FWA

Department of Justice

"WATERGATE LEGISLATION IN RETROSPECT"

REMARKS OF

BENJAMIN R. CIVILETTI

ATTORNEY GENERAL OF THE UNITED STATES

AT THE ANNUAL DINNER

OF THE

UNIVERSITY OF CHICAGO LAW SCHOOL AND ALUMNI ASSOCIATION

Hyatt-Regency Hotel
Chicago, Illinois

Friday, April 25, 1980
7:00 p.m.

New decades always bring reviews of the last ten years and predictions for the next ten. In the economic area, the 70's have been called the "me decade" which resulted in record-breaking inflation. In domestic affairs, the 1970's were the "energy decade" in which Americans waited in long lines to pay twice what they had paid in the 1960's for gasoline. In foreign affairs, the 70's were certainly the "post-Vietnam" era in which we saw the end of selective service and reduced military budgets. And from this Attorney General's vantage point the 1970's will be remembered as the "post-Watergate" decade. These were the years in which the country, shaken by the events leading up to a President's resignation, demanded substantial reforms in government practices, and legislation was enacted to prevent repetition of the abuses uncovered during Watergate.

Now, some eight years after the famous burglary, enough time has passed to take a new look at Watergate and the changes in government it inspired.

The term "Watergate" has come to signify an excessive accumulation and abuse of power. In addition to this general meaning, at least four specific Watergate problems can be identified. First, some government officials were able to initiate investigations without having a substantial basis or a proper predicate. Second, agencies operated behind closed

doors. Individuals were unable to discover or correct information government agencies kept about them. Third, agency officials often used such personal data, especially tax information, improperly. Fourth, those under the potential influence of wrongdoers had the responsibility of investigating their superiors' wrongdoing.

Congress, which believes it was instrumental in uncovering these abuses of power, took and is still taking actions to address these issues. Laws such as the Privacy Act of 1974, the Hughes-Ryan Amendments of 1974, the Tax Reform Act of 1976, the Ethics in Government Act of 1978 and the Right to Financial Privacy Act of 1978 are some of the Watergate-inspired legislation. Even now, there are new proposals, such as the FBI and CIA charters, which can be traced to the desire to assure proper conduct by the executive branch.

It is my firm belief that the major premise of each of the above laws is sound and correct. Officials in our government had been allowed to acquire unchecked power and did abuse it. Nevertheless, it is also my view that, for a number of reasons, these post-Watergate laws, which sought to correct serious problems, have caused serious problems of their own. Too often a new restriction or rule cannot prevent a targeted abuse, and interferes with a legitimate governmental activity as well.

The challenge to administrators and legislators in the 1980's will be to correct the errors in these reforms, yet retain their benefits. Effective law enforcement and personal privacy, for example, can co-exist. A proper balance can be achieved. Therefore, I do not advocate the repeal of any of these post-Watergate laws. They represent important goals and, for the most part, address these purposes correctly. Instead, what is needed is objective review of these laws and the problems which caused them. In my remarks this evening, I will take time to discuss four of the post-Watergate laws.

First: Freedom of Information and Privacy Acts

The Freedom of Information Act was first passed in 1967, years prior to Watergate. However, it was substantially amended after the Watergate scandal when its companion, the Privacy Act of 1974, was also enacted. Together these two laws are Congress' attempt to address both excessive secrecy in and accountability of government agencies.

The Freedom of Information Act gives "any person" a judicially enforceable right to obtain any "agency record," and it imposes only one qualification on that general right. A record may be withheld by an agency if it falls within the scope of one of nine specific exemptions set forth in the Act. On the whole, these reflect a conscientious attempt by Congress to balance the general need for openness in government against the specific needs of government to withhold certain records.

We have learned that this particular statutory machinery does not always work. Consider, for example, the problem of preventing criminals from discovering how we investigate crime. The Department of Justice uses manuals, written instructions, and summaries of technical information relevant to crimes and investigatory techniques to educate and direct government personnel in the performance of their investigatory duties. This is information that criminals must not be permitted to obtain. There should be no serious argument over the question whether the government has a legal duty to provide the general public with materials that are, in effect, do-it-yourself guides for crime; but our courts have difficulty in protecting this information based on the language of the Act. We have made a legislative error here and we need to find new statutory language that will correct it.

