



## Bureau of intimidation

### Memo to Robert Mueller: The FBI is supposed to protect our rights

**BY HARVEY A. SILVERGLATE**

August 10, 2001

THE FBI IS the luckiest agency ever.

In February of this year, the Bureau suffered the humiliating disclosure that Robert Hanssen, a senior agent in its vaunted and secretive counterintelligence unit, had been spying for the Soviets and Russians for more than 15 years, and that his perfidy had gone undiscovered despite a number of clues. Three months later, the agency drew criticism from all three branches of government when it disclosed at the 11th hour that it had failed to turn over thousands of pages of investigative reports to the legal team defending Oklahoma City bomber Timothy McVeigh, causing an embarrassed Attorney General John Ashcroft to postpone McVeigh's execution for a month. And last month the Bureau admitted that an internal inventory had disclosed that hundreds of weapons and laptop computers, including at least one with classified data, could not be accounted for.

How can such high-visibility revelations of gross incompetence be deemed luck? Well, it's simple. Just as the FBI was attracting unprecedented public, media, and congressional criticism and even suspicion, these scandals suddenly popularized the notion that the FBI's problem is one of poor executive management. In fact, the real problem is the agency's culture of hostility to constitutional rights, its lack of respect for civil liberties, and its devotion to enhancing its own unaccountable power. And the confirmation last week of Robert S. Mueller III as the new director — replacing the incompetent but Teflon-coated Louis Freeh — isn't likely to change much.

Over the course of its existence, the Bureau has demonstrated the somber truth of a statement made, ironically, by then-director Freeh during testimony before the House Judiciary

Subcommittee on Crime in June 1997. " We are potentially the most dangerous agency in the country, " he said, while trying to persuade legislators that he and his agency should be given even more power — an undertaking at which Freeh excelled and almost always succeeded.

Last week, Freeh passed to his successor an agency as dangerous today as it was during the nearly 50-year more-terror/less-error reign of the infamous founding director, J. Edgar Hoover. Yet despite the unprecedented amount of scorn and skepticism directed toward the Bureau, Mueller's confirmation hearing was utterly uneventful. No senator seemed to have either the historical perspective or the will to ask any really tough questions. From the current spin, you would think that all the FBI really needed was a good manager, someone to do for it what Jack Welch did for General Electric; the Bureau came across as an agency more bungling than dangerous.

Nothing could be further from the truth. In seeking to promote its own peculiar notion of law and order, the Bureau is a ruthlessly efficient machine.

IF MUELLER'S confirmation hearing was a love-fest, the tone had already been set by June's Senate Judiciary Committee hearing on " Oversight: Restoring Confidence in the FBI " (as if there had ever been a time when we had a basis for real confidence), which the committee's chairman, Senator Patrick Leahy (D-Vermont), called to examine the agency's embarrassments of recent years. Former Missouri senator John Danforth, who headed a 14-month, \$17 million investigation into the FBI's conduct of the Branch Davidian siege at Waco, Texas, solemnly assured the committee that he found no evidence of serious FBI wrongdoing, other than a " lack of openness and candor " meant " to avoid embarrassment " of individuals and of the Bureau itself. " A long-standing value of the FBI is not to embarrass the FBI, " he intoned. But, he assured the senators, " I am sure that systems for managing information can be improved. " Danforth's testimony never even touched on the fundamental question of why the FBI got involved in a situation that could and should have been left to local law enforcement, and how and why the Bureau convinced then-attorney general Janet Reno that an assault on the community was essential in order to stop the alleged child sex abuse by leader David Koresh. (Reno's obsession with child sex abuse was well known from her days as Dade County district attorney, and her law-enforcement advisers knew precisely how to push her buttons.)

Even more ludicrous was the testimony of Michael R. Bromwich, former inspector general of the Justice Department, who conducted a highly publicized investigation in 1995-'97 of the fabled FBI Crime Laboratory, long touted as the premier forensic crime lab in the world. Bromwich reminded the senators that he had " rejected some of the most far-reaching allegations that had been made, including allegations of perjury, obstruction of justice, and

suppression of exculpatory evidence " leveled against the lab and its forensic experts and agents.

