the Interior was a poet. These are thoughtful, educated, smart people. However, they don’t know a thing about law enforcement, and it is going to take some time for them to develop the relevant experiences and expertise. There are some techniques, there are some experiences, that can be learned, and that is why, when we were in Prague, President Havel asked us to open an FBI office there to help train their police officers. It is a problem in a place like the Czech Republic where nobody who’s on the job knows the craft of policing.
It may be a bigger problem in places like Russia and Latvia where they know only too well how to police aggressively, because the exact same officials who were acting in utterly repressive ways under the former regimes are still in power. There has been essentially no turnover in the personnel. One quick story illustrates the prevailing attitude.

When we met with the Baltic states, in Vilnius, I was asked to address a question posed by the Minister of Interior from Lithuania about the principles of law enforcement in the United States. I spoke for a few minutes about aggressively enforcing criminal laws within very carefully crafted and honored procedural protections. I talked about the right to a jury trial, the right to counsel, the fourth amendment protections against unreasonable search and seizure, and the right against self-incrimination. I presented a quick survey of American criminal procedure, from the perspective of the FBI, which the New York Times refers to as a notoriously conservative institution.

It seemed to be well received at the time, but the next morning we got what amounted to an official diplomatic protest from the Latvians, because they felt that I was advocating the coddling of criminals and suggesting procedures which would totally undermine the possibility for effective law enforcement. In comparison to what they are used to, perhaps I was—which should suggest to you that there is a tremendous gulf between our experiences. We all know that, but it is nonetheless enlightening to sit down and address the question of how to exercise law enforcement powers in newly free societies. Our experience suggests that an independent judiciary is one essential element, as are strong internal controls within police institutions.

The problems facing these countries are significantly exacerbated by the fact that these are, for the most part, poor countries. On one of our stops, the police talked about having to hail down a cab when they try to follow somebody on a surveillance because they don't have enough cars for their cops. They don't have phones, they don't have computers, and they get paid very little. This last point is of particular concern, aside from some general sense of the brotherhood of law enforcement officers, because it creates fertile ground for corruption. In Estonia, a cop gets the equivalent of $70 per month. And even in Russia, at the MVD, which is the top-flight national police, the pay reaches only about $200 per month. At the same time, elements of the emergent organized crime groups in Eastern Europe and in Russia are able to pay many multiples of that, even if it's just for someone to look the other way. So the shortage of resources raises additional hurdles to any lasting and effective reform.

Perhaps the biggest problem facing law enforcement in these countries is the way the police are perceived by the public. This perception problem is grounded very firmly in a historical reality—law enforcement was the enemy. Throughout Eastern Europe and the former Soviet Union, the experience of most people with law enforcement is entirely negative. I recognize that this is also the experience of some people in this country, but again, the differences in the experiences can hardly be
overstated. Under the repressive Stalinist regime, law enforcement could arbitrarily come into your home, destroy your family, and imprison or kill your loved ones. Law enforcement was answerable to no one and completely unreachable. Attitudes toward the police which formed and hardened over time will change only slowly and will require a drastic change in the behavior of the police. Regrettably, we observed that the fear of the populace was often met by a total lack of respect for the citizenry from certain elements among the police.

That being said, what do we do about it? We don't have any magic solutions to any of these problems, but we at the FBI think there is no alternative to our trying to do something about it. Every country we visited asked for help. Most of all they asked us to station FBI Agents in their country. I fear that they often misunderstood and vastly overestimated what one or two Agents placed in a country would be able to do. We have neither the resources, the intentions, nor the authority to take over the law enforcement activities of any of these countries; we have enough challenges at home. We are, however, looking toward stationing a limited number of Agents in some of these countries to help coordinate investigative activities and also to facilitate training.

One can hardly overestimate the enormity of the task involved in remaking these law enforcement agencies and, in comparison, how limited our resources are. We can't train the entire MVD in Russia or even the Czech Republic police force. But we are moving toward establishing a training academy in Europe that will enable us to train trainers.\(^6\) Our goal is to train mid-level trainers who can go back and teach in their own countries. This has the advantage not only of providing some training as well as an inculcation in democratic law enforcement techniques, but also provides opportunities to identify people in these countries who are committed to doing the right things for the right reasons and on whom we can rely.

At the same time, we are looking toward negotiating mutual legal assistance treaties with the countries of Central and Eastern Europe. The Department of Justice has such treaties, which provide procedures to share evidence and facilitate cooperative law enforcement, with many countries in the world, but not at present with any of the countries of Eastern Europe or the former Soviet Union. As a result, it takes extraordinary effort to accomplish something as simple as getting a witness or some evidence from one of these countries to use in a trial here. This absence of legal process further insulates these countries and enhances their status as safe havens for criminals. There is not only no extradition procedure, but typically you cannot even get the documents from countries where the crimes may have been planned and initiated.

---

\(^6\) On December 5, 1994, President Clinton announced that an International Law Enforcement Academy, to be located in Budapest, Hungary, will begin training classes in the spring of 1995.
We are now moving forward on all of these fronts, as the stakes are too high for us to ignore these concerns. Russia in particular presents a unique situation in the world. For the first time we face a major nuclear power which is an unstable state. We are starting to see some movement of very small quantities, and for the most part, low purities of nuclear material coming out of Russia and other places in the former Soviet Union. But it is a threat that we, and police forces in Western Europe, take extremely seriously. You have to keep in mind that the security systems for nuclear materials in what was the Soviet Union were designed to work in a country that had an effective totalitarian system of control, and had impermeable borders. Once they lost both of those, the security system intended to safeguard against a nuclear mishap was seriously compromised. This is not merely a law enforcement problem; it's also a diplomatic problem and an intelligence problem. But law enforcement must continue to play a role in combatting the growing danger of the dissemination of nuclear materials.

Some of the crimes that the FBI now faces, and will continue to face, are the same ones we've been facing for a long time: bank robberies, kidnappings, and espionage. Others are still emerging and we have, so far, been able to modify our approach and reallocate our resources to stay ahead of the evolving nature of crime, which is where we are committed to staying. Today, we are again changing our approach. We are thinking much more internationally, indeed globally, while we are also taking advantage of new advanced forensic technologies, such as DNA identification and others developed by the FBI Laboratory. We are identifying the emerging technological hurdles to effective law enforcement and overcoming them before they become a real problem. We are also working more and more closely with other law enforcement agencies both in the United States and abroad to ensure that we anticipate and respond effectively to the evolving nature of crime.

The FBI and our global law enforcement concerns and interests are also becoming more integrated into the foreign policy of the United States. Assistant Secretary Richard Holbrooke gave a speech while we were in Eastern Europe where he said,

7. Remarks of the Honorable Richard C. Holbrooke, then United States Ambassador to the Federal Republic of Germany, at Rotes Rathaus (Berlin City Hall), Berlin, Germany (June 28, 1994).

The FBI and the Department of Justice are committed to making this evolving policy as effective as possible. The problems are simply too big and too serious to ignore.

The trip symbolizes the transition from Cold War politics to the far more difficult issues of the post-war world. People ask, where is the post-war foreign policy. The CIA and Defense Department issues that predominated during the Cold War have receded. Now law enforcement is at the forefront of the national interest in this part of the world and this is the evolving America foreign policy.

The FBI and the Department of Justice are committed to making this evolving policy as effective as possible. The problems are simply too big and too serious to ignore.