FBI UNDERCOVER GUIDELINES

OVERSIGHT HEARINGS

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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ON

FBI UNDERCOVER GUIDELINES

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THURSDAY, FEBRUARY 19, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:35 a.m. in room 2237 of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Kastenmeier, Hyde, and Sensenbrenner.

Staff present: Janice Cooper, assistant counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning, the Subcommittee on Civil and Constitutional Rights will continue the ongoing task of FBI oversight. Almost 1 year ago, the subcommittee held its first hearing on FBI undercover operations. At that time, the Assistant Attorney General for the Criminal Division indicated that the Justice Department was drafting guidelines for all undercover operations, and late last year those guidelines were published.

Now, we are here today to examine those guidelines in light of constitutional principles, social utility, and public policy. This subcommittee has for some time encouraged the FBI to concentrate on "quality" cases. When former Director Kelley announced the "quality versus quantity" program several years ago, we applauded his efforts and we have worked with the FBI, often through the medium of the GAO, to assure continued adherence to this policy.

Undercover police work is often the best way to ferret out some of the "quality" cases we have urged the FBI to undertake. It has been very successful in many situations. And, as evidenced by the FBI's budget—up from $1 million to $4.8 million in a few years—it is clearly becoming an ever more important part of law enforcement.

But very few of us really understand what is involved—how undercover operations work; what the advantages and disadvantages are; what the proper limits to this new technique are, and so forth. The hearings we have had and will be having over the next few weeks and months are an attempt to better understand and oversee this program. Eventually, we hope to have the FBI come over and tell us about specific completed undercover operations to give us a clearer picture of what they're doing.

Our witnesses today are two distinguished professors of criminal law and procedure. Our first witness will be Prof. Geoffrey Stone

from the University of Chicago Law School, and our second witness will be Prof. Michael Seidman from Georgetown Law Center.

Before the witnesses begin, I yield to the gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. I believe it is wise for us to look into the guidelines issued by Attorney General Benjamin Civiletti before he left office, though perhaps not for the same reasons which you might suggest. Like so many midnight regulations and guidelines which appeared at the last moments of the Carter administration, the Carter administration's FBI guidelines, which the new Attorney General has indicated he properly intends to review, restrict the flexibility of the FBI in many ways which are unacceptable to me, and I suspect to many other Members of Congress.

For example, the restrictions applied to the special agent in charge are designed to galvanize control in Washington. Many past abuses which are pointedly noted in the statements of our witnesses today stem from possibly too much control in Washington. I believe, in any event, that's a point worth exploring.

In addition, the guidelines anticipating more active involvement by the local U.S. district attorney in undercover operations administered by the Bureau. I think it is worth noting that the U.S. attorney is almost always a political appointment, the product of appropriate political affiliation in the locality over which he or she has jurisdiction. He's not a sheriff, but he's a prosecutor, and his function is to prosecute the alleged criminal conduct discovered during a lawful criminal investigation.

I am anxious to hear the comments of today's witnesses, but I must assert that I personally wholeheartedly believe in the law enforcement value of undercover operations which do not legally entrap the victim. Moreover, I believe the overwhelming majority of Americans would take the same position.

But I do commend you, Mr. Chairman, for initiating these hearings on this very important subject.

Mr. EDWARDS. Thank you, Mr. Hyde.

Without objection, both the witnesses' statements will be made part of the record.

Mr. EDWARDS. Professor Stone, you may continue at your own pace.

[Professor Stone's statement follows:]

STATEMENT OF PROF. GOEFFREY R. STONE, UNIVERSITY OF CHICAGO LAW SCHOOL

It is a pleasure to appear before you today to discuss the appropriate limits on the use of undercover operations in federal law enforcement.

1. Undercover operations and legitimate expectations of privacy

As Director Webster and Mr. Heymann made clear in their presentations last March, the use of spies, secret agents, and informers to elicit information from unsuspecting individuals and to "invite" such individuals to engage in unlawful conduct can be an extraordinarily effective investigative technique. Undercover operations may enable government investigators to infiltrate the inner-most circles of organized crime and to discern otherwise difficult to detect patterns of "consensual" unlawful behavior. In recent years, the FBI has employed undercover operatives to investigate a wide-range of criminal activity, including labor racketeering, white-collar fraud, political corruption, narcotics trafficking, and truck hijacking. Moreover, as a secondary benefit, undercover operations frequently enable the government to present its evidence in subsequent criminal prosecutions in an unusually reliable form—through the direct testimony of law enforcement officers who have participated personally in the unlawful conduct, and often through video and oral

tapes of the actual criminal transactions. Finally, the widespread use of spies, secret agents, and informers can effectively generate an atmosphere of distrust and suspicion among potential "targets." By rendering such individuals uncertain as to the actual status of their cohorts, the very existence of undercover operations can, as Mr. Heymann suggested, have a potent deterrent effect.

There is, however, another side of the coin. For despite their special utility—indeed, largely because of their special utility—undercover operations pose special dangers to the individual, the government, and to society in general. These dangers are not unfamiliar. Such operations, for example, may "create" crime; they may require government agents to participate directly in illegal activity; they may unfairly entrap unwary individuals into unlawful conduct; they may damage the reputations of innocent persons; and they may seriously undermine legitimate expectations of privacy. Although each of these dangers merits careful scrutiny, and each should be thoughtfully considered in effort to establish a meaningful set of guidelines, I have been asked to address myself specifically to the potential conflict between undercover operations and personal privacy. To what extent, if any, does the government's use of spies, secret agents, and informers, significantly endanger legitimate expectations of privacy? To what extent, if any, should undercover operations be restricted in order to preserve such expectations?

In approaching these questions, it is essential to note at the outset that the "undercover operation" is not a unitary phenomenon. It is, rather, multifaceted in nature, embracing an almost limitless variety of situations. It encompasses the creation of an unlawful business establishment to attract "customers" seeking to engage in illegal transactions, and the infiltration of a drug-smuggling conspiracy by a professional agent; it encompasses the approach of a suspected prostitute by a plainclothes officer on the street, and the activities of an informer who joins the ranks of a political or community organization in the course of a domestic security investigation. The undercover operation may last a moment, or it may extend over many months. It my involve only a single agent, cooperating citizen, or paid informant, or it may involve a complex network of undercover operatives. The extent to which any particular operation intrudes upon legitimate expectations of privacy will necessarily vary according to the circumstances.

With the caveat in mind, I would like to turn now directly to the privacy issue. In assessing the nature of the potential intrusion on legitimate expectations of privacy, it may be helpful to hypothesize a paradigm situation—one posing a not uncommon set of circumstances. Let us suppose that an agent seeks to investigate an individual suspected of complicity in labor racketeering, narcotics smuggling, or political corruption. The goal may be to deceive the "target" individual into revealing desired information, to lead the agent to "higher-ups" in a suspected conspiracy, or to induce the target to engage in a criminal transaction with the agent himself.

Whatever the utimate goal, the target in most circumstances is highly unlikely to disclose his criminal proclivities, if any, to just any stranger off the street. In all probability, the agent, to be effective, will need to initiate and gradually to foster a relationship with the target in which the target will come eventually to trust and to confide in the agent. In short, the agent must win the target's confidence through deception, a task that may require weeks or even months to accomplish. To hasten this process, the agent may seek the cooperation of some person already in a trust relationship with the target—perhaps a friend, a business acquaintance, or even someone in a formally confidential relationship with the target. To secure this cooperation, the agent may appeal to civic duty, offer monetary compensation, or perhaps offer some other inducement.

Whether the agent acts on his own or secures the assistance of a private citizen, the undercover operation in our hypothetical investigation is likely seriously to intrude upon the target individual's legitimate expectations of privacy. Indeed, the intrustion occasioned by such operations is strikingly similiar to and perhaps even greater than that ordinarily associated with other investigative techniques—techniques that may lawfully be employed only when there is a prior judicial finding of probable cause. Consider, for example, such practices as wiretapping, third-party electronic bugging, and eavesdropping. No less than these other practices, the use of spies, secret agents, and informers directly undermines conversational privacy. In the wiretapping, electronic bugging, and eavesdropping context, governmental officials surreptitiously monitor the individual's conversations. In the undercover context, governmental officials deceitfully participate in and overhear those very same conversations. The intrusion upon conversational privacy is functionally the same. As in the case of wiretapping and electronic bugging, the undercover operative will inevitably learn not only about the target individual's criminal intentions, if any, but also about his personal, political, religious, and cultural attitudes and beliefs—matters which are, quite simply, none of the government's business.

Moreover, unlike wiretaps and bugging devices, spies and informers see as well as hear. If, in the course of an investigation, governmental officials want to search an individual's home or office or inspect his documents, letters, or other personal effects, they ordinarily would be required first to obtain a judicial warrant based upon probable cause. In the undercover context, however, the undercover operative may in the course of the investigation be "invited" to enter the target's home or office or to examine his private papers of effects. The undercover operation, if not carefully controlled, would thus have the anomalous effect of enabling government to invade the individual's privacy through deceit and strategm when it could not otherwise lawfully do so.

Finally, there is a special social cost associated with the use of spies, secret agents, and informers. As Mr. Heymann observed last March, the use of undercover operatives can effectively deter criminal conduct by creating doubt and suspicion as to the trustworthiness of the would-be criminal's colleagues and associates. If the use of such operatives is not carefully confined, however, and law-abiding citizens are not reasonably confident that they will not find themselves dealing inadvertently with spies and informers, then this chilling effect can all too easily spill over into completely lawful conversations and relationships. The unrestrained use of such operatives, in other words, has at least the potential to undermine that sense of trust which is essential to the very existence of productive social, business, political, and personal—as well as criminal—relations.

Despite these concerns, no one would sensibly suggest that the government be prohibited absolutely from engaging in undercover investigations. Rather, what is needed is a reasonable accommodation of the competing investigative and privacy interests. In attempting to define such an accommodation, two related bodies of law should be considered—the Supreme Court's analysis of these issues from the perspective of the forth amendment, and the recently promulgated Attorney General's Guidelines on FBI Undercover Operations.

2. Undercover operations and the fourth amendment

The Supreme Court has consistently held that the use of deceit by spies, secret agents, and informers to elicit information from unsuspecting individuals does not in itself constitute a "search" within the meaning of the fourth amendment. See, e.g., *United States* v. *White*, 401 U.S. 745 (1971); *Hoffa* v. *United States*, 385 U.S. 293 (1966); *On Lee* v. *United States*, 343 U.S. 747 (1951). In part, this is the result of historical circumstance. The language and historical background of the amendment made clear that its framers did not affirmatively intend to bring undercover investigations within the amendment's scope. Although the use of spies and informers was not wholly unknown to the framers, the practice simply was not on their minds at the time. In some contexts, the Court has been willing to look beyond the precise intent of the framers and to construe the amendment expansively. This has been the case, for instance, with respect to wiretapping and electronic bugging, see *Katz* v. *United States*, 389 U.S. 347 (1967). The Court has declined, however, to extend the amendment's protections to undercover operations as well.

In large part, the Court has attempted to justify this distinction on the theory that the risk of being betrayed by one's supposed friends and confidants is "inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa* v. *United States*, supra, at 303. And, the theory goes, since this "is not an undue risk to ask persons to assume," the fourth amendment does not protect the individual's misplaced confidence that a person to whom he discloses information will not later reveal it. *Lopez* v. *United States*, 373 U.S. 427, 450 (1963) (Brennan, J., dissenting). With all due respect, this theory is unsatisfactory whether as a matter of constitutional law or as a matter of policy.

It is true, of course, that in the ordinary course of our relationships we necessarily assume the risk that our friends and associates will betray our confidences. Insofar as such persons act solely in their private capacities, and not in cooperation with governmental officials, their betrayals undoubtedly fall beyond the scope of the amendment's concern. The analysis shifts markedly, however, once government enters the picture. For the risk that the individual's confidant may be fickle or a gossip is of an entirely different order from the risk that he is in reality an undercover agent commissioned in advance to report the individual's every utterance to the authorities. In the latter situation, we are no longer dealing with a risk of misplaced confidence inherent in the nature of human relationships; we are dealing instead with government action designed explicitly to invade our privacy and to end in deceit and betrayal—with government action that appreciably alters the nature of the risks we ordinarily expect to assume. The notion that our willingness to assume one risk means that we must necessarily assume the other is doubtful at best.

Indeed, from a constitutional standpoint, we necessarily assume the risk that private citizens will invade our privacy by tapping our telephones, bugging our offices and ransacking our homes. It has never been suggested, however, that because those risks are unprotected by the fourth amendment we must also assume the risk that government agents will engage in similar conduct or induce others to do so for them. There is simply no logical reason to assume that the risk of undercover surveillance is any more "inherent" in our society than the risk that government officers will tap our telephones, bug our offices, or ransack our dwellings.

Another theory occasionally voiced in defense of the Court's distinction between wiretapping and electronic bugging, on the one hand, and undercover operations, on the other, is that the risk of being deceived by a secret agent or informant is not an unreasonable one to require individuals to assume because "it does no more than compel them to use discretion in choosing their auditors, to make damaging disclosures only to persons whose character and motives may be trusted." *Lopez* v. *United States*, supra, at 450 (Brennan, J., dissenting). The idea that individuals exercising only reasonable caution can readily avoid involvement with spies and informers underestimates the skills of government agents and presupposes an unrealistic ability on the part of ordinary citizens to detect deception. In the usual course of our relationships, we do of course make judgments as to the trustworthiness, discretion, and loyalty of our acquaintances. The types of judgments we are asked to make in the secret agent context, however, are entirely different from those we ordinarily expect to make. The individual who is confronted with the possibility that his supposed friends and associates are in reality undercover operatives must attempt to assess not only their loyality as persons, but also the likelihood that they are skilled professional dissemblers specially trained in the art of deception, or that, at some unknown level of monetary or other inducement, they would agree to "sell" that loyalty to the authorities. That most individuals are not in fact especially adept at making these sorts of determinations is demonstrated by the very effectiveness of undercover investigations generally. In any event, one would think that this particular skill is not one that citizens of a free society should ordinarily have to acquire. (For a fuller explication of the Court's fourth amendment analysis, see generally Stone, "The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers," 1976 American Bar Foundation Research Journal 1193.)

Whatever the merits of the Court's approach in the fourth amendment context, it is not dispositive here. The Court has held only that undercover operations do not in themselves constitute "searches" within the meaning of the fourth amendment. The Constitution, however, establishes only a minimum protection of only limited types of privacy interests, and Congress has frequently enacted legislative safeguards of privacy beyond those found by the Court to be mandated by the Constitution. See, e.g., Communication Act of 1935, § 605 (48 Stat. 1103); Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.). The critical question—the question that must ultimately be answered by Congress—is whether and to what extent law-abiding citizens in a free society should be entitled confidently to assume that their supposed friends, confidants, lawyers, and other associates are in fact what they appear to be, and are not in reality clandestine agents of government secretly reporting their activities and conversations to the authorities.

3. Undercover operations, the Attorney General's guidelines, and a proposed accommodation

This, then, brings me to the recently promulgated Attorney General's Guidelines. These Guidelines represent a comprehensive and commendable attempt to come to grips with a wide-range of problems associated with the FBI's use of undercover operations. To the extent that the Guidelines are designed to reconcile such operations with legitimate individual expectations of privacy, they are a clear step in the right direction. They do not, however, go far enough.

The basic framework established by the Guidelines, insofar as privacy interests are concerned, is relatively straightforward. In the absence of "sensitive circumstances," undercover operations lasting no longer than six months may be approved by a special agent in charge upon written determinations that the operation complies with other relevant Guidelines, that the proposed operation "appears to be an effective means of obtaining evidence or necessary information," and that the operation "will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner." (See para. C.)

When "sensitive circumstances" are present, however, the operation must be approved by F.B.I. headquarters. "Sensitive circumstances" related to privacy focus on the existence of a reasonable expectation that (1) the operation will involve an investigation of possible political corruption or of the activities of a religious, politi-

cal, or news media organization; (2) an undercover operative will attend a meeting between a subject of the investigation and his lawyer; (3) an undercover operative will pose as an attorney, physician, clergyman, or member of the news media and there is a significant risk that another individual will be led into a professional or confidential relationship with the operative; (4) a request will be made by an undercover operative for otherwise privileged information from an attorney, physician, clergyman, or member of the news media; or (5) the operative will be used to infiltrate a group under investigation as part of a Domestic Security Investigation. (see para. B (a), (g), (h), (i), (j), (k)). If any of these "sensitive circumstances" is present, the operation ordinarily may proceed only with the approval of the Undercover Operations Review Committee and the Director or a Designated Assistant Director. In determining whether to grant such approval, the Committee must consider such factors as the risk of harm to privileged or confidential relationships, the risk of invasion of privacy, and whether the operation is planned so as to minimize the incidence of sensitive circumstances. (see para. F(3), (4)).

These Guidelines—especially the minimum intrusion requirements—represent a useful step forward in the effort to accommodate competing investigative and privacy concerns. There is, however, room for improvement. Most important, the Guidelines do not adopt any threshold standard for the initiation of undercover operations. As with other highly intrusive investigative techniques, undercover operations should in at least some circumstances be prohibited in the absence of probable cause to believe that the target individual is engaged, has engaged, or is about to engage in criminal conduct. Such a requirement should be imposed as a matter of sound governmental policy, whether or not it is mandated by the fourth amendment.

The probable cause standard serves several valuable functions—it strikes an appropriate and historically acceptable balance between competing investigative and privacy concerns; it restricts the use of highly intrusive investigative practices to a narrowly defined set of circumstances, thereby generating confidence among law-abiding citizens that they will not unreasonably or indiscriminately be subjected to such practices; and it requires a conscious governmental determination in advance that the proposed intrusion upon the individual's privacy is reasonably justified in the particular situation at issue. This is not to say, however, that all undercover operations should be predicated upon a finding of probable cause. To the contrary, such a requirement would in may instances be highly impracticable and unduly restrictive of legitimate law enforcement needs. The probable cause requirement should be imposed only when the proposed undercover operation is likely significantly to intrude upon legitimate expectations of privacy.

This will most often occur in four distinct types of situations, three of which are already recognized as special in the Guidelines. First, the probable cause requirement should be imposed whenever the undercover operation is likely to involve the investigation of an individual's political or religious beliefs or the infiltration of a political, religious, or news media organization. Application of a probable cause standard is such circumstances is justified not only by conventional privacy considerations, but also by the direct and substantial threat posed by such undercover operations to the legitimate exercise of first amendment rights.

Second, the probable cause standard should be employed whenever the undercover operation is likely significantly to intrude upon the privacy of a recognized "confidential" relationship, such as attorney-client, physician-patient, clergyman-penitent, or news media-source. The Attorney General's Guidelines expressly delineate most of the circumstances in which undercover operations might "significantly intrude" upon the privacy of such relationships.

Third, the probable cause standard should be imposed whenever the undercover operation is likely significantly to intrude upon the privacy of what might be termed a "trust relationship." This concept, which is not embodied in the Guidelines, rests on the notion that the greater the intimacy of the agent-target relationship, the more problematic the deceit and betrayal and, hence, the greater the intrusion upon legitimate expectations of privacy. The "trust relationship" concept is, of course, not self-defining. As a compromise, it inevitably lacks perfect clarity. To promote such clarity and to facilitate implementation, the concept should be defined as exempting from the probable cause requirement all undercover operations in which the agent and target interact essentially as strangers or as mere casual acquaintances. This would leave the Bureau free to engage in a wide-range of relatively unintrusive undercover operations without a prior showing of probable cause. For example, the creation of illegal business establishments designed to attract the patronage of individuals seeking to enter into unlawful transactions is a commonly employed operation that would—at least in its early stages—fall outside the "trust relationship" concept as so defined. So, presumably, would most so-called

"pretext interviews." On the other hand, because of their high degree of intrusiveness, operations like Miporn, described last March by Director Webster as involving "two undercover agents who spent 2½ years working their way into the confidence of allegedly some of the nation's major pornography business figures," would and should be prohibited in the absence of probable cause to believe that these "business figures" were actually engaged in crime.