To those with experience in defending people accused of serious crimes on the basis of testimony from FBI lab personnel, the Bromwich report was a joke. (I am currently involved in defending one such client — Jeffrey R. MacDonald, convicted in the " Fatal Vision " murder case at Fort Bragg, North Carolina, in the 1970s. MacDonald remains in prison largely as a result of false testimony by a renegade agent in the same FBI lab whose activities were whitewashed by Bromwich. In fact, while Mueller was a higher-up at the Department of Justice in Washington, I met with him to try to get him to look into the FBI and DOJ frame-up of MacDonald, and Mueller, while cordial, made it clear that criticism of the agents and prosecutors in the case would be " a non-starter. " No investigation ensued.) Bromwich's rejection of the " far-reaching allegations " is more a comment on the failure of the Bureau's internal-policing system than on the essential honesty of its agents and experts. The failure of Bromwich's " investigation " is clear when one recognizes that the person who suffered most from the affair was not one of the offending agents, but rather former FBI forensic expert Fred Whitehurst, the whistle blower without whom the lab's scandalous obstruction of justice and other crimes would never have come to light. Whitehurst was suspended and then fired as a result of his telling the truth, although he got some measure of vindication when the Bureau later settled, with a substantial payment, his lawsuit for wrongful discharge.

Leahy, too, was tepid in his criticism of the Bureau, tipping his hat to an organization that " has long been considered the crown jewel of law-enforcement agencies " but " has lost some of its earlier luster. " The Bureau has lately appeared " unmanageable, unaccountable, and unreliable, " he said. Surely someone as sophisticated and well-intentioned as Senator Leahy cannot be blind to the real history of this " crown jewel, " or believe it has been laid low simply by recent poor management. Is Leahy suggesting that things were better in the days when the Bureau's director exercised *real* managerial control — in the Hoover era?

But even the FBI's most vociferous critics seemed to accept that the agency's failures have resulted from managerial incompetence. Few recalled, for example, the highly dubious indictment of Qubilah Shabazz, daughter of the late Nation of Islam leader Malcolm X, in a phony agency-concocted plot to kill Louis Farrakhan, the Black Muslim leader who some believe bears at least indirect responsibility for the murder of Shabazz's father. Shabazz was contacted in May 1994 by Michael Fitzpatrick, a former Jewish Defense League member who'd previously been convicted of a bookstore bombing. Fitzpatrick not only had his own beef to work off, but also testified that he'd been paid \$34,000 for making secret tapes of his discussions with Shabazz and expected an additional \$11,000 for trial testimony against her. It was one of the classic entrapment-cum-frame-ups for which the Bureau has become famous — a

demonstration of the damage done by the Bureau's obsession with turning scumbag criminals into witnesses against often innocent citizens.

Shabazz was lucky — she had a good lawyer and, in the end, the FBI's case fell apart. The agency offered her a sweet plea bargain to prevent further scrutiny of its conduct: Shabazz, who could have spent 90 years in prison had she been convicted of hiring a hit man, instead agreed to three months' psychiatric counseling and two years' probation. The Bureau's shameful conduct was criticized from the right (James Bovard in the *American Spectator*) and the left (Clarence Page of the *Chicago Tribune*), but nothing much ever came of it. Yet the technique used was a shockingly common one for the Bureau, a result not of administrative failure but rather of a coarse disregard for citizens' civil liberties and such niceties as truth.

People like Shabazz — troubled and down on her luck — have not been the Bureau's only victims. Even the powerful are not immune. Most have forgotten the travails of E. Robert Wallach, a friend of former Reagan-era attorney general Edwin Meese III. Wallach was convicted in 1989 of white-collar crimes in the so-called Wedtech case. His conviction was reversed in 1991 by a federal appellate court, which decried the FBI's cover-up of perjury by its main witness. (Closer to home, the Bureau's Boston office in recent decades conducted a veritable reign of terror, including the conviction of innocent citizens, with the collaboration of the Whitey Bulger gang. The FBI's apologists would pass this off as just a few "rotten apples in the barrel." In fact, however, it's the barrel that's rotten.)