Two other problems agencies have with the Freedom of Information Act are unrealistic time limits and the manpower resources those limits require. An agency now must respond to a request for records in ten days. Very often records cannot even be located within this time; so, this time limit is often disregarded. This, in turn, inevitably leads to disrespect for the law and to cynicism about government. Moreover, agencies which are struggling to meet this impossible deadline are often likely to make mistakes. When the names or other identifying

information of informants are involved, the haste required by the law could have tragic results. Also, if an agency fails to meet the artificial deadline, litigation may result. The unrealistic time limit, therefore, contributes to unnecessary law suits which further clog the crowded court system.

Compliance with the FOI and Privacy Acts requires very large commitments of time to process requests. In the Department of Justice's Criminal Division, for example, there are 20 persons who spend all their time processing initial requests for records. Even so there is a backlog of some 200 requests. At one time the FBI had over 500 people working on requests. These numbers, incidentally, are only for initial requests. The Department has an entire unit of attorneys, paralegals and secretaries to process administrative appeals and a separate part of one of its divisions to handle law suits. When Congress enacted the Freedom of Information Act, it estimated its annual cost to be $100,000. The actual costs of the Freedom of Information and Privacy Acts are estimated to be $45 million.

The imbalance caused by the time limits and drain of resources can be corrected. One absolutely necessary change in the law is a new time limit. To be as fair as possible, the time schedule could be tied to the work required to process a specific request. Second, studies have revealed that a disproportionate number of requests -- 20 percent of all received

by the FBI -- are made by convicted felons serving criminal sentences. While these individuals have legitimate rights to discover the process behind their convictions, in most cases they have exhausted this right during litigation. Some reduction in the opportunities for convicted felons to use up resources in this fashion is needed.

These and other corrections can be made without sacrificing any of the important goals of the law.

Second: Tax Reform Act

One of the most disturbing revelations during the Watergate hearings and resulting investigations was the enemies list. Individuals on this list were subjected to harassment by federal agencies who improperly used personnel records. But the most powerful weapons of harassment seized upon were the tax records of these individuals.

The Tax Reform Act was designed to prevent abuse of tax information by establishing strict procedural and substantive requirements for the disclosure of tax information. While the enemies list made it clear that some restrictions on the use of tax information were needed, Congress imposed too many. Information contained in tax records can be extremely valuable in tracing the financial enterprises associated with both sophisticated white collar crime and organized crime. Since the Department has targeted such crimes and enforcement priorities, the legitimate need for tax information and for financial experts has increased dramatically.

The Tax Reform Act not only prohibits acquiring tax information for improper purposes, it makes it very difficult for the Internal Revenue Service to disclose this highly valuable information for very legitimate investigations. Moreover, the Act's restrictions have denied law enforcement officials the assistance of the expert financial investigators of the IRS who are indispensable in unraveling the manipulations that occur in financial cases. The heavy criminal and civil penalties which threaten IRS personnel for unauthorized disclosures have made IRS personnel extremely cautious in providing even the limited assistance and information that is permissible under the Act.

In an article published a few weeks ago entitled "How the IRS Aids Crime," Newsweek magazine addressed the Tax Reform Act and, as you can see by the article's title, the perception was not positive.

The principal difficulty is that the Act prohibits the IRS from volunteering information. When IRS uncovers evidence of non-tax related crimes, it cannot tell the Justice Department. As one example, Newsweek reported the incident in which federal prosecutors involved in the trial of Harlem narcotics king Nicky Barnes asked the IRS for Mr. Barnes' tax records months prior to his trial. Financial evidence was crucial to demonstrate that Mr. Barnes had sources of income from illegal enterprises.

Not until the case was half over did IRS, struggling with the Act, finally decide to cooperate. When it did, the prosecutors, the judge and the jury all learned what the IRS had known all along. Mr. Barnes had reported $250,000 in drug profits as miscellaneous income on his tax returns.