Finally, there are investigations into the activities of public officials and political candidates. An undercover agent should be permitted without probable cause to approach a public official or political candidate in the context of a non-trust relationship in order explicitly to propose a criminal transaction. This would permit the essentially unrestrained use of some of the most common, most effective, and least intrusive techniques for the investigation of official corruption. It would allow, for example, an agent operating an undercover bar to offer a bribe to a municipal building inspector in return for a license. When such operations become more intrusive, however, probable cause should be required, for the use of undercover operatives to elicit information through deceit from public officials and candidates in a more intensive manner, or to infiltrate their offices and staffs, poses a serious threat not only to legitimate expectations of privacy, but also to fundamental concerns arising out of the first amendment itself. This is not a matter of "double standards" or "special treatment" for government officials. Private citizens in essentially comparable settings—trust relationships and political associations and activities—are entitled to basically the same protections. In any event, the formulation of "special" rules to safeguard the effective operation of our political system is hardly unknown to the law. The doctrine of official immunity is an obvious example of such a safeguard, and the Constitution itself, in the speech and debate clause and, indeed, in its inherent structure, builds such protections into the very fibre of our system of government. See *United States* v. *Nixon,* 418 U.S. 683 (1974).

4. Conclusion

Spies, secret agents, and informers can serve legitimate investigative functions. At the same time, however, their activities, if not carefully controlled, can significantly intrude upon legitimate expectations of privacy. The approach proposed above attempts reasonably to accommodate these important but competing interests.

TESTIMONY OF PROF. GEOFFREY R. STONE, UNIVERSITY OF CHICAGO LAW SCHOOL

Professor STONE. Thank you. It is a pleasure to appear before you today to discuss the appropriate limits on the use of undercover operations in Federal law enforcement.

As Director Webster and Mr. Heymann made clear in their presentations last March, the use of spies, secret agents, and informers to elicit information from unsuspecting individuals and to invite such individuals to engage in unlawful conduct can be an extraordinarily effective investigative technique.

There is, however, another side of the coin. Despite their special utility—indeed, largely because of their special utility—undercover operations pose special dangers to the individual, to government, and to society in general. These dangers are not unfamiliar. Such operations, for example, may create crime; they may require a Government agent to participate directly in illegal activities; they may unfairly entrap unwary individuals into unlawful conduct; they may damage the reputations of innocent persons; and they may seriously undermine legitimate expectations of privacy.

Although each of these dangers merits careful scrutiny, and each should be thoughtfully considered in any effort to establish a meaningful set of guidelines, I have been asked to address myself specifically to the potential conflict between undercover operations and personal privacy.

To what extent, if any, does the Government's use of spies, secret agents, and informers significantly endanger legitimate expecta-

tions of privacy? To what extent, if any, should undercover operations be restricted in order to preserve such expectations?

In approaching these questions, it is essential to note at the outset that the undercover operation is not a unitary phenomenon. It is rather multifaceted in nature, embracing an almost limitless variety of situations. The extent to which any particular operation intrudes upon legitimate expectations of privacy will necessarily vary according to the circumstances.

In assessing the nature of the potential intrusion on legitimate expectations of privacy, it may be helpful to hypothesize a paradigm situation—one posing a not uncommon set of circumstances. Let us suppose that an agent seeks to investigate an individual suspected of complicity in labor racketeering, narcotics smuggling, or political corruption. The goal may be to deceive the target individual into revealing desired information, to lead the agent to higher-ups in a suspected conspiracy, or to induce the target to engage in a criminal transaction with the agent himself.

Whatever the ultimate goal, the target in most circumstances is highly unlikely to disclose his criminal proclivities, if any, to just any stranger off the street. In all probability the agent, to be effective, will need to initiate and gradually to foster a relationship with the target in which the target will come eventually to trust and to confide, at least to some degree, in the agent.

In short, the agent must win the target's confidence through deception—a task that may require weeks or even months, and in some cases, perhaps even years, to accomplish. To hasten this process, the agent may, of course, seek the cooperation of some person already in a trust relationship with the target—perhaps a friend, a business acquaintence, or even someone in a formally confidential relationship with the target individual.

Whether the agent acts on his own or secures the assistance of a private citizen, the undercover operation in our hypothetical investigation is likely seriously to intrude upon the target individual's legitimate expectations of privacy.

Indeed, the intrusion occasioned by such operations is strikingly similar to and perhaps even greater than that ordinarily associated with other investigative techniques—techniques that may lawfully be employed only when there is a prior judicial finding of probable cause. Consider, for example, such practices as wiretapping, third party electronic bugging, and eavesdropping. No less than these other practices—the use of spies, secret agents, and informers—directly undermines conversational privacy. In the wiretapping, electronic bugging, and eavesdropping context, Government officials surreptitiously monitor the individual's conversations. In the undercover context, Government officials deceitfully participate in and overhear those very same conversations. The intrusion upon conversational privacy is functionally the same.

Moreover, unlike wiretaps and bugging devices, spies and informers see as well as hear. If, in the course of an ordinary investigation, Government officials want to search an individual's home or office or inspect his documents, letters, or other personal effects, they would, of course, ordinarily be required first to obtain a judicial warrant based upon probable cause. In the undercover context, however, the undercover operative may, in the course of

the investigation, be invited to enter the target's home or office, or to examine his private papers or effects. The undercover operation, if not carefully controlled, would thus have the anomalous effect of enabling Government to invade the individual's privacy through deceit and stratagem when it could not otherwise lawfully do so.

Despite these concerns, no one would sensibly suggest that the Government be prohibited absolutely from engaging in undercover investigations; rather, what is needed is a reasonable accommodation of the competing investigative and privacy interests.

In attempting to define such an accommodation, two related bodies of law should be considered: the Supreme Court's analysis of these issues from the perspective of the fourth amendment and the recently promulgated Attorney General's guidelines on FBI undercover operations.

The Supreme Court has consistently held that the use of deceit by spies, secret agents, and informers to elicit information from unsuspecting individuals does not in itself constitute a technical search within the meaning of the fourth amendment.

In large part, the Court has attempted to justify this conclusion on the theory that "the risk of being betrayed by one's supposed friends and confidants is inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." And since it is not an undue risk to ask persons to assume, the fourth amendment does not protect the individual's "misplaced confidence that a person to whom he discloses information will not later reveal it."

With all due respect, this theory is unsatisfactory whether as a matter of constitutional law or as a matter of policy. It is true, of course, that in the ordinary course of our relationships we necessarily assume the risk that our friends and associates will betray our confidences. Insofar as such persons act solely in their private capacities and not in cooperation with governmental officials, their betrayals undoubtedly fall beyond the scope of the amendment's concern.

The analysis shifts markedly, however, once Government enters the picture. The risk that the individual's confidant may be fickle or a gossip is of an entirely different order from the risk that he is in reality an undercover agent, commissioned in advance to report the individual's every utterance to the authorities.

In the latter situation, we are no longer dealing with the risk of misplaced confidence inherent in the nature of human relationships; we are dealing instead with Government action designed explicitly to invade our privacy and to end in deceit and betrayal—with Government action that appreciably alters the nature of the risks we ordinarily expect to assume. The notion that our willingness to assume one risk means that we must necessarily assume the other is doubtful at best.

Whatever the merits of the Court's approach in the fourth amendment context, however, it is clearly not dispositive here. The Court has held only that undercover operations do not technically constitute searches within the meaning of the fourth amendment.

The Constitution, however, establishes only a minimum protection of only limited types of privacy, and Congress has frequently

enacted legislative safeguards of privacy beyond those found by the Court to be mandated by the Constitution.

The critical question—the question that must ultimately be answered by Congress—is whether and to what extent law-abiding citizens in a free society should be entitled confidently to assume that their supposed friends, confidants, lawyers, and other associates are not in reality clandestine agents of Government, secretly reporting their activities and conversations to the authorities.

This, then, brings me to the recently promulgated Attorney General's guidelines. These guidelines represent a comprehensive and, for the most part, commendable attempt to come to grips with a wide range of problems associated with the FBI's use of undercover operations. To the extent that the guidelines are designed to reconcile such operations with legitimate expectations of privacy, they are a clear step in the right direction.

They do not, however, go far enough.

Most important, the guidelines do not adopt any threshold standard for the initiation of undercover operations. As with other highly intrusive investigative techniques, undercover operations should in at least some circumstances be prohibited in the absence of probable cause to believe that the target individual is engaged, has engaged, or is about to engage, in criminal conduct.

Such a requirement should be imposed as a matter of sound governmental policy, whether or not it is mandated by the fourth amendment.

The probable cause standard serves several valuable functions: It strikes an appropriate and historically acceptable balance between competing investigative and privacy concerns; it restricts the use of highly intrusive investigative practices to a narrowly defined set of circumstances, thereby generating confidence among law-abiding citizens that they will not unreasonably or indiscriminately be subjected to such practices; and it requires a conscious governmental determination in advance that the proposed intrusion upon the individual's privacy is reasonably justified in the particular situation at issue.

Now, this is not to suggest that all undercover operations should be predicated upon a finding of probable cause. To the contrary, such a requirement would in many instances be highly impractical and unduly restrictive of legitimate law enforcement needs. The probable cause requirement should be imposed only when the proposed undercover operation is likely significantly to intrude upon legitimate expectations of privacy. This will most often occur in four distinct types of situations, three of which are already recognized as special in the guidelines.

First, the probable cause requirement should be imposed whenever the undercover operation is likely to involve the investigation of an individual's political or religious beliefs, or the infiltration of a political, religious, or news media organization. Application of a probable cause standard in such circumstances is justified not only by conventional privacy considerations, but also by the direct and substantial threat posed by such undercover operations to the legitimate exercise of first amendment rights.

Second, the probable cause standard should be employed whenever the undercover operation is likely significantly to intrude

upon the privacy of a recognized confidential relationship, such as attorney-client, physician-patient, clergyman-penitent, or news media-source. The Attorney General's guidelines expressly delineate most of the circumstances in which undercover operations might significantly intrude upon the privacy of such relationships.

Third, the probable cause standard should be imposed whenever the operation is likely significantly to intrude upon the privacy of what, for lack of a better term, might be called a trust relationship. This concept, which is not embodied in the guidelines, rests on the notion that the greater the intimacy of the agent-target relationship, the more problematic the deceit and betrayal, and hence, the greater the intrusion upon legitimate expectations of privacy.

The trust relationship concept is, of course, not a self-defining one. As a compromise, it inevitably lacks perfect clarity. To promote such clarity and to facilitate implementation, the concept should be defined as exempting from the probable cause requirement all undercover operations in which the agent and target interact essentially as strangers or mere casual acquaintances.

This would leave the bureau free to engage in a wide range of relatively unintrusive undercover operations, without a prior showing of probable cause. For example, the creation of illegal business establishments designed to attract the patronage of individuals seeking to enter into unlawful transactions is a commonly employed operation that would—at least in its early stages—fall outside the trust relationship concept, as so defined.

On the other hand, because of their high degree of intrusiveness, operations like MIPORN, described last March by Director Webster as involving "two undercover agents who spent 2½ years working their way into the confidence of allegedly some of the Nation's major pornography business figures," would and should be prohibited in the absence of probable cause to believe that these "business figures" were actually engaged in some sort of criminal conduct.

Finally, there are investigations into the activities of public officials and political candidates. An undercover agent should be permitted, without probable cause, to approach a public official or political candidate in the context of a nontrust relationship, in order explicitly to propose a criminal transaction. This would permit the essentially unrestrained use of some of the most common, most effective and least intrusive techniques for the investigation of official corruption. It would allow, for example, an agent operating an undercover bar to offer a bribe to a municipal building inspector in return for a license.

When such operations become more intrusive, however, probable cause should be required; for the use of undercover operatives to elicit information through deceit from public officials and candidates in a more intensive manner, or to infiltrate their offices and staffs, poses a serious threat not only to legitimate expectations of privacy, but also to fundamental concerns arising out of the first amendment itself.

As noted earlier, spies, secret agents, and informers serve legitimate, indeed important investigative functions; but at the same time, their activities, if not carefully controlled, can significantly intrude upon legitimate expectations of privacy. What is necessary

is some effort at reasonable accommodation. I have attempted to define the contours of such an accommodation. Thank you.

Mr. EDWARDS. Thank you, Professor Stone. If there is no objection, we will hear now from Professor Seidman, and then we will have some questions.

[Professor Seidman's statement follows:]

TESTIMONY OF LOUIS SEIDMAN BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY

I would like to thank the Subcommittee for this opportunity to comment on the Attorney General's Guidelines for FBI Undercover Operations. I intend to limit my comments in two ways. First, I will speak only to those issues raised by the Guidelines relating to the law of entrapment. I do not intend to comment on the very serious privacy, free speech, and free association issues raised by the sort of undercover operations authorized in the Guidelines. Second, I do not pretend to have detailed knowledge of any particular undercover operation. I therefore intend to express no opinion on the legality of any operation. Instead, my comments will be directed to the wisdom and legality of such operations in general and to the kind of safeguards which should limit such operations if they are undertaken.

In general, I think the Attorney General's Guidelines represent a constructive first step toward controlling the obvious dangers posed by undercover operations. The efforts to regularize the decisionmaking process for such operations and to fix responsibility for the decision, once made, are particularly commendable. The Guidelines also impose significant limits on under cover operations in some cases where the costs outweigh the benefits or where an undercover operation would pose a serious risk to individual liberties. Unfortunately, however, the Guidelines also appear to authorize some conduct which is probably illegal and other conduct which is surely unwise. Supreme Court authority not only permits, but positively invites Congressional activity in this area. I believe that Congress should accept this invitation by codifying those parts of the Guidelines which are sound and modifying those parts which are not.

I.

The problem of entrapment began with the serpent's "sting" operation in the Garden of Eden. It poses the fundamental dilemma of criminal law. On the one hand, the government has an obvious and important interest in catching and isolating dangerous criminals before they inflict irreparable harm on their victims. On the other, if the government acts too precipitously, it is likely to ensnare the innocent as well as the guilty. It is this intractable dilemma which has formed the law in areas as seemingly diverse as the definition of criminal attempt and conspiracy, the problem of pretrial release, and the standard for civil commitment. The dilemma is particularly acute when the police attempt to trigger a crime by going undercover and offering inducements, since the same inducement which is essential to catch a potential criminal may also tempt others to commit crimes which otherwise would not have occurred.

The Supreme Court has responded to these conflicting pressures by developing two interrelated doctrines. First, the Court has read criminal statutes implicitly to exculpate a defendant when "the Government plays on the weaknesses of an innocent party and beguiles him into commiting crimes which he otherwise would not have attempted." *Sherman* v. *United States,* 356 U.S. 369, 376 (1958). See also *Sorrells* v. *United States,* 287 U.S. 435 (1932); *United States* v. *Russell,* 411 U.S. 423 (1973). The ability to invoke this defense, usually labelled "entrapment," depends entirely on the subjective state of mind of the defendant. It "'focus [es] on the intent or predisposition of the defendant to commit the crime,' rather than upon the conduct of the Government agent." *Hampton* v. *United States,* 425 U.S. 484, 488 (1976), quoting *United States* v. *Russell,* 411 U.S. 423, 429 (1973). The public policy behind the defense is clear enough: since the entrapped defendant is not predisposed to commit the crime, he poses no risk absent the government inducement and therefore no social purpose is advanced by punishing him. As the Court held in *Sherman* v. *United States:*

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." 356 U.S. 369, 372 (1958).

Although the Court has made clear that entrapment doctrine is unavailable to a predisposed defendant, it has suggested a second doctrine protecting even predisposed defendants when the government becomes "overinvolved" in criminal activity

or engages in outrageous misconduct. See *United States* v. *Russell,* 411 U.S. 423, 431–432 (1973); *Hampton* v. *Unites States,* 425 U.S. 484, 492–495 (1976) (Powell, J. concurring). See also *United States* v. Archer 486 F.2d 670 (2nd Cir. 1973); *United States* v. *Twigg,* 588 F.2d 373 (3d Cir. 1978). Unlike entrapment, this second doctrine is constitutionally based. It is premised on the notion that it violates due process to convict even a guilty defendent by improper government conduct. Although a majority of the Court has been insistent on preserving the possibility of such a claim, see *Hampton* v. *United States,* 425 U.S. 484, 492–495 (1976) (Powell, J. concurring), it has yet to decide a case where a violation has actually been found. The scope of the doctrine is therefore uncertain. We know only that due process does not bar conviction simply because a government agent has proposed the criminal activity, see *Hampton* v. *Unites States,* Supra, or provided an ingredient necessary for the successful completion of the crime. See *United States* v. *Russell,* 411 U.S. 423 (1973).

II.

When one examines the Attorney General's Guidelines in light of these doctrines, a number of disturbing problems emerge. First, it should be obvious that no conduct authorized by the Guidelines conflicts with the entrapment doctrine. No conduct could conflict with that doctrine, since the doctrine's applicability turns on the defendant's predisposition rather than the government's conduct. However, the Supreme Court has emphasized that its narrow articulation of the entrapment defense has been dictated by separation of powers concerns. See *United States* v. *Russell,* 411 U.S. 423, 435–436 (1973). It follows that Congress has a responsibility to face the entrapment problem and to make an independent judgment. In this case, Congressional action is especially important because although the Guidelines themselves may not violate the Court's entrapment doctrine, they surely authorize activity which violates the policies behind that doctrine.

I am particularly concerned that the Guidelines appear to permit the FBI to dangle substantial inducements before wholly innocent citizens suspected of no wrongdoing and unlikely ever to be involved in crime. Under the guise of crime prevention, such operations are certain to entrap non-predisposed citizens and create crime which otherwise would not occur. Indeed, there is no need to speculate about this possibility. We know from newpaper accounts, for example, that during the Abscam operation, the government offered substantial inducements to members of Congress who not only were not predisposed to accept them, but indignantly rejected them. Moreover, one district court judge has already dismissed an Abscam prosecution on the ground that the defendant was entrapped as a matter of law. See *United States* v. *Jannotti,* F. Supp. (No. 80–166, Nov. 26, 1980).

This risk of entrapment is created by the failure of the Guidelines to limit the offering of inducements to those reasonably suspected of criminal activity. Indeed, the Guidelines specifically provide that, with the Director's authorization, inducements may be offered despite the absence of any "reasonable indication . . . that the subject is engaging, has engaged, [or] is likely to engage in illegal activity of a similar type." Worse still, the guidelines seem to permit the Director to authorize operations despite the absence of "reason for believing that persons drawn to the [illegal] opportunity, and brought to it, are predisposed to engage in the contemplated illegal activity."

The risk of entrapment is reduced, but not eliminated, by the Guidelines' insistence that the corrupt nature of the activity be "reasonably clear" to potential suspects and that "the nature of any inducement . . . not [be] unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage." These are important and commendable safeguards in their own right which, in my judgment, Congress should codify. There are no substitutes, however, for restricting the scope of undercover operations. Tempting a subject with an exessively attractive inducement clearly serves no public purpose since it is unlikely that the subject would ever be forced to face such temptations but for the government's intervention. Even if the government limits inducements to the "going rate," however, it may still ensnare harmless subjects since it may be unlikely that the subject would ever have been approached by a person proposing criminal activity but for the under cover operation. Indeed, there is an ironic inverse relationship between the potential harmfulness of a subject and the risk of entrapment: The more innocent and naive the subject, the less likely he is to know the "going rate" for criminal activity and, therefore, the smaller the inducement which may be necessary to entrap him.

Moreover, even when the government restricts itself to the market rate for criminal activity, it inevitably competes with real criminals and, so, stimulates crime. Suppose, for example, the government establishes a fencing operation which purchases stolen goods at market rates. This operation will inevitably compete with

real fences, thereby increasing the price which thieves can command and stimulating additional burglaries.

The only way to avoid these effects is to carefully target undercover operations on subjects for whom there is convincing evidence of predisposition. It is no response to say that if an operation sweeps too broadly, those caught up in it who are not predisposed can assert an entrapment defense at trial. In the first place, it is simply a waste of scarce law enforcement resources to mount broadscale operations which ensnare those posing little societal risk. More fundamentally, it is a myth that the post hoc assertion of an entrapment defense fully remedies the harm done to an entrapped defendant. Juries are likely to be skeptical of the defense and may convict defendants who should be acquitted. Even if the defendant prevails, his personal and business dealings are likely to be shattered by the experience. And, most fundamentally, the social fabric is inevitably strained by the spectacle of seemingly law abiding citizens induced to commit crimes. It is worth remembering that the most righteous among us is not immune from temptation and that any of us could fall victim to our baser instincts in a weak moment. The government simply has no business randomly and purposelessly stress-testing the morality of its citizens, like so many soldered joints on an assembly line.

III.