Many of Freeh's touted successes simply offer more evidence of the Bureau's rapacious grab for power. In the aftermath of every dramatic incident of domestic "terrorism," Freeh and the FBI proved themselves adept at exploiting momentary public and congressional panic to get repressive legislation enacted. Consider the Orwellian-sounding Digital Telephony and Communications Privacy Improvement Act, passed in 1994 in the wake of the World Trade Center bombing. It requires manufacturers of telecommunications equipment to make their products wiretap-friendly by following FBI guidelines. In effect, the Bureau obtained the power not only to force private industry to help spy on unsuspecting customers (also known as American citizens), but also to impede technological progress in terms of both efficiency and privacy in the service of facilitating government eavesdropping. Likewise, Freeh and the FBI have vociferously opposed unfettered distribution of sophisticated encryption systems, on the theory that unless the Bureau is able to crack every code, communications might ensue that the FBI will not be able to monitor.

Similarly, in the aftermath of the 1995 Oklahoma City bombing, the Bureau forced additional "anti-terrorist" legislation through Congress that authorized "roving wiretaps," which follow a target from phone to phone, thereby incidentally eavesdropping on the conversations of many

more people. And, of course, there's the infamous Anti-Terrorism and Effective Death Penalty Act of 1996. It decimated the writ of habeas corpus, a venerable legal device (dating back to the Magna Carta of 1215) for obtaining judicial review of unlawful imprisonment long after trial. As a result, convicts who could show substantial evidence of innocence are now being rushed to the death chamber — a convenient way to avoid, among other things, unsettling probes into the accuracy of FBI forensic-lab technicians and the veracity of informant witnesses-for-hire.

A GLIMMER of the real FBI came through the other day. Massachusetts congressman Barney Frank learned that a letter he'd written in 1989 about some immigration legislation he was sponsoring had landed in FBI files, stamped secret. The files also contained a report from a "highly knowledgeable source" that Frank's legislation had been discussed at a public meeting in 1989 at the UN Plaza. Frank's letter was discovered in FBI files as a result of a request filed by the *Los Angeles Times* some 15 years ago under the Freedom of Information Act and just recently answered. (Ironically, much of the Bureau's spying on Americans in search of "disloyal" citizens such as Frank was headed by none other than indicted spy and confessed traitor Robert Hanssen. The notion that Hanssen was monitoring Frank's loyalty to the country tells us more than we want to know about FBI culture!)

Robert Mueller, a former Boston US attorney, Justice Department official, and career prosecutor, is tough, intelligent, and incorruptible. This is his well-earned reputation, and since I know him and have defended the accused in cases he has prosecuted (see "The Real Bob Mueller," TJI, July 19), I can corroborate it from personal experience. However, he lacks a fourth quality that is vital for the next FBI director — a deep skepticism of an institutional culture that fails to recognize the existence of values more worth defending than the Bureau's notion of law and order. Some means are unacceptable, regardless of how important the Bureau believes the ends to be. There are bad guys (or those the FBI *thinks* are bad) to get, but there is also a Bill of Rights to protect and even nurture. Much has changed in the country since Hoover's death, but too little fundamental change has taken place within the FBI. This sad truth is demonstrated daily when agents and executives who work out of the Bureau's main headquarters in Washington enter and leave the J. Edgar Hoover Building.

*Harvey A. Silverglate, a partner at the Boston law firm of Silverglate & Good, writes about criminal law, students' rights, and civil liberties for the Phoenix. He is also the co-author of The Shadow University: The Betrayal of Liberty on America's Campuses (HarperPerennial, 1999) and co-founder of the Foundation for Individual Rights in Education. He can be reached at [has@world.std.com](mailto:has@world.std.com)*

*Julian Jordan provided research assistance for this article.*