While the Tax Reform Act did recognize that tax information could be valuable to legitimate prosecutions, its provisions for allowing the IRS to disclose information are far too narrow. IRS can disclose information only after a specific, formal request is made personally by the head of another agency or a court order obtained. The law creates a Catch-22 for our prosecutors, however, by requiring the request or the affidavit for the court order to show that the tax information desired is the most probative information about a crime that has been committed and cannot be obtained from other sources. If prosecutors knew this much about the tax records, they would not have to seek them from IRS.

I recognize that legitimate privacy interests of taxpayers are furthered by the Act. At the same time, the problems and examples I have described cause one to question how American society as a whole is benefited by significantly reducing IRS' ability to lend its expertise and store of information to the investigation and prosecution of persons engaged in multi-million dollar criminal conduct. Changes can be made that will ensure that tax information is not abused and, at the same time, will allow law enforcement agencies to work together where investigations

are legitimate and records or assistance sought are relevant and appropriate.

Third: The Ethics in Government Act

The Watergate cover-up identified a fourth concern. There were conflicts of interest and certainly the appearance of conflicts when individuals potentially under the influence of wrongdoers had the responsibility of investigating these wrongdoers.

Congress' direct response to this concern was the enactment of the Ethics in Government Act. One title of this Act deals with Special Prosecutor authority. The law requires the Attorney General to conduct a preliminary criminal investigation whenever he receives "specific information" of a criminal violation against any one in a large group of designated executive branch officials. The Attorney General is required to apply to a special court for the appointment of a special prosecutor where a preliminary investigation does not prove the allegations to be unsubstantiated.

I think it helps to think of the special prosecutor procedure as a limited recusal procedure. Its purpose is not to change rules of decision, but to change decision-makers, and thereby to provide further assurance that the rules will be observed. The theory of the Act is that evenhanded, independent

enforcement of the law can best be ensured if the Department is required to recuse itself in the most sensitive cases involving high government officials in favor of another decision-maker, the special prosecutor.

There is a basic irony here. To ensure regularity and objectivity in the administration of the criminal law, we have found it necessary to create a special office, a special jurisdiction, a special procedure; yet special sections have never held an honored place in our jurisprudence, and they are rightly condemned for their tendency to promote irregularity, lack of accountability, and special treatment -- the very things the special prosecutor provisions hoped to prevent.

In the year and a half since the Act has become effective, the Department has had some experience with applying the Act's provisions. This experience has shown that the Ethics Act follows the pattern I have identified in the other post-Watergate legislation.

To begin with the Act covers <u>too</u> many government employees. While an argument can be made for a special prosecutor procedure in cases of serious allegations involving the President, Vice President, Cabinet members and highest level White House staff, the Act goes further. It covers these officials and some 200 others, including those on the Council of Environmental Quality

and many employees in the Office of Management and Budget. The Act assumes wrongly that the Department of Justice's career investigators and prosecutors cannot effectively and impartially investigate allegations made against a large number of officials even when there is only the remotest possibility of conflict.

Not only does the Act cover too many individuals, it covers these people for too long a period of time. Officials remain under the Act as long as the President with whom they served or another President of the same party stays in office. In other words, if the President is re-elected in 1980 and a Democrat should win in 1984 and 1988, an individual who served as a mid-level official for a short time in 1977 could still be subject to the Act even though he or she had been out of government service for over ten years and was in no way connected with the incumbent administration. Except where a real conflict can be shown, there is no reason for people to remain covered after they leave a covered position.

The difficulties caused by having so many people covered for so long are compounded by the breadth of the Act, which includes too many crimes. The Act comes into effect not only for serious crimes or crimes with a direct relation to public service but even for misdemeanors.