When one measures the Guidelines against the Due Process limitations on undercover operations, the results are even more unsettling. As I have already indicated, Supreme Court opinions provide little guidance as to the precise degree of government involvement in crime which violates Due Process. At a minimum, however, one would think that the Constitution precludes the government from engaging in otherwise unlawful activity which causes more harm than it prevents. Unfortunately, the Guidelines contain no similar restriction. Indeed, several provisions appear to authorize operations which clearly serve no legitimate law enforcement purpose.

Perhaps the most disturbing aspect of the Guidelines is that they not only fail to prohibit, but actually authorize government agents to engage in deliberate and illegal acts of violence for the sole purpose of maintaining credibility with persons under investigation. Paragraph I(2) specifically permits the Director to approve "otherwise illegal activity involving a significant risk of violence or physical injury to individuals." While Paragraph I(5) prohibits undercover employees from engaging in illegal acts designed to obtain evidence, Paragraph I(1)(b) permits such acts when necessary "to establish and maintain credibility or cover with persons associated with the criminal activity under investigation."

In my judgement, these provisions are unacceptable. For example, so long as the approval of proper officials is secured, they would appear to permit government agents to participate in armed robberies, assaults, or even murders when necessary to maintain their cover. Our memories of this sort of government abuse are too fresh to discount the possibility that this authority might someday be used. It is hard to imagine a justification for government participation in criminal acts of this kind, especially since any prosecution resulting from such an undercover operation would almost certainly face insurmountable Due Process obstacles. See *Hampton* v. *United States*, 425 U.S. 484, 493–495 (1976) (Powell, J. concurring); *United States* v. *Archer*, 486 F. 2d 670 (2d Cir. 1973). It is imperative that the Guidelines be amended to remove this authority and to expressly prohibit government agents from committing, encouraging, or tolerating illegal acts of violence.

A less serious but still significant defect in the Guidelines is their failure to prohibit agents from supplying a subject with an item or service necessary for a criminal scheme but which would be unavailable but for the government participation. Although Paragraph B(d) prohibits an agent from engaging in this conduct without approval of the Undercover Operations Review Committee and an Assistant Director, the Guidelines appear to confer the power to grant such approval.

Thus far, the Supreme Court has scrupulously avoided upholding the constitutionality of this form of government action. In *United States* v. *Russell*, the Court rejected a due process attack on a conviction secured after government agents supplied a crucial ingredient for the manufacture of an illegal substance. However, the majority carefully noted that the defendant had not claimed that the ingredient would have been unavailable had the government not provided it. See 411 U.S., at 431.

There is good reason to think that such government conduct runs afoul of the Due Process limitations on undercover operations. Moreover, whether constitutional or not, it is difficult to justify as a matter of public policy. It may well be that a defendant caught by such a ploy is predisposed to commit the crime if given an opportunity and, therefore, cannot claim entrapment. But such a defendant is, by definition, harmless since the unavailability of a crucial item makes it impossible

for him to commit the crime. When the government supplies the item, it is creating a crime which otherwise would not occur for the sole purpose of prosecuting the perpetrator. In these days of tight budgets and scarce resources, there are surely better ways for the FBI to spend its time and money.

IV.

In summary, the Attorney General's Guidelines on FBI Undercover Operations represent an important first step in controlling the evils associated with this law enforcement device. It is clear, however, that Congress shares responsibility for outlawing techniques which risk entrapping innocent subjects or are otherwise unacceptable. I believe that Congress should exercise that responsibility by codifying the Guidelines and providing that their violation should be a defense to any resulting criminal prosecution. Moreover, it is imperative that the Guidelines be modified to prohibit the offering of inducements to subjects not reasonably suspected of criminal activity, bar government agents from committing, encouraging, or tolerating criminal acts of violence, and outlaw the practice of supplying a subject with an item or service necessary for a crime but which would not otherwise be available.

TESTIMONY OF PROF. LOUIS SEIDMAN, GEORGETOWN LAW CENTER

Mr. SEIDMAN. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee, I would like to start by thanking you for having me here today and giving me an opportunity to express my views on the Attorney General's guidelines. I think I should start by suggesting there are two limitations on what I intend to say. First, since Professor Stone has spoken quite comprehensively on the issue of privacy raised by undercover operations, I do not intend to address that issue, but rather to restrict my remarks to comments about the problem of entrapment.

Second, I do not pretend to be an expert on any particular undercover operation, and I therefore do not intend to express an opinion as to the legality or propriety of any particular operation. I intend, rather, to address the problem more generically.

In general, I think that the Attorney General's guidelines represent a constructive first effort toward controlling and regularizing this obviously important, but nonetheless in some cases troubling, mode of law enforcement. In particular, I think that the efforts to regularize the decisionmaking process and to fix responsibility for that decision, once made, are commendable.

Let me say in that regard, I think I agree with Congressman Hyde's remarks that allowing political officials to approve certain kinds of operations does, indeed, pose a significant risk. And, as I will indicate later, I think that therefore, efforts have to be made to control the kinds of operations that they can approve.

But I think also, Congressman, in the long run we are better being able to fix the decision someplace, and being able to say that someone in the chain of command is taking responsibility for making the decisions. I also think the guidelines are important in that they impose some significant limits on operations where the benefits of the operation are outweighed by the risks, or where indeed there are very little in the way of benefits to be obtained at all.

Unfortunately, however, the guidelines also appear to authorize some conduct which is probably illegal, and other conduct, which in my judgment is surely unwise. The Supreme Court authority in this area not only permits, but indeed positively invites congres-

sional activity in this area; and I believe that Congress should accept this invitation by codifying those portions of the guidelines which are wise, and by modifying those parts which are not.

To get to the problem of entrapment, then, the entrapment defense really began with the serpent's sting operation in the Garden of Eden. It poses one of the fundamental dilemmas in the criminal law.

On the one hand, the Government has an obvious and important interest in catching and isolating dangerous criminals before they inflict irreparable harm on society. And yet, on the other hand, if government acts too precipitously, it is likely to ensnare innocent as well as guilty subjects.

The dilemma becomes particularly acute when the police attempt to trigger a crime by going undercover and offering inducements, since the same inducement which is essential to catch a potential criminal also bears the possibility of producing crimes which otherwise would not have occurred.

Now, the Supreme Court has responded to that dilemma by developing two interrelated doctrines. First, the court has read criminal statutes implicitly to exculpate a defendant when, in the words of the court, "the Government plays on the weaknesses of an innocent party and beguiles him into commiting crimes which he otherwise would not have attempted."

That defense, which is somewhat confusingly called the entrapment defense, depends entirely upon the subjective state of mind of the defendant. The question is simply whether the defendant was predisposed to commit the crime.

Although the entrapment defense is unavailable to a predisposed defendant, there is a second doctrine which protects even a defendant who is predisposed when the Government becomes overinvolved in criminal activity, or engages in some form of outrageous misconduct. That second doctrine, which is constitutionally based, focuses not on the state of mind of the defendant, but on what the Government has done. It is premised on the notion that it violates due process to convict even a guilty defendant by improper Government conduct.

Although a majority of the court has been insistent on preserving the second, constitutionally based claim, it has yet to actually decide a case where a violation has been found; and we are, therefore, left somewhat in the dark as to what precisely the scope of that second doctrine is.

When one examines the Attorney General's guidelines in light of these doctrines, a number of disturbing problems emerge. First, it should be obvious that no conduct authorized by the guidelines conflicts with the statutory construction aspect of the entrapment doctrine. No conduct could conflict with that portion of the doctrine, since the doctrine's applicability turns on the defendant's predisposition, rather than the Government conduct.

However, the Supreme Court has emphasized that its narrow articulation of the entrapment defense has been dictated by a separation of the powers concern and it seems to me that Congress has a responsibility to face the entrapment problem and make an independent judgment.

In this case, congressional action is especially important because, although the guidelines themselves may not violate the Court entrapment doctrine, they surely authorize activity which violates the policies behind that doctrine. In that regard, I am particularly concerned that the guidelines appear to permit the FBI to dangle substantial inducements before wholly innocent citizens suspected of no wrongdoing and unlikely ever to be involved in a criminal activity.

Under the guise of crime prevention, such operations are certain to entrap nonpredisposed citizens and create crime which otherwise simply would not have occurred. Indeed, we have no need to speculate about this possibility. We know from newspaper accounts, for example, that in the so-called Abscam operation, the Government offered substantial inducements to some Members of Congress who not only were not predisposed to accept them, but who indignantly rejected them.

Furthermore, one district court judge—as I am sure you know—has already dismissed one of the Abscam prosecutions alleging that the defendant was entrapped as a matter of law.

I think that this risk of entrapment is created by the failure of the guidelines to limit the offering of inducements to those who are reasonably suspected of criminal activity. Indeed, the guidelines specifically provide that, with the Director's authorization, inducements may be offered despite the absence of any reasonable indication that the suspect is engaging, has engaged, or is likely to engage in illegal activity of a similar type. Worse still, the guidelines seem to permit the Director to authorize operations despite the absence of reason for beliving that persons drawn to the illegal opportunity and brought to it, are predisposed to engage in the contemplated illegal activity.

The risk of entrapment is reduced, but not eliminated, by the guidelines insistence that the corrupt nature of the activity be made reasonably clear to the suspect, and that the nature of the inducement not be unjustifiable, in view of the nature of the illegal transaction.

These are important and commendable safeguards, which are defensible in their own right and which, in my judgment, Congress ought to codify. They are not substitutes, however, for restricting the scope of undercover operations. Tempting a subject with an excessively attractive inducement really serves no public purpose, if it is unlikely the suspect would ever be forced to face such a temptation but for the Government's intervention. Even if the Government limits the inducement to the so-called going rate, however it may still ensnare harmless suspects, since it may be unlikely that the suspect would ever be approached by a person proposing criminal activity, but for the existence of the undercover operation.

In fact, there is an ironic inverse relationship between the potential harmfulness of the suspect and the risk of entrapment. The more innocent and naive a subject is, the less likely he is to know what the going rate is.

Mr. HYDE. May I interrupt you there?

Mr. SEIDMAN. Certainly, Congressman.

Mr. HYDE. Because I will lose the thought if I don't. A fascinating poll might be taken of every Member of Congress as to whether

or not they have ever been offered $500 to get someone in from India, to introduce a private bill. I daresay, most have. And you made the statement that this crime would have been committed but for.

If you're talking $500 or talking $25,000 or $200,000, I grant you it's a whole different circumstance. You don't get offered $200,000. But I think it would be fascinating to find out from a goodly representative number of Congressmen from all over the country—not just New Jersey—how many have been offered, and not necessarily in an overtly criminal way, but you know—a campaign contribution that is so closely tied in with helping to get this person in—might be very relevant in terms of whether this might have happened, but for.

Mr. SEIDMAN. Yes; I think your point is very well taken, Congressman, and obviously that is an area in which you have much more expertise than I do.

Mr. HYDE. Well, I can tell you that I have been made uncomfortable by people wanting to make a contribution, very close to a request for—and it was quite obvious, and of course I rejected it out of hand. But I daresay it's happened with a lot of Members.

Professor SEIDMAN. I certainly would not want to quarrel with that. That was indeed why I indicated, at the outset, that I wanted to avoid, to the extent that I could, commenting on the legality of a particular operation.

My point is simply that if an inducement is a type which is unlikely to have been offered to an individual——

Mr. HYDE. Meaning the amount of money?

Professor SEIDMAN. Not just the amount, but also the possibility.

It strikes me as conceivable, for example, that there may be an individual who has such a high reputation that no one would ever conceive of approaching that person to engage in illegal activity. And if that were true, and if there were no real possibility of its ever happening, then it seems to me to be pointless for the Government to come in and approach that person.

Now, it may be—what you're saying, I suppose, is that this sort of thing is so common that there may be no such person. And if that were true, that would certainly impact on the legality and wisdom of the operation.

Mr. HYDE. It would be interesting to find out. And, of course, in New Jersey there was a former Congressman who was convicted for taking money through these private bills. Private bills are really the source of the problem.

Professor SEIDMAN. I'm sure you're right.

Mr. HYDE. Anyway, I'm sorry for the interruption. I just thought I would forget it, if I didn't. Thank you.

Professor SEIDMAN. In my judgment, really the only way to avoid the risks that we're talking about is to try to carefully target the undercover operation, in much the way that Congressman Hyde suggests—in areas and on subjects where there is some convincing evidence of a risk of the crime occurring, and a predisposition.

And I don't think it's any response to say that if an operation sweeps too broadly, those caught up in it, who were not predisposed, can assert an entrapment defense at the trial.

In the first place, it is simply a waste of scarce law enforcement resources to mount broad-scale operations which ensnare those posing little societal risk. There is no point to it.

But, more fundamentally, I think it is a myth that the post hoc assertion of an entrapment defense fully remedies the harm done to an entrapped defendant.

Juries are likely to be sceptical of the defense, and may convict defendants who should be acquitted. Even if the defendant prevails, his personal and business dealings are likely to be shattered by the experience—for no purpose.

And, most fundamentally, I think the social fabric is inevitably strained by the spectacle of a seemingly law-abiding citizen induced to commit crimes.

It is worth remembering that the most righteous among us is not immune from temptation, and that any of us could fall victim to our baser instincts, in a weak moment.

The fundamental point is that the Government simply has no business randomly and purposelessly stress testing the morality of its citizens, like so many soldered joints on an assembly line.

When one measures the guidelines against the second part of the test—the due process limitations on undercover operations—I think the results are even more unsettling.

As I have already indicated, the Supreme Court opinions provide little guidance as to the precise degree of Government involvement in crime which violates due process. But, at a minimum, one would think that the Constitution precludes the Government from engaging in otherwise unlawful activity, which causes more harm than it prevents.

Unfortunately, the guidelines contain no similar restrictions. And, indeed, I think the guidelines are ambiguous and can be read in different ways.

Several provisions appear to authorize operations which clearly serve no legitimate law enforcement purpose.

Perhaps the most disturbing aspect of the guidelines is that they not only fail to prohibit, but actually appear to authorize, Government agents to participate in deliberate and illegal acts which run a significant risk of violence. And that for the sole purpose of maintaining the credibility of the agent who has the persons under investigation.

In my judgment, those provisions are simply and flatly unacceptable.

For example, so long as the approval of the proper official is secured, they would appear to permit Government agents to participate in schemes involving risks of armed robberies, assaults, and murders—when necessary for the agents to maintain their cover.

And, as Congressman Hyde suggested in his opening remarks, I think that when this power is vested in political appointees, the risk is particularly severe.

Our memories of that sort of Government abuse are too fresh to discount the possibility that this authority might some day be used. It is hard to imagine a justification for Government participation in criminal acts of that kind.

Mr. EDWARDS. May I interrupt, at this point, Professor Seidman?

Just because illegal conduct would be authorized at a higher level in the police action—whether it be the FBI or some other police organization—you're not stating that it would be a defense in a criminal trial of the offending officer or informant?

Professor SEIDMAN. I don't have an opinion on that, because I haven't studied it.

I think there would be complex supremacy clause problems, at least if there were Federal statutory authority, for the person to engage in the conduct.

In any event, it seems to me that it's simply indefensible to allow Government agents to engage in that conduct; and it becomes more indefensible still, if it were to turn out that the conduct that the Federal Government was authorizing was a violation of State criminal statutes.

I don't think that the Federal Government ought to be in the business of authorizing its agents to go around violating State laws against things like armed robbery and murder. I just don't see the justification.

Mr. EDWARDS. That's an interesting question.

If the informant was authorized to institute a burglary, and was arrested by the local police, what would happen when he was brought before the local magistrate and had a trial by jury?

Professor SEIDMAN. It is interesting.

Mr. EDWARDS. I'm sure it would be offered as a defense. But whether or not it would stand up is something else. We really don't know? Do we?

Professor SEIDMAN. I'm simply not prepared to speak to that point, Mr. Chairman.

It's an interesting constitutional question that I would not want to address without having done some more reading than I have done to prepare for today.

A less serious, but still significant, defect in the guidelines, I think, is their failure to prohibit an agent from supplying a subject with an item or a service which is necessary for a criminal scheme, but which is unavailable but for the Government's participation.

There is good reason to think that such Government conduct runs afoul of the due process limitation on undercover operations. But whether it is constitutionally prohibited or not, it's simply difficult to justify, as a matter of public policy.

It may well be that the defendant caught by such a ploy is predisposed to commit the crime if given the opportunity; and, therefore, cannot claim an entrapment defense. But such a defendant is, by definition, harmless since the unavailability of a crucial item makes it impossible for him to commit the crime, but for the Government supplying it to him.

When the Government supplies the item, it is therefore creating the crime which otherwise would not occur, for the sole purpose of prosecuting the perpetrator, which in these days of tight budgets and scarce resources, seems to me to be a rather foolish way for the FBI to be spending its time and money.

In summary, then, the Attorney General's guidelines on FBI undercover operations, I think, represent an important first step in this controversial and significant area.

It's clear, however, that the Congress shares responsibility for outlawing techniques which risk attracting innocent subjects, or are otherwise unacceptable.

I believe that Congress should exercise that responsibility, by codifying the guidelines and providing that their violation should be a defense in a resulting criminal prosecution.

Moreover, it is imperative that the guidelines be modified: To prohibit the offering of inducements to subjects not reasonably suspected of criminal activity; to bar Government agents from committing, encouraging, or tolerating criminal acts of violence; and to outlaw the practice of supplying a subject with an item or service necessary for a crime, but which would not otherwise be available.

Thank you, very much.

Mr. EDWARDS. Thank you very much, Professor Seidman.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you.

Professor Seidman, you suggest that in order to avoid entrapment, there should be evidence of predisposition before inducements are offered.

Do you suggest, then, that you favor the subjective approach to the doctrine of entrapment, that the focus ought to be on the state of mind of the target, rather than the behavior of the police?

Professor SEIDMAN. Well, Congressman, I was speaking in the context of present Supreme Court doctrine, rather than suggesting how I would change it, if I could.

My point was that presently the Court has adopted essentially a subjective approach, although they have reserved the possibility of some objective standard, if the conduct is really outrageous.

And my point is that if the police fail to limit an undercover operation to people who they have reason to believe are predisposed, they will inevitably, under present law, entrap some people who are not predisposed, under a subjective approach.

Mr. HYDE. Predisposed to this particular crime? Or to criminality in general?

Professor SEIDMAN. Well, I think it would be to this particular crime, sir.

Mr. HYDE. In a recent reversal of the usual procedure, the District of Columbia undercover police have begun selling illegal drugs on the street, and arresting buyers.

In this situation, there may have been probable cause. But not any evidence, necessarily, of predisposition.

In your opinion, does this go over the edge of entrapment?

Professor SEIDMAN. I think a program like that—any program that is broadly based, raises very serious problems.

One of the problems that it raises is that it makes crime pay more, because when the Government goes into competition with real criminals, the effect that has is to drive up the price that criminals can command for their criminal activity; and, thereby, to induce more people to commit crimes.

Mr. HYDE. On the other hand, if the buyer never knows who he is buying from, that might have a very anticompetitive effect, very discouraging. "Chilling," I believe the preferred phrase is.

Professor SEIDMAN. You're absolutely right about that.

And what I think is necessary to do is to strike some sort of balance. There's no doubt that undercover operations serve a useful deterrent effect in that they make criminals think twice about whether they're dealing with a Government agent.

The question is whether we are willing to buy that effect at the price of, perhaps, increasing the total amount of crime and perhaps ending up punishing some people who are completely innocent and who would never have been involved in crime, but for the Government activity.

Mr. HYDE. Well, selling drugs on the street corner doesn't really pose that situation that you have just described. I mean, someone coming up to buy drugs from you, you can't say they wouldn't have committed a crime, I suppose, but for your being there.

Well, each depends on the situation, I suppose.

Professor SEIDMAN. That's exactly right.

It really is fact specific. It depends on whether there were other people around who would have sold the drugs, for example.

Mr. HYDE. OK.

One question for Professor Stone. What is your proposal for a limited probable cause standard?

Where does this proposal place the decisionmaking? Is it a standard for judicial warrant? Or does it mean that the FBI headquarters must make the decision as to whether probable cause is present?

If the latter, why not the former?

Professor STONE. Well, I think the probable cause decision should always be located somewhere other than in the hands of the persons who are intimately involved in the process of investigation.

It's a cliche by now that participants in the law enforcement process ideally should not themselves make such determinations. They're simply not likely to be dispassionate, objective, unbiased decisionmakers.

On the other hand, I would think it preferable to have a probable cause standard administered within the Bureau, rather than not to have such a standard at all. That would certainly be better than nothing.

Mr. HYDE. You could see a workable arrangement where, say, we're talking about the FBI as distinguished from some local sheriff's office. But let's even assume the highest placed people within the framework, the most responsible people, the ones who are accountable to maybe the highest political authority, could make this decision as distinguished from the cop on the beat or the——

Professor STONE. Again, the question is clear. The further you move—

Mr. HYDE [continuing]. Rather than somebody outside.

Professor STONE. The further you move from the person who is personally involved in the investigation—who has a vested interest in "catching" the particular suspect—the more reliable the determination is likely to be.

Mr. HYDE. But you don't think it's the greatest idea in the world to have the U.S. attorney make those decision, or do you?

Professor STONE. I think there are at least two possible difficulties with that. First, the U.S. attorney is a participant with some vested interest in the investigative process. And second, I think

there may also be concerns, as you suggest, about the neutrality of U.S. attorneys. It would thus be preferable for these decisions to be taken out of the hands of either the Bureau or the U.S. attorney and put it in the hands of the judiciary. And I see no reason why there should be any particular obstacle, assuming a probable cause standard is otherwise thought to be desirable, to having the judiciary handle this. There is no obvious reason, for example, why the difficulties would be any greater than those encountered in administering the warrant requirement for ordinary searches, wiretaps, or electronic buggings.

Mr. HYDE. I take it you're in favor of judges working harder and longer hours, and I agree.

Professor STONE. I'm all in favor of that.

Mr. HYDE. Thank you.

Mr. EDWARDS. The gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Coming down to specific cases, the most notorious in the eyes of some is the FBI's Abscam operation. Can you give us your opinion on what the guidelines will do, from what we read about Abscam in the paper?

Professor STONE. I would be reluctant to do that. My knowledge of Abscam is sketchy, based solely upon what I have read in the newspapers, and I'm not sure that's an adequate basis for that kind of judgment. I would prefer not to attempt to answer that question without having a more definite set of facts stated—either actual facts or hypothetical facts.

Mr. SENSENBRENNER. Well, assuming for the sake of argument that none of our departed colleagues committed a crime until he started working with the FBI's undercover agent, Mr. Weinburg, do you think that these guidelines would have prohibited that activity so that the Abscam would have died aborning?

Professor STONE. These guidelines I think probably would not have prohibited Abscam, although again I must qualify that by saying I'm not aware of all of the facts of all the different investigations.

Mr. SENSENBRENNER. There may have been a predilection to commit some crime on the part of the Congressmen that got involved, but there certainly was no probable cause to believe that a crime might have been committed until they had been in contact with either FBI agents or people who are out on the FBI payrolls.

Professor STONE. That's right. These guidelines do not require probable cause.

Professor SEIDMAN. If I could comment briefly on that question, Congressman, I also don't want to get involved in the specifics of the Abscam operation, but what the guidelines clearly permit is the dangling of very substantial inducements before Members of Congress, who are unlikely to be involved in criminal activity, and that's what I find to be troubling, because they run the risk of leading a Member of Congress into a crime where it would be very unlikely but for the Government operation that that person would have been anything other than an effective and outstanding public servant.

Mr. SENSENBRENNER. I have no further questions.

Mr. EDWARDS. A number of years ago, this subcommittee worked with the FBI and the Department of Justice on the FBI's domestic security program, and we had an interesting dialog that went on for many, many months. Eventually Attorney General Levi promulgated guidelines with respect to domestic security cases that really established a criminal standard and the same type of higher supervision that these guidelines provide for, where you have to get permission after a certain number of days, and if not, you go to a higher level and so forth. So there is a sort of a paper protection, too, in the domestic security guidelines. However, I'm not absolutely sure either of the witnesses are acquainted with them.

Those guidelines are very emphatic that for the investigation to continue, there must be the almost immediate danger that a crime is about to be committed or somebody is going to get hurt, something like that, and then the guideline provides for the investigation to be called off after a certain number of days if this is not established.

Now, these guidelines are much more benevolent to the police organization; isn't that correct?

Professor SEIDMAN. That's correct, Congressman.

Mr. EDWARDS. In other words, it can go on for 2 or 3 years without any evidence that criminal activity is about to take place.

Professor STONE. They don't, however, modify the Levi guidelines. Indeed, they specifically state that in the context of domestic security cases, the Levi guidelines are to remain in effect. What the new guidelines do is to preserve the Levi guidelines with respect to domestic security investigations and adopt somewhat different and less restrictive rules with respect to nondomestic, ordinary criminal investigations.

The Levi guidelines, by the way, do require something akin to probable cause for the use of undercover investigations of political organizations. Basically they require a showing of specific and articulable facts giving reason to believe that the individual or organization is engaged in unlawful activity.

Mr. EDWARDS. And it does require a series of writings from the officer to a superior and to others in the chain of authority, which I think is important.

Mr. Hyde?

Mr. HYDE. I think it's worth noting that Pulitzer Prizes have been won by newspaper people going undercover, setting up their own Abscam operations. I can think of a couple in Chicago that have been very successful, lauded by everybody as a great contribution to the commonwealth. So are we setting up one standard for media people—the people's right to know, which is an overarching right over and above everything? The Constitution really doesn't apply to a media person, but to a policeman who may be trying to root out criminality, not for a Pulitzer Prize, but to do their duty?

I have trouble, and it's in an inarticulate way about the special place that we give media people for this very thing.

Professor STONE. The investigation you're referring to in Chicago, the Mirage Bar investigation, is consistent with the proposal I suggest. In that instance, reporters working in the bar offered bribes to government building inspectors. This type of investigation

falls beyond the realm of what I suggested should be covered by the probable cause requirement.

To the extent that the media engage in more intrusive types of investigation, they too might pose serious questions. But I think it's mistake too easily to equate the dangers posed by intrusions into privacy by government and superficially similar intrusions by other elements of society.

For one thing, the resources available to the Government are far greater, and therefore the potential ability to intrude upon privacy is far more pervasive. Moreover, the incentive of the Government to gather information for "law enforcement" purposes is quite different from the incentives motivating the press. The Government is more likely to be interested in wide-scale information gathering.

Mr. HYDE. There surely are differences, and they surely aren't fungible. But there is a double standard that troubles me.

Professor SEIDMAN. If I could just have a word on that point, Congressman, I think even the most fervent defender of the first amendment would not claim that the media ought to have the right to engage in illegal conduct or acts of violence of the kind that may be authorized by these guidelines, on one reading of them on the part of government agents.

Mr. HYDE. Yes, I agree with you. It's an undercover—it's spying, you know, operation, but when you own a bar in Old Town and electrical inspectors are coming through—I won't say any more.

Probable cause certainly rings a bell.

Mr. EDWARDS. Gentlemen, I don't think that it's happened in our country—surely we all hope it doesn't—where, as you point out on page seven of your testimony, Professor Seidman, police, whether they're Federal or State or local, randomly just go around all our cities and stop people on the street and offer people bribes or offer them money or try to sell them drugs or anything.

Wouldn't you agree that it would produce serious damage to the fabric of our society if we approved that sort of thing, even though a lot of people would be arrested?

Professor SEIDMAN. I think that's right, Congressman. There's no legitimate purpose served by conducting little tests of the morality of people. It's hard enough with the tests that people have to contend with in the real world without government making it harder still for people to walk the straight and narrow.

Mr. EDWARDS. It would be especially hard on young people, high school students.

Professor SEIDMAN. Yes.

Mr. EDWARDS. Mr. Hyde, any more questions?

Mr. HYDE. No. I was just thinking. Public officials do not fall under that protective umbrella. They are always to be tested for moral defects, it seems to me.

Mr. EDWARDS. Well, I think you and I will agree we should be held responsible to a very high standard.

Mr. HYDE. Exactly. People expect more from us and do not always get it.

Mr. EDWARDS. Counsel.

Ms. COOPER. Professor Seidman, I would like to turn to the question of what constitutes governmental overreaching and a violation of the due process doctrine in this context. Would an under-

cover operation that is premised on a kind of a stress-test theory—where there is no evidence of predisposition—but a target is nevertheless offered an inducement, is that, in your opinion, in itself a governmental overreaching?

Professor SEIDMAN. Well, without directly answering your question as to what my opinion is, I think that the Supreme Court authority is relatively clear that the mere offering of inducement without probable cause, does not violate due process. The Court hasn't told us precisely what does violate due process, but I think it's pretty clear that does not.

Ms. COOPER. Well, it seems that the case law is not clear as to the parameters of what constitutes governmental overreaching. In your opinion, can the guidelines fill that void?

Professor SEIDMAN. I think it's particularly important that they fill the void, because of the unclearness of the case law. And I might add, one of the reasons why the case law is unclear is because the Court has said repeatedly that it's not our job to decide questions of policy about law enforcement, that's Congress job, and it would be wrong, therefore, for Congress now to turn around and say "We're not going to do anything about this, because the Court has settled it." The buck has to stop someplace, and I think it's Congress responsibility to make the hard judgment about what kind of law enforcement techniques are permissible and what kind are not.

Ms. COOPER. In a sense, the guidelines do point out dangers that high-level people within the Bureau or the Justice Department must consider before they approve undercover operations in certain circumstance. The guidelines seem to be based on the premise that the higher you go in the bureaucracy, the more responsible will be the decisionmaking. Do you agree with that premise?

Professor SEIDMAN. Well, I think it's an important first step to fix responsibility someplace, and in some visible place, for authorizing these programs. The worst situation is where a questionable program is authorized, and then after the fact, when it comes out, you're never quite sure where along the chain of command it began, and you have a situation where some low-level subordinate is ultimately held responsible. I think the guidelines take a step in the right direction by saying that there has to be, as the chairman said, a paper record, and there has to be approval someplace close to the top.

On the other hand, I don't think that anybody ought to have the authority to authorize certain kinds of programs. When you're dealing with that kind of a program, there is a substantial risk that giving the authorization power to someone in a political position will someday lead to authorization being given for unacceptable reasons.

Ms. COOPER. There's also a danger that the people at the top have the least information, and by the time evidence filters up to the top, it's primarily conclusory. The people at the top are not in a position to test the credibility of the evidence they're getting about facts of the case.

Should the guidelines themselves mandate the kind and quality of factual basis that must be presented to the decisionmakers?

Professor SEIDMAN. I think that's a useful suggestion, counsel.

Professor STONE. It seems to me important to understand the intent of the guidelines' internal review process. As I understand them, at the lowest level, there must be an approval and recommendation that the operation be undertaken, before further approval is sought from a higher level. Approval from levels higher up in the Bureau is thus an added protection against the unjustified use of an undercover operation. Without those higher levels of review, presumably all the same operations would be conducted, and at least some additional ones as well.

Ms. COOPER. The question is, Are people at the higher levels in a position to do anything other than rubberstamp the earlier decisions?

Professor Stone, you concluded that not all undercover operations should be predicated upon a finding of probable cause. Would you make the same exception for other kinds of techniques that now do require probable cause, for example, wiretaps?

Professor STONE. No.

Ms. COOPER. Why do you make the distinction?

Professor STONE. The degree of intrusiveness of undercover operations varies with the nature of the circumstances. For example, simply to offer a municipal building inspector $5 not to write up a violation, does not seem to involve any appreciable intrusion upon privacy.

Ms. COOPER. Well, what if a wiretap was designed solely to find out whether the person is going to accept the bribe?

Professor STONE. It is much more difficult to do, because you don't know what the people are going to say. The conventional wiretap issue does not involve the direct participation of a Government official in the conversation. Ordinarily, the Government is tapping conversations between two private individuals, neither of whom has approved the wiretap. Therefore, the information received is wholly outside the Government's control. There's no reason to believe it will be limited to essentially unintrusive items of information. In the undercover situation, however, one of the participants is an agent of the Government, and therefore, to some extent at least, the Government retains the ability to structure the situation in such a way as to keep it reasonably unintrusive. There's no guarantee it will always stay unintrusive, but at least that potential is present.

Ms. COOPER. Would you agree, Professor Seidman, that some, but not all, undercover operations ought to be subject to the probable cause requirement?

Professor SEIDMAN. I found Professor Stone's exposition rather convincing, I have to say, though I did not come here prepared to talk about the privacy aspect of this, and I, therefore, would be reluctant to give my final opinion on the subject.

Ms. COOPER. What is the practical difference between having a standard of not approaching anyone who has a predisposition versus not initiating an undercover operation unless there's probably cause?

Professor STONE. There's a definite overlap between the two. To the extent Professor Seidman's view on predisposition is adopted, it would, to some extent, require something akin to probable cause, even in those circumstances which would not require such a show-

ing for privacy reasons alone. That's largely because there are two different types of interests at stake—the interest in privacy and the interest in not being offered participation in a criminal transaction without justification.

Mr. EDWARDS. We welcome the gentleman from Wisconsin, Mr. Kastenmeier. Any questions?

Mr. KASTENMEIER. Thank you, Mr. Chairman. I think I have only one. I compliment the chairman and the staff and these witnesses. We are dealing with a very complex and difficult subject.

My question is a general one, in terms of the use of informants in undercover operations. How does the present state of affairs with respect to the Federal Bureau of Investigation differ from or resemble undercover operations on the State and the local level? In terms of developing some rational and reasonable restrictions, are we way ahead at the Federal level? Have other States proceeded with models with which we might care to compare these proposed guidelines?

Professor STONE. To the best of my knowledge the proposed guidelines are, I suspect, as progressive a response to the problem as one would find anywhere. Perhaps the only exception would be the ordinance enacted in Seattle, which adopted important restrictions on several facets of undercover investigations.

Mr. KASTENMEIER. In terms of legal complications and in terms of the use of these particular practices, is this something which has mushroomed in the recent past and recently come to a head, or have we always had substantial activities in the field, largely unregulated, except by an occasional case before some court, to test the peace powers?

Professor STONE. The use of undercover operations has expanded dramatically over the past several decades. Undercover operations are especially effective, as Director Webster and Mr. Heyman indicated last March, in the investigation of "consensual" crimes. In the past few decades, Government has increasingly criminalized various types of behavior falling within that general category. Laws involving narcotics, racketeering, public corruption, and taxes are only a few examples. As a consequence, the use of undercover operations has mushroomed. This is true at the local as well as at the Federal level.

Thank you. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. Professor Stone, how would you like to see the FBI respond to the circumstance in which one of its paid informants reports that certain public officials are willing to introduce and supervise the passage of legislation in exchange for $50,000?

Professor STONE. Wisely. More specifically, they should take the information to a judicial officer and obtain a warrant to engage in a full-scale undercover investigation.

Mr. BOYD. So you are suggesting that it's probable cause?

Professor STONE. I'm assuming that the informant's information is reliable.

Mr. BOYD. Of course.

Professor STONE. Sure. Certainly.

Mr. BOYD. No further questions.

Mr. EDWARDS. One of the problems, obviously, is the auditing and controlling of not only the informant but the undercover operation, whoever he or she may be. Great damage might be done to innocent people by these people who sometimes are criminals themselves being authorized and sent out into society by the police organization. How do you think that they should be audited or controlled, or should there be a careful auditing by the supervisors of the police organization or the FBI?

Professor SEIDMAN. Well, I think so, Mr. Edwards. In that regard, it seems to me one of the ironic aspects of Professor Heyman's testimony before this committee last year was that he defended the Abscam operation, because the Government had not made a selection of the people to approach, but rather that selection had been made by the person who was himself criminally involved. That's doesn't seem to me to be much of a defense. Surely, in a matter as sensitive as that, there ought to be closer Government control over which individuals are approached and how they're approached, and what sort of inducements are offered to them.

Mr. EDWARDS. Well, my problem is—that surfaced as a result of Mr. Kastenmeier's question—that we really don't have very much information, because insofar as the FBI is concerned, undercover operations are a relatively new phenomena. When Mr. Hoover was the director during the time that I was with the Bureau, we didn't have any of these at all, and so I think that we're going to have to get a lot more information about what is going on and what has been going on. Are they a bunch of lawsuits about these operations and the difficulties that have been encountered by people as a result of these operations?

We really are in a rather new area, so far as the Federal Bureau of Investigation is concerned.

Professor STONE. Under Director Hoover, the vast majority of undercover operations were in the domestic security area, and the number of agents or agent informants or confidential sources who were actively investigating various Communist or supposedly Communist-related groups, was substantial. There was a good deal of experience with that sort of undercover operation. It was largely in response to those activities that the guidelines were framed.

Mr. EDWARDS. That's correct. Counsel?

Ms. COOPER. One more question. The sale or purchase of drugs, for example, or stolen goods by undercover agents is now a relatively common undercover operation, and the crimes involved there are, on their face, unambiguous. All the parties realize that they're engaging in something illegal.

When you get into the more sophisticated crimes, such as corruption or other white collar-crimes, the line between legitimate and illegitimate behavior gets a lot fuzzier. As Congressman Hyde was explaining, there is legal ambiguity arising from the offer of a bribe or a political contribution in return for a political act when the understandings are left unstated, but there is a meeting of the mind. Does that reality suggest that the guidelines themselves ought to create special precautions, special requirements, when you're dealing with a substantive crime which, by its nature, is fuzzy?

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Professor SEIDMAN. Well, I think, counsel, one of the commendable aspects of the guidelines is that they do provide that the undercover agent should make unambiguous and clear the illegal nature of the conduct to the participant. I'm a little uncertain how one does that without blowing one's cover. It seems to me it would require some skill. But I think that is a commendable safeguard.

Ms. COOPER. Suppose that the guidelines were in effect and a defendant claims that that was not done. It didn't happen. It was ambiguous. The jury convicts anyway, for whatever reasons. The appearance of guilt is overwhelming, despite the ambiguity of the criminality of the offer. Absent codification of these guidelines, what would be the defense's recourse?

Professor SEIDMAN. Well, that's one of the most unfortunate aspects of the guidelines, I think. They are very clear—the last sentence says "They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforcible at law, by any party in any manner, civil or criminal." And I think that makes it as clear as it is possible to be, that they're intended to create no recourse. And one of the useful things that this subcommittee and Congress as a whole can do, is to make these guidelines worth something more than the paper they're written on, by providing that they would be a defense to a criminal prosecution if they were violated.

Professor STONE. May I add a related thought. Especially in the entrapment area, it is terribly important that Congress understand that it's not in any way, shape, or form bound by the Courts' formulation of entrapment. It's not a constitutional concept. It's simply a matter of either common law or statutory interpretation. Rather than attempting to unravel the entrapment doctrine as formulated by the Court, Congress should rethink the issue anew and devise its own formulation of entrapment. The Court's approach should be viewed as merely one form of the defense which might or might not be accepted by Congress.

Mr. EDWARDS. Thank you. That would be a most satisfactory solution, but it's not at all likely to take place. That's the real world. We have a kind of a definition of "entrapment" as enunciated in various court decisions; there has to be, there should be a predisposition, and when the Government goes too far, when the conduct is outrageous, then it's entrapment. Is that about what it amounts to?

Professor SEIDMAN. That's about it, Congressman.

Mr. EDWARDS. Well, I think the witnesses also would agree that until the requirement for a warrant for undercover operations is put into law—and that's very unlikely—the guidelines at least ought to require that the higher officials in the FBI that are approving one extension after another, should have almost the same kind of information a magistrate would have, the same kind of proof that a magistrate would require for approval of a warrant; is that correct?

Professor STONE. I would agree with that.

Mr. EDWARDS. Are there any other questions?

[No response.]

Mr. EDWARDS. The testimony of both Professor Seidman and Professor Stone has been very helpful. We thank you very much

for appearing here today, and we are looking forward to communicating in the future.

Thank you.

The next hearing will be held on the 25th of February.

[Whereupon, at 10:50 a.m., the hearing was adjourned.]

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FBI UNDERCOVER GUIDELINES

WEDNESDAY, FEBRUARY 25, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:45 a.m. in room 2226 of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Kastenmeier, Schroeder, Washington, Hyde, Lungren, and Sensenbrenner.

Staff present: Janice Cooper, assistant counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today we continue the subcommittee's examination of FBI undercover operations and the Attorney General's recent guidelines on that subject. Our witnesses this morning bring a range of experience and knowledge that will add immeasurably to our understanding of the nature of this topic. Prof. Paul Chevigny of New York University Law School has not only studied the problem from an academic, legalistic point of view, but also is a practicing attorney who has worked successfully with law enforcement personnel to devise ways to monitor and control the use of undercover operatives.