Still another problem with the Act is the vagueness of its standard. The special prosecutor provisions come into

play whenever there is receipt of "specific information" of a federal crime. This term is not defined in the Act, and there is little legislative history. To take it in its broadest context would allow too little discretion, and the Act could be triggered frivolously. But beyond that, the Act does not recognize that in normal circumstances, the Department of Justice does not investigate or prosecute every federal crime that comes to its attention. We exercise discretion. We stay our hand in individual cases, not for the purpose of advancing or threatening personal interests, but for the purpose of doing justice and advancing the common good, as we see it. This discretion is one of the great prerogatives that devolves upon us under the common law. It is enormously important, and it is honored in tradition. The special prosecutor law, seeking to ensure that high government officials receive no different treatment than that given everyone else, results in the opposite. The law makes no provision for and does not take into account the normal and regular exercise of investigative and prosecutorial discretion. The net result is clear: Whenever a high officer has the misfortune to be the target of a specific accusation, regardless of its real merit, he may be subjected to a criminal investigation by federal authorities in circumstances in which any other officer or a private citizen, would be without jeopardy.

I recognize and agree with the argument that those who serve in high public office must be subject to higher standards.

Nonetheless, the breadth of the Act, along with the number of people who are included and the time in which it applies, if interpreted woodenly, would result in gross unfairness.

It is the combined effects of all of its provisions which causes the imbalance in the Ethics in Government Act. Consequently, the time may soon be at hand to consider several changes in the law. These changes would preserve the basic purpose of the Act but would remove the dangers of triviality and unfairness.

Fourth: The Right to Financial Privacy Act

The last of the Watergate-inspired laws that I would like to address is the Right to Financial Privacy Act, enacted just last year. This Act seeks to ensure that government agencies do not obtain personal financial information for improper purposes. It provides that (1) requests for financial information must be made in a formal way; (2) individuals receive notice when records about them are being requested; (3) individuals can sue in federal court to challenge government acquisition of financial records; and (4) transfers of financial records from one agency to another cannot occur unless specific procedures, including a second round of notices, are followed.

Again, the difficulty with this Act lies not in the overall legislative intent but in the consequences of the Act's method. I have already referred to the critical role that financial information plays in the detection of major federal crimes --

organized crime and white collar crime in particular. The Act, recognizing the government's need for financial information, permits the Department of Justice to file with banks formal written requests for that information. But through some legal and social chemistry we have not yet fully understood, the Act or its offspring in the states has drastically reduced the willingness of financial institutions to comply with those requests for information.

The Act's effect is to require the use of compulsory process to obtain financial records. The act, however, does not take into account the fact that very few law enforcement agencies have any kind of formal legal process for general investigative purposes. Within the Department of Justice, for example, neither the FBI, the Criminal Division or the Civil Rights Division has any form of compulsory process. Therefore, federal prosecutors have to resort to the grand jury far earlier in an investigation or do without the crucial information provided by financial records. Rather than making requests voluntary, the Act should provide that financial institutions have to comply. This would correct the balance without diminishing any of the important privacy protections. Compulsory demands would still have to be accompanied by notice to the customer and agencies would still have to show how the demands for records are relevant to legitimate investigations.

A second problem caused by the Act has still not been satisfactorily resolved. Prior to the passage of the Financial Privacy Act, bank supervisory agencies, such as the Federal Deposit Insurance Corporation, could transfer evidence of wrongdoing they uncovered during their audits to the Department of Justice, so that the individuals suspected of illegal conduct could be investigated and, if appropriate, prosecuted. Because of confusion in the law, many of the bank supervisory agencies are not sure whether and how they can continue to make these referrals. Some believe that they have to give notice to the individuals whom they suspect are committing a fraud or cheating the bank in some other way and who, because of their positions, can tamper with evidence or obstruct an investigation after receiving this notice. Other bank supervisory agencies, not sure of the requirements of the law, have stopped making referrals altogether. Still others ask the banks themselves to refer the evidence of possible crime to the Department of Justice. You can readily see how this last approach is not a very good one when the individual suspected of violating the law is a bank officer. To remedy this problem the Act should be changed to make clear that bank supervisory agencies have the right and the duty to report violations of law in a way that allows the appropriate law enforcement agency to fully investigate and prosecute the offense.

Very often our legislative process is a reactive one. When the event that triggers legislation is as powerful and traumatic as was Watergate, the legislative reforms are bound to be sweeping. Sufficient time has now passed to examine these particular reforms both to strengthen their best features and to correct our mistakes in their worst features.

END