Prof. Gary Marx, of the Massachusetts Institute of Technology, has approached the issues as befits his training as a sociologist. He has examined numerous undercover operations, and analyzed the ethical, practical, economic, and social implications of their spreading use. Only this kind of aggregate review of the tactics can provide the kind of information we need.

Without objection, both full statements will be made a part of the record.

And before I recognize Professor Marx, who will speak first, I yield to the distinguished gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. I have no opening remarks.

Mr. EDWARDS. Professor Marx, we welcome you and you may proceed at your own time.

STATEMENT OF GARY T. MARX, PROFESSOR OF SOCIOLOGY, MIT

Mr. Chairman and members of the subcommittee, I am pleased to be here today to discuss some of the issues raised by the new police undercover work and their implications for the proposed FBI charter and guidelines. My concern will be with some of the broader social and policy issues raised by police undercover work. Questions of legality are of the utmost importance, but they should not be the only issues considered. The mere fact that a tactic is legal (and even this is in dispute for some recent undercover actions), should not be sufficient grounds for its use. Its ethical, practical, economic, and social implications must also be considered. Nor

should we be content with guidelines and formal oversight procedures (however important as a first step), in the absence of enforcement mechanisms and a means of assessing their effectiveness.

The advantages and successes of recent undercover work have been well publicized. Director Webster and Asst. Atty. General Heyman mentioned some of these in their testimony to this Committee last March. Without denying these, or arguing that undercover work should be categorically prohibited, I would like to suggest some possible disadvantages, abuses, and costs which have received far less public attention. I will then suggest a way of categorizing types of undercover operations and activity and some general policy guidelines that flow from this. I will then offer comments on the recently released guidelines for undercover work and call attention to some issues which are unresolved, or in need of further work. Finally I will speculate on what recent undercover work may imply about the changing nature of social control in America.

A. PROBLEMS ASSOCIATED WITH UNDERCOVER POLICE WORK

The problems that may be associated with undercover work can be usefully approached by consideration of the major groups involved: (1) Targets of the investigation, (2) informers and unwitting middlemen, (3) police, and (4) third parties. I will then consider some questions which cut across these, dealing with overall effectiveness and costs and benefits.

Some of the problems to be considered of course may also occur with more conventional police methods. But these problems seem more characteristic of undercover work, because of its special properties and the way it has recently been carried out. The discussion which follows is more tentative than I would like. As in the testimony last March on the positive aspects of undercover work, examples (in this case of negative aspects) will be given, but one cannot say with much certainty how frequently, or under what conditions these are likely to occur. Given the sensitivity of the issues involved, and the risks to cherished liberties, our ignorance in these matters is appalling. There is a strong need for systematic research and public discussion into the questions raised by the new police undercover work.

The targets, or subjects of an investigation, may be victims of Government trickery or coercion, rather than autonomous criminals.—Most critical public attenion has focused here. The key legal questions usually are: (1) Did the person violate the criminal law and (2) was the person predisposed to do this? The fact that the crime could/would not have occured without the government's involvement is usually not considered legally relevant if the person is predisposed. Yet for understanding causes of behavior, and developing guidelines for the use of scarce law enforcement resources, issues around the behavior of government agents is crucial. Furthermore, where there is coercion, trickery, or a highly seductive temptation, the determination of predisposition is very difficult. There are also abuses which are independent of legal guilt/or innocence, such as invasions of privacy, the use of political criteria in choosing targets, the use of leaks to damage a person's reputation, and blackmail.

Three common forms of trickery are offering the illegal action as a minor part of a very attractive socially legitimate goal, hiding or disguising the illegal nature of the action, and weakening the capacity of the target to rationally distinguish right and wrong. In the first case targets are lured into the activity on a pretext. The goal put forth is legal and desirable and the illegality is secondary. Thus in the Philadelphia Abscam case the defendants were told that their involvement could bring a convention center and possibly other investments to the city. They were led to believe that the project would not come to Philadelphia if they did not accept the money. Judge Fullam, in his ruling on the Philadelphia case of Schwartz and Jannotte, indicates that neither of the defendants asked for money and both indicated that no payment was necessary. Rommie Loudd, the first black executive with a professional sports team, organized the Orlando, Florida, franchise in the World Football League. With the failure of the WFL Loudd went broke. A man whom he did know called and offered him $1 million to reorganize his team. The caller promised to bring wealthy collegues into the deal. However, Loudd initially was told to loosen up the financiers with cocaine. Loudd resisted the offer, but eventually introduced the caller (an undercover agent) to two people who sold him cocaine. Loudd, with no previous criminal record, was sentenced to a long prison term. On tape the agent involved said to his partner, "I've tricked him worse than I've tricked anybody ever."

Ignorance of the law is not an excuse for its violation. However, the situation seems different when one is led into illegal activities by government agents who claim that no wrong doing is occurring. Here the agent may be both exploiting ignorance and generating a subterfuge.

In several Abscam cases defendants were apparently led to believe that they could make money without having to deliver on any promises. The video-tape from the Williams case reveals the main informant coaching the target in what to say and almost literally putting words in his mouth: "You gotta tell him how important you are, and you gotta tell him in no uncertain terms: 'Without me, there is no deal. I'm the man who's gonna open the doors. I'm the man who's gonna do this and use my influence and I guarantee this.' "

The Senator is then assured that nothing wrong is happening: "It goes no further. It's all talk, all bullshit. It's a walk-through. You gotta just play and blow your horn."

Abscam defendants were told that in accordance with the "Arab mind" and "Arab way of doing business" they must convince the investors that they had friends in high places. The criteria for doing this was that money had to be paid. No commitment to be actually influenced by the payment was required by the undercover agents. The key element was appearances. In several cases the situation was structured so that the acceptance of money would be seen as payment for private consulting services and not as taking a bribe.

A third problematic area involves using trickery against people with diminished or weakened capacity, such as the mentally limited or ill, juveniles, and person under extreme pressure, or in a weakened state (e.g., addicts in a state of withdrawal). Such person may be more susceptible to persuasion and less able to distinguish right from wrong. The undercover agent may attempt to create, or help along such conditions in the target as part of the investigation. In a New Jersey Abscam case the target refused the first offer of cash. However, he eventually takes money after the resourceful government agents (who have concluded that he is an alcoholic) give him liquor.

Participation may emerge out of fear of not participating rather than free choice. An element of this seems inherent in certain fake criminal situations, or in using as informants those accustomed to using threats of violence to get their way.

For example, two federal agents and a convicted armed robber became involved in a gambling and prostitution front in Alaska as part of an anticipatory plan to catch organized crime when it came with the pipelie project. They helped finance a bar which was to be the center of the operation and actively sought participants for the scheme. One of the agents posed as the organization's "heavy muscle"—and appears to have played a heavy-handed role in intimidating and prodding some participants.

Former Assistant United States Attorney Donald Robinson was accused of taking money for information from what he thought were organized crime figures, but who were actually police involved in a sting. He eventually won his case on entrapment grounds.

Robinson, at first, ignored their approaches. He became involved only after persistent phone calls, a threatening call to his wife, and a warning that he might end up missing. When coercion is mixed with temptation the incentive to participate can be very strong.

Recent undercover actions have transformed the Biblical injunction to something like "lead us into temptation and deliver us from evil." Temptation raises different issues than coercion or trickery. An act is no less legally criminal because it is in response to a very attractive temptation. The concern rather is with the assumptions on which the tactic is based, a sense of fairness and whether scarce resources ought to be used in this way.

Defenders of these tactics usually make the assumption that the world is clearly divided between the criminal and non-criminal. It is assumed that providing an opportunity will not tempt the latter and the former will commit the offense regardless. Yet this must be questioned. The number of arrests possible from certain undercover actions is simply astounding. What happens when widespread, if not near universal, desire is met with state-provided oppo.tunity?

In response to a reporter's question Al Capone once said something like "lady when you get down to cases nobody's on the legit." It is certainly not true that everyone has their price or can be tempted. While imagery of turning on a faucet, or providing fly paper for flies to stick to is overdrawn, there are certain categories where undercover tactics can turn up offenses a goodly proportion of the time. This is the case for sexual encounters, for certain forms of illegality related to routine job performance (e.g., a building inspector taking a bribe for issuing a permit that would have been issued anyway), and the general desire to purchase popular consumer goods inexpensively.

Even if temptations are not offered, most complex activities, whether of businesspersons, legislators, or academics have legally grey areas wherein secret investigations could turn up violations. Those who get ahead in organizations are often those who make things happen by breaking rules and cutting through red tape.

Rules are often general, contradictory, and open to varied interpretations. As those in law enforcement bureaucracies know too well, organizations have a vast number of rules which are overlooked until a supervisor wants to nail someone. In many such cases morality and conformity are not the simple phenomena that a rule violation may make them out to be. The use of secret forms of information gathering, even without providing temptations, can be problematic.

Some of the new police undercover work has lost sight of the profound difference between carrying out an investigation to determine if a suspect is in fact breaking the law and carrying it out to determine if an individual can be induced to break the law. As with God testing Job, the question "is the corrupt?" was replaced with the question "is he corruptible?"

Questions of police discretion are involved here. With limited resources, how much attention should authorities devote to crimes which appear in response to the opportunity they themselves generate or which can be subtly ferreted out through secret tactics, rather than focusing on more "genuine" offenses which appear without their inducement? As Judge Frankfurter wrote in *Sherman* v. *U.S.*: "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."

Conventional investigations which appear in response to the complaint of a victim, offer some control over police behavior not present in secret investigations undertaken at police initiative. Openness in an investigation (with respect to the fact that it is being carried out and the means used) and the presence of a complainant as a concerned outside party, reduce discretionary power. Secret investigations carried out at police initiative that involve intergrity testing are a powerful means for the discovery and/or creation of discrediting information.

The creation of a tempting opportunity and the actions of the undercover person can affect conversation and behavior in ways that a hidden non-human recording device never can. It is surprising that the former is not regulated by the courts.

Undercover operations share with wiretapping the invasion of privacy, but without the restraint imposed on the latter by judicial warrant. The video-taping and bugging in recent undercover operations permits the development of secret information on conversations and behavior which may never appear in court. Discrediting information may be developed which has nothing to do with the initial investigation. Regardless of actual behavior, the appearance of involvement as a suspect in the apparatus of covert government investigation cannot help but cast a shadow on a person's reputation. To be secretly video-taped or taperecorded and then to have this made public will convey a presumption of guilt to the uncritical. For the unprincipled it offers a tool for character assassination.

Third parties innocent of no wrong doing may be equally damaged by merely having their names mentioned on tapes which become public. This is the case for at least three Senators mentioned as possible targets for Abscam. The frequent reliance of such investigations on con-artists with a proclivity to lie, boast and exaggerate makes matters worse. That those so named may later receive a letter from the Justice Department indicating that an intensive investigation "disclosed no evidence of illegality that warranted our further investigation," seems small compensation.

The discovery and/or creation of discrediting information can offer a powerful means of controlling a person through arrest, the threat of exposure, or damaging their reputation through leaks. The potential for political and personal misuse is strong. There are many examples from the last decade of radical activists who could not be arrested for their political beliefs being targets for drug arrests instead. In Los Angeles a top Mayoral aide, unpopular with police because of his role in police department changes, was arrested on a morals charge under questionable circumstances. He lost his job. In the case of Abscam, middlemen apparently suggested a number of other congressmen as potential targets. What criteria were used in deciding who would be tempted? Even if the criteria are beyond reproach, as long as police have such wide discretion they will be continually vulnerable to accusations of misuse. The breadth of some criminal laws such as conspiracy offer very wide law enforcement discretion and can mask the political motivation behind an investigation.

The investigation may have been carried out with no intention of formal prosecution. In cases where there is no prosecution because of insufficient evidence, or improper official behavior, the subject may still be damaged through leaks to the media. The unregulated power to carry out integrity tests at will offers a means of slander, regardless of the outcome of the test. In the case of politicians for whom matters of public reputation are central, the issue is particularly salient.

The situation offers opportunities for blackmail and coercion. Incriminating information can be filed away as long as those implicated continue to cooperate in legal ways, such as by offering information or setting up others, or in illegal ways such as

through pay-offs. Blackmail following sexual enticement is a well-known example. Getting information on the extent of this is very difficult since undercover police and those blackmailed have a shared conspirational interest in keeping silent.

In some jurisdictions where employees are required to report illegal activities, they may face double testing. Thus a New York City buildings superintendent was approached by an undercover investigator who offered him a bribe if he would submit falsified architectural plans. The bribe was rejected. However, the superintendent was nevertheless suspended from his job for failing to report the bribe attempt. While legal, this takes the traditional integrity test to a new extreme. A person may become the target of an undercover opportunity scheme, not because of suspected corruption, but merely to see if requirements that bribes be reported are followed. The potential for misuse is clear. This can be a tool for getting rid of employees seen as troublesome on other grounds.

Exploitation of the system by informers.—Can be a major problem. The frequency and seriousness of the problems informers can cause make them the weakest link in undercover systems. Most undercover operations must rely to some degree on informants in the criminal milieu for information, technical advice, "clients," contacts, and legitimation of their disreputability. A heavy price may be paid for this. While informers face exceptional risks, they also face exceptional opportunities.

Some recent cases appear to represent a significant delegation of law enforcement investigative authority. Informers can be offered a hunting license to go after whomever they want, as long as they assert that the target they choose is predisposed to illegal actions. According to the new guidelines a person can be "invited to engage" in an operation such as Abscam (as a target) on the basis of an informer's account that he or she "is engaging, has engaged, or is likely to engage in illegal activity of a similar type."

Verification of such accounts is often difficult and the guidelines say nothing about this. Those who know, for self-interested reasons will obviously often not say. Those who say, may well not know or have a vested interest in lying. This is likely to be particularly true of criminal informers whose professional lives routinely require deceit, lying, and covering up. When the informer has a motive to lie, as is often the case, matters are even worse. Because of charges they are seeking to avoid, the promise of drugs or money, or a desire to punish competitors or enemies, they may have strong incentives to see that others break the law. This can mean false claims about past misbehavior of targets and ignoring legal and departmental restrictions. Whether out of self-interest or deeper psychological motives some informers undergo a transformation and become zealous super-cops creating criminals, or sniffing them out using prohibited methods.

According to media accounts the convicted swindler in Abscam (described by Judge Fullam as an "archetypical, amoral fast-buck artist") had a 3-year prison sentence waived and received $133,150 for his cooperation in the two-year investigation. Accounts in an internal Justice Department memorandum further indicate that he "would be paid a lump sum at the end of Abscam, contingent upon the success of the prosecution." In testimony the informer acknowledged that he expects to make more than $200,000 from his undercover activities.

The bridge to the truth is further weakened when informers draw brokers or middlemen into the operation. The latter do not even know they are part of a police operation. For example a middleman in the Abscam case was apparently led to believe that he could earn broker's fees of millions of dollars for helping an Arab Sheik invest $60 million in real estate. It is not surprising that he apparently cast a wide net in seeking to gain "cooperation" from public officials. Claims about past misbehavior, or predisposition of potential targets become even more suspect when this circuitous path is followed. This may help account for why, under the very tempting and facilitative conditions of Abscam, only half of those approached took the bait.

Informers and to an even greater extent middlemen, are formally much less accountable than sworn law officers and are not as constrained by legal or departmental restrictions. Increased police respect for individual liberties and rights may come partly at a cost of decreased respect of them by informers and other civilians in law enforcement such as "professional witnesses" and private detectives. What police need to have done but cannot themselves do legally, may be delegated to others. The greater the restrictions on police the greater the delegation. This need not involve police telling informers to act illegally. But the structure of the situation with its insulation from observability, skills at deception and strong incentives on the part of the informant, make supervision very difficult. Videotape and recordings are a means of monitoring informer behavior. But the crucial and generally unknowable issue is what takes place off the tape recording. To what extent are

events on the tape contrived? Informers and middlemen are well situated to engage in entrapment and the fabrication of evidence.

The structure of the situation may also favor informers committing crimes of their own, apart from their role as law enforcement agents.

The informer-controller relationship is usually seen to involve the latter exercising coercion over the former. Through a kind of institutionalized blackmail, the threat of jail, or public denouncement as an informer, is held in abeyance as long as cooperation is forthcoming. What is less frequently realized is the double-edged sword potential of such relationships. When not able to hide criminal behavior, the skilled, or fortunately situated informer may be able to manipulate or coerce the controller as well, with a kind of stand-off resulting.

The price of gaining the cooperation of informers may be to ignore their rule-breaking. But beyond this "principled non-enforcement," these situations lend themselves well to exploitation by informers for their own criminal ends. Major cases may require the government to deal with master con-artists operating in their natural habitat. They are likely to have a competitive edge over police.

An insurance expert, playing an undercover role in "operation front-load" investigating organized crime in the construction industry, was apparently able to obtain $300,000 in fees and issued worthless insurance 'performance bonds.' As part of his cover he was certified as an agent of the New Hampshire Insurance Group with the power to issue bonds. The problems in this expensive case which resulted in no indictments became known through a suit against the government. How many other such cases are there that we do not hear about because no one brings suit?

An informer in the Abscam case was apparently able to exploit his role and the false front that had been set up (Abdul Enterprises, Ltd.) to swindle West Coast businessmen. Realizing they had been taken, the businessmen complained to the FBI. However, the informer was able to carry on for a year and a half. The FBI took no action, essentially covering up his crime until after Abscam became public.

Here we see a type of immunity that undercover work may offer. In this case it was only temporary to protect the secrecy of an ongoing investigation. Once the investigation was over the informer was indicted, though one can speculate on the harm done (and lack of compensation) to victims. Their victimization was indirectly aided by the government, first through helping provide the opportunity and then in failing to intervene or to warn others. Even more troubling are cases where informers can essentially blackmail police into granting them permanent immunity. This happens when a trial and related publicity would reveal dirty tricks and illegality on the part of government agents, secret sources, techniques of operation, projects or classified information.

Undercover work offers great risks and temptations to the police involved.—As with informants, the secrecy of the situation, the protected access to illegality, and the usual absence of a complainant can be conducive to corruption and abuse. Undercover operations can offer a way to make easy cases or to retaliate, damage, or gain leverage against suspects not otherwise liable to prosecution. Issues of entrapment, blackmail, and leaks were considered in the section on targets. Here the focus is on direct implications for police.

The character of police work with its isolation, secrecy, discretion, uncertainty, temptations, and need for suspiciousness, is frequently drawn upon to explain poor police-community relations, the presence of a police subculture in conflict with formal departmental policy, and police stress symptoms. The former are even more pronounced in the case of undercover work.

In addition it involves other factors that may be further conducive to problems. Beyond the threat of physical danger from discovery, there may be severe social and psychological consequences for police who play undercover roles for an extended period of time.

Undercover situations tend to be more fluid and unpredictable than with routine patrol or investigative work. There is greater autonomy and rules and procedures are less clear. The expenses in setting up an undercover operation are often significant. The financial cost of mistakes or failure is much greater than with conventional investigations. The need for secrecy accentuates problems of coordination and concern over all that can go wrong. Undercover police may unknowingly enforce the law against each other or have it enforced against themselves, sometimes with tragic consequences.

Undercover agents are removed from the usual controls of a uniform, a badge, a visible supervisor, a fixed place of work, radio or beeper calls and a delineated assignment. These have both a literal and symbolic significance in reminding the officer who he or she is.

Unlike conventional police work, the undercover agent tends to deal only with criminals and is always carrying out deception. A criminal environment and role

models replace the more usual environment. The agent is encouraged to pose as a criminal. The ability to blend in and be liked and accepted, is central to effectiveness. It also serves as an indication to the agent that he or she is doing a good job. As positive personal relationships develop the agent may experience guilt and ambivalence may develop over the betrayal inherent in the deceptive role being played. The work is very intense. The agent is always "on." For some operatives the work becomes almost addictive. The agent may come to enjoy the sense of power the role offers and its protected contact with illegal activity.

Isolation from other contacts and the need to be liked and accepted can have unintended consequences. "Playing the crook" may increase cynicism and ambivalence about the police role and make it easier to rationalize the use of illegal and immoral means, whether for agency or corrupt goals. In his novel Mother-Night, Kurt Vonnegut tells us that "we are what we pretend to be, so we must be careful about what we pretend to be." Police may become consumers or purveyors of the vice they set out to control. For example, as part of an investigation a Chicago policeman posed as a pimp and infiltrated a prostitution ring. He continued in the pimp role after the investigation ended and was suspended. A member of an elite drug enforcement unit in the Boston area became an addict and retired on a disability pension. The financial rewards from police corruption, particularly in gambling and narcotics, can be great and chances for avoiding detection rather good. Ironically, effectiveness and opportunities for corruption may often go hand in hand. Police supervisors and lawbreakers may face equal difficulties in knowing what undercover police persons are really up to.

Awareness of the problematic aspects of undercover activity helps explain J. Edgar Hoover's opposition to having sworn agents in such roles. The stellar reputation of the FBI for integrity is partly a function of the fact that its agents under Hoover did not face the same temptations as did police in agencies routinely involved in undercover activities.

Police folklore suggests that those who work vice and play undercover roles are sometimes different and negatively affected by the experience. I am not aware of any studies of the social and psychological consequences of long term involvement in undercover roles. For theoretical reasons and from impressionistic evidence, I would predict that undercover agents would disproportionally show symptoms of stress.

The possible damage to third parties. Is one of the least explored aspects of undercover work. Because of the secrecy and second order ripple effects much of it never comes to public attention and those who are hurt may not even be aware of it to complain or seek damages. Its invisibility makes it even more problematic.

One type of damage to third parties has already been considered, crimes committed by informants under the protection of their role, but unrelated to an investigation. A second type more directly involves the intended law enforcement role. The most obvious cases involve the victims of government-inspired or facilitated crimes. In Denver two young men learn that a local "fence"—in reality a police sting, is buying stolen cars. They then steal a car, kill its owner in the process and then sell the car to the "fence." They repeat this again and are then arrested. According to one estimate only about half of the property stolen in the hope of being sold to a police-run fencing operation is actually returned to its owners. People may not report their loss or the property may lack distinctive identification. Even in cases where people do get their property back, should the trauma of their victimization entitle them to some special compensation because of the government's role?

For security reasons or to gain cooperation, citizens, or established businesses approached about cooperating with an undercover operation may not be given the full and candid account necessary for truly informed consent. Such was apparently the case with the informer in "operation front load." In seeking his certification as an insurance agent with the power to issue bonds, FBI agents described him to the insurance company in question as a former police officer and "a straight arrow" and used a false name. The insurance company was not told of his criminal record, or of the fact that he agreed to be an informer to avoid a nine-year prison sentence and fine. Because of the misbehavior of this informer, as of May 1979, damage suits had been filed in five states against the New Hampshire Insurance Group, the certifying insurance company. Company officials claim that his actions in issuing fake performance bonds to construction companies cost them and insurance brokers more than $60 million in business losses. The head of a Chicago insurance firm states "What the FBI did was a disgrace . . . they've ruined us." He is suing for $40 million dollars.

The web of human interdependence is dense and deceptively trifling with one part of it may send out reverberations that are no less damaging for being unseen. The

damage to third parties need not be only economic. The latter may have negative consequences for health and family relations.

Have any small businesses been hurt by the competition from proprietary fronts run by police? To appear legitimate, such fronts may actually become competitors during the investigation. Government agents with their skills and no need to make a profit, would seem to have an obvious competitive edge over many small businessmen. Their exemption from many of the laws regulating government financial transactions can be conducive to questionable practices.

The most private and delicate of human emotions and relationships may be violated under the mantle of government deceit. Thus as part of an attempt to infiltrate the Weather underground a Federal agent developed an ongoing relationship with a woman. She became pregnant. After considerable indecision and at the urging of the agent she decided to have an abortion. The agent's work then took him elsewhere and he ended the relationship, with the woman apparently never knowing his secret identity and true motives. One can imagine the publicity and law suits if she had kept the child and the circumstances of the paternity became known, or if she had died in childbirth, or become mentally unstable.

Indirect damage to third parties may be seen in the increase in non-uniformed police impersonators which appears to be accompanying the spread of undercover police work. Impersonators are offered role models and their initial tales are made more credible by the public's knowledge that undercover work is common. According to one estimate several years ago, more than a quarter of the complaints filed against the New York City involve impersonators. Classic con games, such as that where the "mark" is persuaded to draw money from the bank in order to secretly test the honesty of bank employees, may be made more believable by the actual spread of various kinds of government secret integrity tests. Official statistics probably greatly underestimate the extensiveness of this, since those preyed upon are often prostitutes, homosexuals and persons seeking to buy or sell narcotics, who are less likely to report their victimization.

An additional problem area lies in the lack of knowledge about the intended effects and financial costs of such operations.—The case for the newer (and some of the older) forms rests on a number of inadequately tested assumptions. The public relations efforts of advocates of these tactics and media infatuation with them glosses over this. They are heralded as tactics that finally work in the war against crime, and as the only way to deal with conspirators. The dramatic impact of suddenly making a large number of arrests and recovering substantial amounts of property is stressed. But far less attention is given to questions such as: What happens to crime rates during and after the operation? Who is being arrested? How does the number of arrests made, or property recovered compare to that which would be expected over a comparable period of time using conventional methods? What is the cost per arrest or value of property recovered as compared to conventional methods? Any assessment of costs must include undercover efforts that had to be closed down because of leaks. Their high vulnerability to discovery is an added cost. What side effects might the tactics have?

Assessment of the consequences requires that stings and anti-crime decoys directed against a general "market" of suspects be separated from undercover work used against subject whose identity is known in advance, as with the infiltration of particular organizations, police posing as hit men, or the offering of opportunity for corruption. The latter are judged by their success in the individual case in question. Was a serious crime prevented? Were convictions obtained that would not have been otherwise possible, or less expensively than with the use of conventional methods? The former cases have general deterrence as a goal. The offences here involve a victim who can report the incident, rather than being reported only as a result of arrest actions, as is the case with consensual crimes. Analyzing their consequences is easier. The available research has dealt with anti-crime decoys and fencing stings. Even in these cases the evidence is quite limited and not very reassuring.

An analysis of New York City's much heralded Street Crime Unit (which specializes in decoy operations) while laudatory of the group's arrest and conviction record did not find that the unit was "* * * decreasing either robberies or grand larcenies from a person" (Abt Associates, 1974 New York City Anti-Crime Patrol Exemplary Project, Washington, D.C., National Institute of Law Enforcement and Criminal Justice). Nor did a sophisticated analysis of Birmingham's experiment with an anti-robbery unit, which relied heavily on decoys, find any impact on rates of larceny or robbery (M. Wycoff, C. Brown, and R. Petersen, 1980, Birmingham Anti-Robbery Unit Evaluation Report, Washington, D.C., Police Foundation).

A 1979 in-house Justice Department Study entitled "What Happened" makes rather grandiose claims for the success of 62 anti-fencing sting operations carried

out since 1974. But a careful re-analysis of these data by fencing expert Carl Klockars (1980, "Jonathan Wild and the Modern Sting" in C. Tapel, History and Crime: Implications for Contemporary Criminal Justice, Sage Publications, Beverly Hills, Cal), casts serious doubt on the quality of these data and their interpretation. Klockars concludes that there is no sound statistical evidence to suggest that the sting operations produced a decline in the rate of property crime. An analysis of the use of Federal funds for anti-fencing projects in San Diego over a five year period concluded that neither the market for stolen property, nor the incidence of property crimes had been reduced (S. Pennell, Sept. 1979, "Fencing Activity and Police Strategy," The Police Chief). Mary Walsh in Strategies for Combatting the Criminal Receiver of Stolen Goods (1976, Washington, D.C., Law Enforcement Assistance Administration) notes that police engaged in anti-fencing operations were positively effected by the experience, but had "* * * serious questions as to what had really been accomplished." If the evidence is thus far lacking that such tactics reduce crime on an aggregate basis, is it possible that under some conditions they may actually increase it, or through other unintended effects make law enforcement more difficult?

Among ways that undercover tactics may amplify crime are: Generation of a market for the purchase or sale of illegal goods and services and the indirect generation of capital for other illegal activities (at least as long as the undercover operation is in progress); generation of the idea for a crime; generation of a motive; provision of a scarce skill or resource without which the crime could not be carried out or provision of a seductive temptation to a person who would be unlikely to encounter it were it not for police actions; coercion, intimidation, or persuasion of a person otherwise not predisposed to commit the offense; generation of a covert opportunity structure for illegal actions on the part of the undercover agent or informant; some of these may be necessary to gain credibility in the role, while others will represent exploitation of the role (corruption, bribes, blackmail, frames, fraud, or the very crimes the action is directed against); stimulation of a variety of crimes on the part of those not targets of the undercover operation (impersonation of a police officer, vigilante-like assaults, or crimes committeed against undercover officers by people who do not realize they are dealing with police; and retaliatory violence against informers.

Highly complex questions involving difficult measurement issues are involved here. Research will always be relatively weaker in this area. However there is a need to ask hard questions about these operations. If claims about the effectiveness and benefits of these are to be accepted, the Justice Department must go much farther in permitting research by disinterested outside evaluators. Such research should be concurrent with the investigation, and not restricted to evaluations done six months after the close of the investigation.

A number of problems with undercover tactics have been considered. As the longer paper I brought indicates,[1] it is relatively easy to document examples. Given effective use of the media by law enforcement in recent undercover operations and the secrecy that surrounds such operations (with its conduciveness to not seeing; or covering up mistakes, abuses, and costs) public perceptions are probably skewed toward over-estimating advantages and under-estimating the disadvantages of the tactic.

Because of a lack of research we can not say much about how frequently or when the problems with undercover work occur. Nor can we adequately answer major questions such as:

(1) Under what conditions are the gains worth the costs?
(2) Can the gains be obtained in less costly alternative ways?
(3) What additional policies, guidelines, oversight practices, procedures, and training are needed to minimize problems, for those cases of last resort where the tactic may be deemed appropriate?

There are many types of undercover activity and these vary greatly in their potential for problems. As an aid to thinking about this, and relating policies to specific forms, the following section describes some of the more salient types of undercover operation and activity.

B. TYPES OF UNDERCOVER ACTIVITY AND THE RECENT GUIDELINES

The politically and emotionally charged climate around undercover police work can lead to extreme positions. Some critics claim that such tactics violate basic rights and ought to be banned outright, while supporters uncritically advocate any use of them in the struggle against crime. Taking an informed position requires making distinctions between types of undercover operations.

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[1] G. T. Marx, "The New Police Undercover Work" Urban Life, vol. 8, January 1980: 399-446.

Table I lists dimensions by which they can be contrasted. Certain combinations are much more fraught with difficulty than others. In general the more the factors on the right side of the table are present the more problematic the use of the tactic. These dimensions do not occur together randomly, but tend to cluster. Recent undercover activities tend to be set apart from earlier efforts, (aside from their scale and complexity) by a shift to factors on the right side. For example the classic tactic of infiltration tends to involve police selection of targets, initiation in response to complaints and criminal intelligence in the natural environment, informers, and an active conspirational role. Abscam in contrast involved police initiative, in some cases what seemed to be random integrity testing in an artificial environment, and the use of informers and unwitting informers, (while sharing with infiltration police selection of suspects and an active conspirational role.

TABLE I.—*Dimensions for contrasting undercover operations*

Source for initiating the investigation: In response to citizen complaints or crime pattern.	Police initiative.
Criteria for selecting targets: Targets or locations chosen on the basis of intelligence.	Random integrity testing.
Responsibility for initiating the crime: Self-selection by suspects offered an opportunity.	Police selection.
Degree of activity in undercover role: Passive	Active.
Nature of the role: Victim	Co-conspirator.
Type of setting: Natural environment	Artificial environment.
Who plays the undercover role: Police (informers)	Unwitting informers.

Turning to the dimensions, on what basis do officials decide to initiate an undercover investigation? One of the liberty enhancing aspects of the Anglo-American legal system is its historic tendency for police to be mobilized in response to citizen complaints, rather than on their own initiative. This is a function of the historical distrust of government and concern over abuses on the Continent. It has probably meant lesser use of secret police practices than is the case in Europe. But even where present in the United States, traditional police undercover activities have tended to be mobilized in response to citizen complaints and information from informants. Anti-crime decoy units are deployed in response to recent crime patterns. When police pose as hit men or arsonists this is in response to an informant's tip about planned crimes. In many cities vice enforcement is carried out primarily in response to complaints of merchants, wives whose husbands have lost money gambling, parents concerned about temptations for minors, or where other crimes are present. While this "reactive" police behavior can be exploited and has other costs such as waiting until a crime occurs before taking action, it introduces a degree of citizen control and can direct the wide police discretion. In contrast are investigations undertaken entirely at police initiative in the absence of grounds for suspecting that crime is occurring. The rationale for this may be to establish an impressive arrest record, to gather intelligence, to damage a person's reputation, to harass those suspected of other crimes for which evidence to establish guilt is lacking, to gain coercive leverage over the target, and to test levels of integrity.

After a decision to initiate an undercover investigation has been made, what criteria are used in deciding whom to direct it against? At one extreme, and most troubling, we have what amounts to random integrity tests, "trolling", or "fishing" for would-be offenders, in the absence of any information about the suspect's past criminal behavior or inclinations. For example "lost" wallets are left in various places where police will find them, the goal being to see if they will be turned in intact; undercover police pose as thieves and go to bars and appliance stores offering bargains on "stolen" television sets and stereos, middlemen hoping to earn huge commissions cast a wide net in bringing in elected officials as targets for bribes. At the other extreme are targets (or locations) chosen on the basis of criminal intelligence. Here authorities have information about a person's previous or current criminal activities, or know that a given area is the scene of criminal activities. The intelligence directs and limits the investigation. The goal is gathering evidence and apprehension of a person thought to be criminally predisposed, rather than seeing at what point people will break the law if given a contrived chance.

Many of the legal questions turn on the nature of the role played by the undercover person. Was it passive or active? If the latter, just how active was it? What was supplied by the agent—the idea and plans for the crime, incentives, temptations, and persuasion? Were skills and resources offered without which it could not

be carried out? Degree of activity varies from disguised surveillance to intensive and directed interaction with the target in a criminal conspiracy. Where the goal is not crime prevention or counter-intelligence actions, the more passive the law enforcement role the fewer the problems.

An important aspect of the undercover role is whether it involves playing the potential victim or posing as a co-conspirator. Examples of the former include the decoy who invites attack by posing as a drunk with an exposed wallet or the FBI agent who pretended to start a garbage collection business in the hope of becoming the target of an extortion racket. In such cases, assuming the temptation offered by the decoy victim is consistent with what might be expected in the natural environment, the use of the tactic is less problematic. The illegal initiative comes from the suspect who is self-selecting and the undercover agent plays a passive role with respect to any illegality. Thus is in contrast to playing the role of the willing partner who conspires with the subject of the investigation to break the law. Examples of this include the undercover agent posing as a fence, armed robber, pornographic book seller, briber, hit man, or supplier or client for vice. Here police are likely to choose the target and play an active role.

Some undercover opportunities are structured so that there is good reason to believe that those who criminally exploit them were predisposed to do so. Undercover situations that involve self-selection on the part of rule breakers are clearly preferable to those where authorities select who is to be tempted and take aggressive actions to be sure the opportunity is taken.

Undercover situations where agents are victims are likely to be characterized by self-selection. For example many people will walk by the drunken decoy with an exposed wallet, some will even try and help him, the person who does take the money and run has shown a degree of autonomy in these actions. Similarly in the case of police-run fencing fronts in fixed locations, those with stolen goods choose to come to the fence (although an exception are those drawn in as a result of the roping actions needed to spread the word that the fence is in business). In these cases agents cast the bread of opportunity upon the water, or better the streets, and wait to see who takes it.

With respect to the nature of the undercover creation the more it is a part of the natural world the less problematic it is. Put another way, the less the deception the better. This has both practical and legal advantages. Thus infiltration into an ongoing criminal enterprise, appearing to go along with a bribe offer, or turning a genuine fencing operation into a police front seem more appropriate than highly imaginative creations which may have few counterpoints in reality or lead to new victimization.

This contrasts with many drug, prostitution, and homosexuality cases, and the recent bribery cases where the agent selects a particular person to approach.

Of course it could be argued that even in such cases that there is a degree of self-selection since the person could always say "no" (as half of the Congressmen who were approached in Abscam did). Yet the self-selection in the cases first discussed has a more assertive quality in the face of an available, but relatively passive opportunity.

In the first section the problematic aspects of undercover work as they may involve police, informers, and unwitting informers were considered. Here we can simply note that as we move from the use of sworn agents, to cooperating informers to those who do not even know they are part of an undercover operation, control and accountability become ever more difficult.

THE GUIDELINES

Public guidelines for sensitive law enforcement activities, such as those issued by the Justice Department on informers, search warrants, racketeering enterprises, and most recently on undercover operations, are in principle an admirable policy device. As voluntary restraints on the use of police power they can help protect privacy and liberty. They can increase accountability by offering outsiders criteria by which to judge government performance, can create a moral climate within an agency, and can help limit the wide discretion in the law enforcement role. They can be a useful tool along with Judicial review, Congressional oversight, internal supervision training and evaluation.

Yet the impact of guidelines in practice depends on their implementation and on their substance. The general issue around implementation is whether the guidelines will be applied in a serious and rigorous way, or, as if often the case in bureaucratic organizations, will come to be applied largely ritualistically with acquiescence to whatever is asked for, within broad extremes.

A more specific issue involves the question of how apparent abuses, as in many of the Abscam cases, came to happen. The recent guidelines are said to make formal

existing procedures. If this is the case it appears that a number of guidelines were violated involving informers; the need to make clear the corrupt nature of the activity; reasonable indication that the subject is engaging, has engaged, or is likely to engage in illegal activity of the type in question; and entrapment.

To the extent that this is correct, how did it happen? Is it the FBI's newness to complex undercover operations, relative to the Drug Enforcement Administration or the Alcohol, Tobacco and Firearms Bureau? Were the guidelines not fully understood or known? Is there a weakness in supervision? Did the closeness of the Justice Department to the FBI, relative to other law enforcement agencies, lead to a less critical look at what was going on? Is it a case of the possibility of catching really big fish overwhelming the guidelines, as the costly investigation developed its own momentum? Is it a case where, because of the secrecy and temptations, even with good faith, guidelines can not be carried out very well? Or one might conclude that Abscam was carried out consistent with the guidelines, as the testimony last March suggested. Yet this conclusion is even more troubling. If it is correct, then the substance of the guidelines is woefully inadequate. Let me consider the substance.

With respect to substance of the guidelines there are two areas of concern. The first concerns what they do say and the second what they fail to say, or do not say clearly enough. I approach this topic with humility. It is difficult for an outsider to comment on these matters. There is the danger of Monday morning quarter-backing from the safety of the university or press room, far removed from responsibility or first hand experience. However outsiders are in a good position to raise more fundamental questions about goals, purposes, and broad trends.

The guidelines can be seen as a compromise between the needs of citizens in a democratic society and the needs of law enforcement, yet there is a decided tilt toward the latter. The critic may see them as a way of gaining legitimacy for the most egregious of practices, at a minor cost of listing possible dangers and restricting the discretion of local agents initiating and carrying out certain forms of undercover activity. However these can always be carried out if approval is obtained. This is a little like saying to a child that because poison can kill you, it should only be used when necessary and if your parents approve your using it.

For example it is all to the good that local agents can not initiate undercover operations (p. 3, B) under "sensitive circumstances" (e.g. making untrue representations concerning innocent persons; engaging in most felonies; attending in an undercover capacity a meeting between a subject of investigation and his or her lawyer; posing as an attorney, physician, clergyman, or journalist when there is a significant risk that another person will be drawn into a professional or confidential relationship with the undercover person as a result; and when there is a significant risk of violence or physical injury or a significant risk of financial loss to an innocent individual.

But when will higher authorities use their power to authorize such activities? Apparently they can be approved when there is a "need" for them. Thus on p. 6 the guidelines state that undercover operations are "* * * to be conducted with *minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner.*" (italics added) Crimes by agents can be approved when there is a need "to obtain information or evidence necessary" for prosecution and "to establish and maintain credibility or cover with persons associated with the criminal activity under investigation".

If police are to be given the power to engage in felonies, make untrue representations about third parties, violate professional confidentiality and privilege, and take actions where there is a significant risk of damage to innocent third parties, we need to know more specifically under what conditions this will be done. Justifications via the need for information and evidence, or to establish and maintain a cover, are insufficient because they are so general. To be sure, there is need for some flexibility and openness in any guidelines. Reality's richness can never be fully anticipated by a listing of formal rules. Fast breaking developments, extenuating circumstances and emergencies require that those in formal organizations have room to maneuver. Yet I think the guidelines offer too much latitude for approval as currently written. Should any tactics be categorically prohibited, regardless of the circumstance? The exceptional conditions which may require using such tactics should be enumerated.

Other areas in need of work or clarification are:

(1) The conditions governing the use of unwitting informers, middlemen or brokers who do not know they are part of a law enforcement operation. If their accountability and respect for legal requirements can not be increased by "turning them", should their use be prohibited?

(2) A clearer statement of the temporal dimensions of the activity is needed. Is there any limit to how many times a given target can be approached? If a person

refuses the illegal opportunity should they be tempted again and again? Where the target is a diffuse group, as with thieves how long should a fencing front continue to operate? Where the activity involves progressively greater rule violations, at what point should police intervene. There is something of a conflict here between the law enforcement goal of prevention and apprehension. There is no easy answer to such questions. They illustrate how complex the causes of crime can be. They demonstrate the inter-dependence between police and violators in the production of certain types of crime.

(3) On p. 14 the guidelines state that entrapment "should be scrupulously avoided" and then give a definition which does not reflect the varying judicial perspectives on this. This should be broadened to indicate that due process may be denied (even with predisposition and guilt) when the behavior of the government is sufficiently outrageous. As Justice Frandfurter argued in a 1954 dissent in *Irvine* v. *Calif.*, "observation of due process has to do not with questions of guilt or innocence, but the mode by which guilt is ascertained."

(4) The degree of certainty required to determine that a person is predisposed to the illegality in question and the methods of validating this. Extreme care should be taken to insure that the unscrupulous have not generated a pretext to make it appear that the conditions for authorizing undercover operations and opportunities exist, when in fact they do not. In some places the concept of "dropping a dime" on someone (phoning in an anonymous complaint) can be a means of making what is essentially a pro-active police response appear to be reactive.

(5) Once general approval has been granted, under what conditions must changes in the original plan, or the use of the tactic against new subjects be approved? Unless supervision is close and continuous it is easy to imagine how obtaining general approval for an operation might serve to legitimate subsequent incremental changes which violate the spirit or the letter of the guidelines.

(6) A clearer statement of the kinds of damage to third parties that may occur and of the government's procedures, if any, for redressing these.

(7) A statement about records access and retention. What happens to the videotypes and bugs of opportunities for illegal activity created by government agents when no wrong doing is discovered or no charges brought. Are these destroyed? Who has access to them?

(8) The composition of the Undercover Operations Review Committee. How large is it, what specific type of persons will be on it, how long will they serve?

(9) How broadly do the guidelines apply? Will the FBI refuse to participate in any joint undercover operations where the behavior of state, local, or private police is not consistent with the guidelines? Should there be broad standards across Federal agencies or whenever Federal funds are used by state and local agencies?

(10) A new phenomenon has been private financing of public police ventures. At the local level this has involved factories paying much of the cost of having undercover police pose as workers in an effort to break up suspected drug activity. Some police fencing fronts have been paid for by private sources including insurance companies, businesses, and chambers of commerce. At the Federal level an FBI investigation into the selling of pirated records and tapes received a substantial contribution from the record industry. There is a need for public information on how widespread this practice is. While private cooperation and support may be welcomed in financially restrictive time, other issues are raised. Just what is being bought with the private sector's contribution? Will the highest bidders be able to garner a disproportionate share of public supported law enforcement because of the contribution they can offer?

If the money comes with no strings attached and is for an investigation consistent with an agency's priorities and one that it would have been likely to carry out anyway, there can be little problem. However to the extent that law enforcement priorities, discretion, tactics, confidential information, or prosecutorial actions are affected, then the tactic must be closely looked at. What limits should be placed on what may appear to be the private sector's ability to hire public agencies to pursue its own interests, even though the public interest may also be served? If private financing is to continue, then there is a need for guidelines in this area.

(11) Because the use of undercover tactics has expanded so rapidly, and because of their problematic aspects relative to more conventional tactics, shouldn't there be a periodic review, not only of the effectiveness of these particular guidelines, but of the undercover tactic as a whole?

C. BROAD CHANGES IN SOCIAL CONTROL

Whatever their legal and ethical implications, or short term effects, actions such as Abscam and police-run fencing operations may be portends of a subtle and perhaps irreversible change in how social control in our society is carried out. It was

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roughly a half a century ago that Secretary of War Henry Stimpson indignantly observed (in response to proposed changes in national security practices) "gentlemen do not read each other's mail." His observation seems touchingly quaint in light of the invasions of privacy and routinization of surveilance that subsequent decades have witnessed. How far we have come in such a short time.

Fifty years from now will observers find our wondering about the propriety of police agents trying to bribe Congressmen, distributing pornographic film, and running fencing operations equally quaint? FBI expenditures for undercover work have more than quadrupled in the last three years, going from one million to a requested 4.8 million dollars for 1981. In recent years millions of dollars of new federal aid has gone to local police for undercover activities.

Broad changes in the nature of American social control appear to be taking place. We are experiencing a general shift away from some of the ideas central to the Anglo-American police tradition. The modern English police system which Robert Peel established in 1829 was to prevent crime by a uniformed visible 24-hour presence. As societal conditions have changed and as the deterrent effect of this visible and predictable police presence has been questioned, an alternative conception has gradually emerged.

Rather than only trying to decrease the opportunity structures for crime through a uniformed police presence or more recent "target hardening" approaches involving more secure physical structures and education for crime prevention, authorities now seek to selectively increase the opportunity structures for crime ("target weakening"), operating under controlled conditions with non-uniformed police. Anticipatory police strategies have become more prominent.

In this respect police may be paralleling the modern corporation which seeks not only to anticipate demand through market research, but to develop and manage that demand through advertising, solicitation, and more covert types of intervention. Secretly gathering information and facilitating crime under controlled conditions offers a degree of control over the "demand" for police services hardly possible with traditional reactive practices.

Whenever a market is created rather than being a response to citizen demand, there are particular dangers of exploitation and misuse. This is as true for consumer goods as for criminal justice processing. In legal systems where authorities respond to citizen complaints, rather than independently generating cases, liberty is likely more secure. There is a danger that once undercover resources are provided, and skills are developed, that the tactics will be used too indiscriminately. Given pressures on police to produce, and the power of such tactics, it is an easy move forward from targeted to indiscriminate use of integrity tests and from investigation to instigation.

The bureaucratic imperative for intelligence can easily lead to the seductions of counterintelligence. On this linkage former FBI executive William Sullivan observes "as far as I'm concerned, we might as well not engage in intelligence unless we also engage in counterintelligence. One is the right arm, the other the left. They work together."

The allure and the power of undercover tactics may make them irresistible. Just as any society that has discovered alcohol has seen its use rapidly spread, once undercover tactics become legitimate and resources are available for them, their use is likely to spread to new areas and illegitimate uses. To some observers the use of questionable or bad undercover means is nevertheless justified because it is used for good ends. Who after all cannot be indignant over violations of the public trust on the part of those sworn to uphold it, or the hidden taxes we all pay because of organized crime? One of the problems with such arguments is of course that there is no guarantee that bad means will be restricted to good ends.

One important party to the elaboration and diffusion of undercover tactics is likely to be police trained in government programs who may face mandatory retirement at age 55, if they are not attracted to the more lucrative private sector long before that. Perhaps we will get to the point where some type of registration will be needed for former Government agents trained and experienced in highly "sensitive" operations who continue such work in the private sector.

From current practices we may not be far from activities such as the following Rather than infiltrating on-going criminal enterprises, or starting up their own pretend ones, police agents (such as accounting specialists) might infiltrate legitimate businesses to be sure they are obeying the law, or would obey it if given a government engendered chance not to. In the private sector husbands or wives, or those considering marriage might hire attractive members of the opposite sex to test their partner's fidelity. Businesses might create false fronts using undercover agents to involve their competitors in illegal actions for which they would then be arrested.

A rival's business could be sabotaged by infiltrating disruptive workers, or its public image damaged, by taking false front actions in its name.

One rationale for such techniques is a hope that they will have a general deterrence. The goal here according to an experienced undercover worker is "to create in the minds of potential offenders an apprehension that any 'civilian' could in fact be a police officer." While the costs and risks of the illegality may be increased, the effect on those committed to taking serious criminal actions may simply be to make them more clever, rather than to deter them. There is likely to be a diminishing returns effect, particularly with more sophisticated criminals. The tactics do little to attack the basic motivation of those involved in consensual crimes, where lawbreaking is a cooperative activity. Were this their only effect, it might be acceptable as just another innovation in the never ending, and evolving, struggle between rulebreakers and enforcers. But even if we grant that such tactics were effective as deterrents, there are other issues to be considered.

Law enforcement is very different from other forms of governmer · service such as education, since we self-consciously limit its effectiveness by balancing it with rights and liberties. Simply put we want law enforcement to be optimally, rather than maximally, effective and efficient. In this regard we can note how the spread of ever more sophisticated ruses and elaborate surveillance damages trust in a society. American society is fragmented enough without adding a new layer of suspiciousness and distrust. The greater the public's knowledge of such tactics the greater the distrust of individuals for one another.

In recent decades undercover police activities such as COINTEL and the many local varieties, clearly damaged the protected freedoms of political dissenters. But now, through a spill-over effect, they may be inhibiting the speech of a much broader segment of the society. The free and open speech protected by the Bill of Rights may be chilled for everyone. After Abscam, for example, people in government cannot help but wonder who it is they are dealing with. Communication may become more guarded and the free and open dialogue traditionally seen as necessary in high levels of government inhibited. Similar effects may occur in business and private life.

A major demand in totalitarian countries that undergo liberalization is frequently for the abolition of the secret police and secret police tactics. Fake documents, lies, subterfuge, infiltration, secret and intrusive surveillance, and reality creation are not generally associated with United States law enforcement. However we may be taking small, but steady steps toward the paranoia and suspiciousness that characterize many totalitarian countries. Even if these are unfounded, once they are set in motion and become part of the culture, they are not easily undone.

Soothsayers of doom are likely to become increasingly apparent as we approach 1984. The cry of wolf is easy to utter and hence to dismiss. Liberty is complex and multifaceted and in a context of democratic government there are forces and counter-forces. Double-edged swords are ever-present. Tactics which threaten liberties can also be used to protect them.

However, neither complexity, sophistry, nor the need for prudence in alarm-sounding should blind us from seeing the implications of recent undercover work for the redefinition and extension of government control. The issues raised by recent police undercover actions go far beyond whether a given Congressman was predisposed to take a bribe or the development of effective guidelines.

Such police actions are part of a process of the rationalization of crime control that began in the 19th century. Social control has gradually become more specialized and technical, and in some ways more penetrating and intrusive. The State's power to punish and to gather information has been extended deeper into the social fabric, though not necessarily in a violent way. We are seeing a shift in social control from direct coercion used after the fact, to anticipatory actions involving deception, manipulation, and planning. New technocratic agents of social control are replacing the rough and ready cowboys of an earlier era. They are a part of what French historian Michael Foucault refers to as the modern state's "subtle calculated technology of subjection."

Here undercover practices must take their place alongside of: New or improved data gathering techniques such as lasers, parabolic mikes and other bugs, wire taps, videotaping and still photography, remote camera systems, periscopic prisms, one way mirrors, various infrared, sensor, and tracking devices, truth serum, polygraphs, voice print and stress analysis, pen registers, ultra violet radiation, dog sniffing (dope dogs), and helicopter and satellite surveillance; new data processing techniques based on silicone computer chips which make possible the inexpensive storing, retrieval, and linkage of personal information that previously was not collected, or if collected, not kept, or if kept, not capable of being inexpensively brought together in seconds. To this must be added the increased prominence of

computers (with their attendant records) in everyday affairs, whether involving commerce, banking, telephone, medical, educational, employment, criminal justice, pay television, or even library transactions. The amount and variety of retrievable data available on individuals is continually increasing; the vast and continuing expansion of the relatively uncontrolled privately security industry (according to some estimates now three times the size of the public police force). This is staffed by thousands of former military, national security and domestic police agents schooled and experienced in the latest control techniques while working for government, but now much less subject to its control; and evolving techniques or behavior modification, manipulation and control including operant conditioning, pharmacology, genetic engineering, psychosurgery, and subliminal communication.

Taken in isolation and with appropriate safe-guards each of these may have appropriate uses and justifications. However, they become more problematic when seen in consort and as part of an emerging trend. Observers will differ as to whether they see in this an emerging totalitarian fortress, or benign tools for a society ravaged by crime and disorder. But regardless of how it is seen, it is clear that some of our traditional notions of social control are undergoing profound change. There is a need for careful analysis and public discussion of the complex issues involved. Because undercover practices can be so costly to other values, and have such potential for abuse and unintended consequences, they ought to be used only under the most limited and carefully specified and evaluated circumstances, and as tactics of last, rather than first resort.

TESTIMONY OF GARY MARX, PROFESSOR OF SOCIOLOGY, MASSACHUSETTS INSTITUTE OF TECHNOLOGY

Mr. MARX. Thank you, Mr. Chairman. I am very pleased to be here. I brought a lengthy statement which I will summarize.

In my statement I try and develop three broad areas. The first has to do with the problems that are associated with undercover police work. The second deals with the need to make some distinctions among types of undercover work; and related to that, some comments on the recent guidelines. The final section deals with some broad changes in social control.

Let me say a bit about each of these areas. I am talking about the problems, because I think it is important to be aware of the problems of undercover work, as well as the advantages. In testimony last March, you heard about a number of the positive aspects of undercover work, and in my remarks I have chosen to emphasize some of the negative.

In the case of problems, I have found it useful to approach this by looking at four groups that are involved. The first are the targets of the investigation, the second are informers, the third are police, and the fourth are third parties who may be damaged by these activities. I will say a bit about each of these.

In the case of the targets, they may be victims of trickery, coercion, or unrealistic temptations. In the case of trickery, for example, people may be led to believe that they are participating in an activity which is socially legitimate. The illegal aspects may be minimized. The illegal aspects may be hidden or disguised, so they are not made aware of the fact that law violations are going on. Or the weakened capacity of the target to judge right and wrong may be drawn upon; for example, by getting someone drunk.

The issue of temptation is a fascinating one. The basic point is: Are we dealing with people who are corrupt? Or are we asking the question: Is someone corruptible? And here there is a parallel to Job, I think, where God was seeking to test Job without any prior evidence that Job had done anything wrong.

Another Biblical parallel the message gets shifted to lead us into temptation, and deliver us to evil.

There are other problems involving targets, such as the invasions of privacy, damage to reputation, the potential for blackmail and harassment.

In the case of exploitation by informers, they are clearly the weakest link. What we see here is something relatively new in law enforcement, where informers are being delegated significant authority. Informers are put in a position to choose who it is that is going to be investigated. This becomes doubly troublesome when we deal with unwitting informers, with people who are not aware of the fact that they are part of a law enforcement operation.

A third problem area has to do with the great risks and the temptations to the police who are involved. There is a line from a novel from Kurt Vonnegut, where he says: we have to be careful about what we pretend to be, because we may become what we pretend to be.

When police are in undercover roles for long periods of time, removed from their normal occupational situation and from supervision, they may come to question the traditional restraints on police behavior.

In the case of damage to third parties, the issues are very troubling. There are ripple effects. Where there is any secret or covert action, it is hard to know where it will eventually go or who it will effect.

There was a case in Lakewood, Colo., that received some attention recently, where two young men learned of a police fencing front, They stole several cars and sold these to the front. They also at this time displayed a weapon that they had previously stolen. They then went, I think the following day, and stole another car, killing its owner. They again sold the car. They then committed another murder while stealing a car and again sold it to police.

Another problem involves the issue of the fence providing a market. People who tend to steal in neighborhoods near where their fences are. And to the extend that you have marginally effective thieves, the offer of a government-provided facility to purchase goods, may stimulate these people in their crimes.

Another area where there are major problems, has to do with our lack of knowledge in cost-benefit terms about the intended effects of these operations. Here I'm not talking about things like ABSCAM, but rather activities such as police fencing fronts or the decoy activities that are directed at a broader kind of audience or market.

All sorts of grandiose claims have been made about how finally we have something in law enforcement that works. I have reviewed the evidence and it is rather meager. One can certainly not conclude that there is an abundance of evidence that these activities decrease crime. In fact, under some conditions, one could even argue the opposite, that they may stimulate or amplify crime.

I will mention some of the ways that this can happen. They can generate a market for the purchase or sale of illegal goods and services. While the undercover activity is going on they may generate capital that can be used for other illegal activities.

There may be generation of the idea for a crime. There may be generation of a motive. There may be a provision of a scarce skill or resource without which the crime could not be carried out.

There may be coercion, intimidation or persuasion of a person not otherwise predisposed to create a crime.

Covert opportunity structure for illegal actions can be created. Some of these may be necessary to gain credibility in the role, while others will represent exploitation of the role. Corruption, bribes, blackmail, frames, fraud or the very crimes the action is directed against may ————————.

Finally, there is the possibility of stimulating a variety of crimes on the part of people who are not a target of the undercover investigation; for example, impersonating a police officer or vigilante-like assaults by people who don't know the undercover person is a police officer. There is also the issue of retaliatory violence against informers.

Questions regarding effectiveness are very complex. And unfortunately, there's not been adequate cooperation from the Justice Department in its sponsorship of research. Beyond a lack of funding, there are some restrictions that severely limit research, such as requiring that it be done 6 months after an operation is closed down.

The problems mentioned do not occur randomly. They tend to be associated with particular types of undercover operation. One of the problems with this whole area is that people take a polemical response. They either say: This undercover stuff is teriffic; or they say: It's terrible and we should ban it. Clearly, there is a need for a middle ground. To move toward that middle ground, it is important to make some distinctions.

In my testimony on page 31, there is a table which contrasts different types of undercover activity. To the extent that those things on the right side of the table are present, I think the tactic becomes more and more troubling.

The most troublesome situations are those undertaken at police initiative that involve random integrity testing; those that involve police playing or taking an active role where they initiate the crime as coconspirators, rather than appearing as victims; and those involving an artificial environment and the use of unwitting informers.

Let me turn to the guidelines. Public guidelines for sensitive law enforcement activities, such as those issued by the Justice Department, are important for a number of reasons. Yet the impact of guidelines depends very much on how they are implemented, and on their substance.

The general issue around implementation is whether the guidelines will be applied in a rigorous and serious way, or as if often the case in bureaucratic organizations, will come to be applied largely ritualistically, with acquiescence to whatever is asked for, within broad extremes.

A more specific issue involves the question of how apparent abuses, as in many of the Abscam cases, came to happen. The recent guidelines are said to make formal existing procedures. We were told in the hearings last March that Abscam was carefully supervised, that it was conducted in a way that was consistent with Bureau policy. If that is the case, it would appear to me that a number of the guidelines were violated; those involving informers, those involving a need to make clear the corrupt nature of the

activity, reasonable indication that the subject is engaging or has engaged in illegal activity of the type in question, and so on.

Now, to the extent that this is correct, one can ask: How did it happen? Is it that the FBI is relatively new to complex undercover operations, relative to the Drug Enforcement Administration or the Alcohol, Tobacco and Firearms Bureau? Were the guidelines not fully understood or known? Was there a weakness in supervision? Did the closeness of the Justice Department to the FBI, relative to other law enforcement agencies, lead to a less critical look at what was going on? Is it a case of the possibility of catching really big fish overwhelming the guidelines, as the costly investigation developed its own momentum? Is it a case where, because of the secrecy and temptations, even with good faith, guidelines could not be carried out very well?

Or one might conclude that Abscam was carried out consistent with the guidelines, as the testimony last March suggested. Yet this conclusion is even more troubling. If it is correct, then the substance of the guidelines is woefully inadequate.

One always needs a balance in a democratic society and the needs of law enforcement and liberty. Yet there is a decided tilt toward the latter here. The critic may see the guidelines as a way of gaining legitimacy for the most egregious of practicies, at a minor cost of listing possible dangers and restricting the discretion of local agents initiating and carrying out certain forms of undercover activity. However, these can always be carried out if approval is obtained.

This is a little like saying to a child that because poison can kill you, it should only be used when necessary, and if your parents approve your using it. Police are given the power to engage in felonies, to make untrue representations about third parties, to violate professional standards of confidentiality and privilege, to take actions where there is a significant risk of damage to innocent third parties. We need to know more specifically about under what conditions can this happen?

In terms of specific comments on the guidelines, there are areas where they should be strengthened and where additional information is needed. The most serious lack is the failure to specify the conditions governing the use of unwitting informers, middlemen and brokers who don't know they are part of a law enforcement operation.

Now, in many investigations, the accountability of such people is increased by "turning them." Their cooperation is gained by holding off on prosecution or sentencing. When that isn't done, I think their use is very problematic.

The Government may have incentive for using them because if an informer entraps someone in a case, that is grounds for dismissal. But if an unwitting informer entraps someone, then the government is in business. So, I think much more attention has to be given to the limits on the use of unwitting informers.

The second area has to do with the temporal dimensions of the activity. Is there any limit to how many times a given target can be approached or tempted? What if a person refuses the illegal opportunity the first time, or a second time? Should they be tempted again and again and again? What about situations where the

target is a diffuse group, as with thieves? How long should a false fencing operation continue to operate? Where the activity involves progressively greater rule violations, at what point should police intervene?

One strategy is to get the largest fish. This can operate to keep the undercover operation going as long as possible, even though damage at a lower level may, in fact, be done. There is an interesting conflict between the police goal of prevention, and apprehension. This points out the need for more research and thought.

The guidelines state that entrapment should be scrupuously avoided. Then, they give a definition of what entrapment is, which doesn't reflect the varying judicial perspectives on this. I think it should be broadened to indicate that due process may be denied, even if there is predisposition and guilt, when the behavior of the Government is sufficiently outrageous.

Another area in need of work has to do with the degree of certainty that is required to determine that a person is predisposed to the illegality in question and the means of validating this. Extreme care has to be taken to insure that the unscrupulous have not generated a pretext to make it appear that the conditions for authorizing undercover operations and opportunities exist, when in fact, they do not.

In some places, the concept of "dropping a dime" on someone can make a reactive police response appear to be proactive response.

I think a clear statement is needed of the kinds of damage to third parties that may occur, and of the government's procedures, if any, for redressing those.

Something is needed about records access and retention. What happens to the videotapes and bugs of opportunities for illegal activity created by government agents when no wrongdoing is discovered or no charges brought? Are these destroyed? Who has access to them?

I think the composition of the Undercover Operations Review Committee needs to be more clearly spelled out. How large is it? What specific types of people will serve on this committee? For how long? How broadly do the guidelines apply? Will the FBI refuse to participate in any joint undercover operations where the behavior of State, local or private police is not consistent with the guidelines?

There is a new phenomenon which some Federal law enforcement agencies prohibit. This involves the private financing of public police ventures. At the local level, this has involved factories paying much of the cost of having undercover police pose as workers in an effort to break up suspected drug activity. Some police fencing funds have been paid for by private sources, including insurance companies, businesses, and chambers of commerce. At the Federal level, an FBI investigation into the selling of pirated records and tapes received a substantial contribution from the record industry.

There is a need for public information on how widespread this practice is. One could, of course, welcome private cooperation. Yet if support may be welcomed in financially trouble times, other issues are raised. Just what is being bought with the private sector's contribution? Will the highest bidders be able to garner a

disproportionate share of public supported law enforcement because of the contribution they can offer?

If the money comes with no strings attached and is for an investigation consistent with an agency's priorities and one that it would have been likely to carry out anyway, there can be little problem. But to the extent that law enforcement priorities, discretion, tactics, confidential information or prosecutorial actions are affected, then the tactic must be closely looked at.

Because the use of undercover tactics has expanded so rapidly and because of their problematic aspects relative to more conventional tactics, shouldn't there be a periodic review, not only of the effectiveness of these particular guidelines, but of the undercover tactics as a whole?

In summary, let me say a bit about some broader implications of undercover work. I think that whatever their legal and ethical implications, whatever their short-term effects, things like Abscam and police-run fencing operations may be portends of a subtle and perhaps irreversible change in how social control in our society is carried out.

It was roughly a half a century ago that Secretary of War, Henry Stimpson, indignantly observed in response to proposed changes in national security practices, "Gentlemen do not read each other's mail."

In light of the invasions of privacy, we've come a long way in a short time. fifty years from now will observers find our wondering about the propriety of police agents trying to bribe congressmen, distributing pornographic film, and running fencing operations equally quaint?

FBI expenditures for undercover work have more than quadrupled in the last 3 years, going from $1 million to a requested $4.8 million for 1981. In recent years, millions of dollars of new Federal aid has gone to local police for undercover activities.

This represents a broad change in the nature of American social control. We are seeing a shift from some of the ideas that were central to the Anglo-American police tradition.

There are parallels to the modern corporation, which seeks not only to anticipate demand through market research, but to develop and manage that demand through advertising, solicitation, and more covert types of intervention. Secretly gathering information and facilitating crime, under controlled conditions, offers a degree of control over the demand for police services, hardly possible with traditional reactive practices.

Whenever a market is created, rather than being a response to citizen demands, there are particular dangers of exploitation and misuse. The alure and the power of undercover tactics may make them irresistible. Just as any society that has discovered alcohol has seen its use rapidly spread, once undercover tactics become legitimate and resources are available for them, their use is likely to spread to new areas and illegitimate uses.

One justification for such means is that they are used to obtain good ends. This is the classic means—end problem. The danger, of course, is there's no guarantee that the bad means won't be used for bad ends.

From current practices, we may not be far from activities such as the following: Rather than infiltrating ongoing criminal enterprises, or starting up their own pretend ones, police agents such as accounting specialists might infiltrate legitimate businesses, to be sure they are obeying the law, or would obey it if given a government-engendered chance not to.

In the private sector, husbands or wives or those considering marriage might hire attractive members of the opposite sex, to test their partner's fidelity.

Businesses might create false fronts, using undercover agents to involve their competitors in illegal actions, for which they would then be arrested. A rival's business could be sabotaged by infiltrating disruptive workers; or its public image damaged by taking false-front actions in its name.

In recent decades, undercover police activities such as COINTEL and the many local varieties clearly damaged the protected freedoms of political dissenters. I think there may be a spillover effect. These activities may be inhibiting the speech of a much broader segment of society. After Abscam, for example, people in government cannot help but wonder who it is they are dealing with. Communication may become more guarded, and the free and open dialog traditionally seen as necessary in high levels of government inhibited. Similar effects may occur in business and in private life.

It's interesting to look at the demands that are made in totalitarian countries that undergo liberalization. A frequent demand is for the abolition of the secret police and secret police tactics. Things like fake documents, lies, subterfuge, infiltration, secret and intrusive surveillance, and reality creation are not generally associated with U.S. law enforcement.

It's possible we are taking small but steady steps toward the paranoia and suspiciousness that characterize many totalitarian countries. Even if these are unfounded, once they are set in motion and become part of the culture, they are not easily undone.

Now, soothsayers of doom are likely to become increasingly apparent, as we approach the year 1984. It's easy to cry wolf and, because of that, it's easy to dismiss the cry of wolf.

Liberty is complex. It's multifaceted and, in a context of democratic government, there are forces and counterforces. Double-edged swords are ever present. Tactics which threaten liberties can also be used to protect them.

However, neither complexity, sophistry, nor the need for prudence in alarm-sounding should blind us from seeing the implications of recent undercover work for the redefinition and extension of government control. The issues raised by recent police undercover actions go far beyond whether a given congressman was predisposed to take a bribe, or the development of effective guidelines.

These police actions can be seen as a part of a process of the rationalization of crime control that began in the 19th century. Social controls are becoming more specialized, technical, penetrating, and intrusive.

The power of the State to punish and gather information is extended ever deeper into the social fabric, but not, in a violent way.

We are seeing a shift in social control away from directly coercing people, after the fact, to anticipatory actions involving deception, manipulation, and planning. New technocratic agents of social control are replacing the rough and ready cowboys of an earlier era. They are a part of what French historian Michael Foucault refers to as the modern state's "subtle calculated technology of subjection."

In conclusion, let me note that in this regard, recent undercover police practices have to take their place alongside of other developments in social control.

Things like new or improved data-gathering techniques, such as lasers, parabolic mikes, and other bugs, wire taps, videotaping and still photography, remote camera systems, periscopic prisms, one-way mirrors, various infrared sensor and tracking devices, truth serum, polygraphs, voice print and stress analysis, pen registers, ultraviolet radiation, sniffing as well as helicopter and satellite surveillance.

New data processing techniques, based on silicone computer chips, which make possible the inexpensive storing, retrieval, and linkage of personal information that previously was not collected; or if collected, not kept; or if kept, not capable of being inexpensively brought together in seconds.

To this must be added the increased prominence of computers in everyday affairs, whether involving commerce, banking, telephone, medical, educational, employment, criminal justice, pay television, or even library transactions. The amount and variety of retrievable data available on individuals is continually increasing. The vast and continuing expansion of the relatively uncontrolled private security industry, according to some estimates now three times the size of the public police force, is also a factor. This is staffed by thousands of former military, national security, and domestic police agents schooled and experienced in the latest control techniques while working for Government; but now much less subject to its control.

Evolving techniques of behavior modification, manipulation, and control, including operant conditioning, pharmacology, genetic engineering, psychosurgery, and subliminal communication are further examples.

Taken in isolation and with appropriate safeguards, each of these may have appropriate uses and justifications. However, they become more problematic when seen in consort, and as part of an emerging trend.

Observers will differ as to whether they see in this an emerging totalitarian fortress, or benign tools for a society ravaged by crime and disorder. But regardless of how it is seen, it is clear that some of our traditional notions of social control are undergoing profound change.

There is a need for careful analysis and public discussion of the complex issues involved. Because undercover practices can be so costly to other values, and have such potential for abuse and unintended consequences, they ought to be used only under the most limited and carefully specified and evaluated circumstances, and as tactics of last, rather than first, resort.

Thank you.

Mr. EDWARDS. Thank you very much, Professor Marx.

Before we have our questions, we will ask for the statement of Professor Chevigny.

PREPARED STATEMENT OF PAUL CHEVIGNY

My name is Paul Chevigny. I am Associate Professor of Law at New York University School of Law, concentrating in the field of evidence, and I have written on police practice, particularly as they relate to infiltration and the use of informers. I have studied such practices both by the FBI and the New York City Police over the past fifteen years.

You have asked me to testify about possible legislative remedies for abuses in federal undercover work. I want to say a few words about the Attorney General's gudielines of January 5, 1981 and earlier guidelines, as an introduction to my suggestions about legislation.

There is no doubt that the new undercover guidelines constitute a kind of reform. They recognize areas in which infiltration may present special problems: for example, political corruption or situations in which an informer wants to supply contraband to suspects. For such situations, as well as others, the guidelines do not leave discretion entirely in the hands of the FBI, but instead pull in others from the Justice Department to decide on the advisability of undercover operations.

Together with these real reforms, the guidelines have theoretical weaknesses, apart from the weakness in principle of the guidelines device itself, which I will come to in a moment. For example, in outlining the standards for permission for entrapment, the guidelines permit an opportunity for crime to be offered to a person even when there is no existing reason to suppose that the person tempted was previously involved in crime. The guidelines allow approval for undercover work to run for the extraordinarily long period of six months without renewal. Finally, the guidelines seem to me so complex as to be difficult if not impossible to administer. The number of judgments to be made—by people unaccustomed to such restrictions, and usually under pressure to make a quick decision—in deciding whether a matter ought to be referred to headquarters and a Review Committee, seem to me to invite a host of possible errors of judgment in invoking the provisions of the guidelines.

These principal weaknesses in the internal structure of the guidelines point toward overall problems inherent in the use of any standards entirely internal to the Justice Department, and not controlled by legislation—that is of "guidelines". The judgments essential to action under the guidelines are made entirely within the Justice Department. As the occasion requires, the terms in the guidelines can be interpreted expansively or narrowly. And if, even within the very flexible definition of terms, some local or national officer should make a gross error of judgment, there is absolutely no sanction for the abuse. The guidelines, in the last paragraph, put all discretion in the Justice Department; there isn't even the promise of disciplinary action against an agent or another who violates the guidelines. Finally, if in fact the flexibility of terms should not prove to be sufficient to give federal agents the discretion the Justice Department thinks they need, the guidelines can be changed overnight. Some of them have been changed repeatedly over the past few years.

It has been my experience that these characteristics of gudielines lead to contempt for them on the part of people who are subject to them. For example, in 1973, the New York City Police Department established "guidelines" for infiltration and undercover work by its officers, yet there is evidence that those guidelines made little or no difference in the conduct of investigations. I refer you to the opinion of Justice McQuillan in *People* v. *Collier*, 376 N.Y.S. 2d 954 (1975), where he castigates the New York City Police for failing to follow the guidelines. I have negotiated guidelines for other areas of police work, with similar results. Such guidelines may sometimes work, with similar results. Such guidelines may sometimes work for a very short time, while everyone has them in his mind, but soon they fall into disuse. Regulations have to have teeth, either from legislation or a court order.

In a similar vein, but less conclusively, I had an experience with these federal FBI guidelines. The package of guidelines for me sent from the office of this Committee was lost in the mail for a time, these past two weeks. I called the New York office of the FBI. That office said they had no copy. Two assistant U.S. Attorneys I spoke to, who work on criminal matters, were completely unfamiliar with any such guidelines, and could not find a copy.

My point is that guidelines, because they are discretionary in application, carry no sanctions, and may be changed, are likely to be mere show-pieces, not taken seriously or enforced. The Justice Department may assure you as much as they like that these things are serious, but that will not change the situation. The guidelines

are still alterable at will and without bite. My conclusion is that legislative action is essential, and I would like to pass to what action is appropriate.

Before stating my recommendations, I would like to step back a moment from the technicalities of guidelines. An undercover operation, with its attendant infiltration into the associations of its targets, is potentially an enormous intrusion into private affairs. The guidelines themselves point this up, by specifying no less than twelve "sensitive" methods of infiltration. And the guidelines blandly allow these for six months at a shot, without further intervention. Think of the number of meetings, the number of parties, the number of conversations that would commonly be monitored in a period of six months. It is in fact an intrusion more complete than any that is possible either by a search or eavesdropping, both devices which are ringed round with protections for privacy.

The ability to establish an undercover operation and select persons for temptation into crime, moreover, puts into the hands of the government an enormous power: to decide who shall be tempted. It is a power which can be used to weaken or eliminate an opposition.

Finally, the ability to set up an entire criminal operation, including a supply of contraband and even an apparatus for sale, multiplies the police power still more. If the government stands on the supply side of a criminal operation, and starts up a criminal business, in many cases a question arises whether any legitimate state interest is being served. Are criminals being detected or created? When this power is brigaded with the power to select who shall be tempted, the potenital for absue by the ambitious and unprincipled is clear.

The most familiar device for the control of discretion by the police where privacy is threatened is that of a warrant. It is infinitely more simple than these "guidelines" which are so elaborate that perhaps no one will be able to follow them. It replaces them with a neutral magistrate who may take all of the factors in the guidelines into account. He can call a halt to an ambitious program when it in fact serves no legitimate governmental function in detecting existing criminals, simply by refusing to sign the warrant. Such a warrant should be required for the use of informers, for offering an opportunity for crime, and for undercover operations. Of course, there will be emergencies, when there is no time to apply for a warrant, and in those cases the agents should be permitted to go to the magistrate after the fact, explain the circumstances, and apply for a continued warrant. Such devices exist in current law for search warrants and are provided for in these guidelines.

I know that the warrant proposal is anathema to the Justice Department. Of course it is, because it is the only one that offers even a chance of real control over police discretion.

I want to emphasize here what sort of a warrant requirement I am talking about. It is not a very strong one. I do not say that the stringent standard we call "probable cause" should be adhered to by the magistrate in issuing the warrant. I know that agents may often have no more than an informed suspicion as the basis for their application, and I know that magistrates will usually give them the benefit of the doubt and grant the request. I am not concerned so much what standard is used by the magistrate. The important things, it seems to me, are that the officers should be obliged by law (not "guidelines") to state in writing to neutral persons their reasons for suspicion, and then that they should return at frequent intervals, no more than forty-five days, summarize what they have learned, and explain why they ought to be allowed to go on. These requirements have the extra benefit of recording the work of agents and especially informers as it goes along, so that testimony cannot be tailored in the light of hindsight. Yet these are less than what we impose as requirements for wiretaps, a less intrusive device than undercover work, and they are the irreducible minimum to protect us from the dangers of government infiltration and manipulation of our lives.

In closing, I might mention that although I think a system of warrants, renewable at short intervals, is essential, failing that I would not mind seeing these new guidelines, slightly amended to put them into legislative form, enacted into law. That would at least make them mandatory for law-enforcement personnel, and would prevent them being changed overnight. I assume that the Justice Department's representatives would vigorously oppose any such enactment. That fact only reinforces for me that they do not take their own guidelines very seriously. If they did, they ought to be happy to see them be made the law of the land. If they wish the strictures on their agents to be left as "guidelines", outside the control of Congress, that can only mean that they want to be free to ignore or change the guidelines.

TESTIMONY OF PAUL CHEVIGNY, PROFESSOR OF LAW, NEW YORK UNIVERSITY

Mr. CHEVIGNY. Thank you very much.

I have had a lot of experience with these problems, but because I was coming here to speak to a legislative body, and I knew that you had received a great deal of testimony concerning the empirical problem and you were experienced with it, I thought that I would shorten my testimony, in respect to the nature of the problem, and talk about what I see as the simplest legislative solution.

I did that primarily in my testimony. I will come to that in a moment.

I am glad I did, because Professor Marx has given us so much information on the empirical aspects of the problem.

I want to say a couple of words about these guidelines, these undercover guidelines—recent undercover guidelines—and about the use of guidelines generally by law enforcement.

These guidelines are a reform in some respects. I think the chief respect in which they are a reform is that they require, in certain cases, that the FBI reach outside the FBI to obtain approval for certain types of surveillance, at least in sensitive areas. That's an important concept.

Nevertheless, there are weaknesses, structural weaknesses in them.

One principal weakness simply surrounds the area of deciding when an issue is sensitive, and when it isn't. I mean, that's for the local person to decide—when it ought to go to Washington, and so on, in general.

And that leads to another problem: that the guidelines are complex. They are difficult to read. And, I venture to say, very difficult to administer.

But another point about them that's interesting is that, in effect, they summarize for you, as Congresspeople, all the problems. When they say "sensitive," they're not kidding. They emphasize for you all the empirical problems that have come up in the last few years, in the administration of law, by means of undercover operations.

That word "sensitive" is a very euphemistic term for the kinds of practices they describe. They describe practices which have come under serious question by the courts, by this body, and by other congressional bodies in the last few years.

All they do is establish a group of internal guidelines for them.

And, furthermore, they permit an investigation conducted in accordance with these guidelines, in those sensitive areas—which you know to be sensitive areas—to be conducted for 6 months, without any further oversight.

Now, that characteristic of the guidelines points to the empirical problem that's a legislative problem. I want to say to you now why it isn't a guidelines problem, why it's not a law enforcement problem.

It's very simple. These guidelines are not a law. And they say so at the end. And it's no good saying: "Well, law enforcement need flexibility." The courts are perfectly well able to give flexibility in enforcement of law. That's one of the things the courts are for.

But the guidelines can be changed overnight. They have been changed repeatedly. And, furthermore, they are not even enforceable. There's no sanctions for them. If not followed—the failure to follow them doesn't give anybody any rights, at all.

So, that means if they're ignored, they're ignored. That's too bad. Somebody made a mistake. Pity.

Because they are not a law, and because they have the characteristics that I mentioned, law enforcement people tend not to follow them. They tend to be ignored. If not in the short run, at least in the long run.

There were guidelines in New York City for undercover work in political cases, that were established in 1973. They were ignored. There's a case that I cite for you in the testimony. I tell a story in this testimony about my attempt to find a copy of these guidelines in New York. The FBI office in New York doesn't have one. Two U.S. attorneys—assistant U.S. attorneys—didn't know what I was talking about. They never heard of them.

I find in that—I detect in that a contempt for law enforcement guidelines, which I've always found in district attorneys, and U.S. attorneys, and policemen with respect to guidelines.

We need a law.

Now, let's talk a little bit about it.

The only kind of intrusion that we have experience, within our legal system, with the control of—is search and seizure—invasions of privacy under the fourth amendment.

We require—our law requires warrants for searches and warrants for wiretaps. Searches and wiretaps fall, if you like, on either side of the kind of intrusion we're talking about here, which is an infiltration by a person. Not an eavesdropper, not a person who comes and kicks in your door; but somebody who infiltrates himself into your life or your organization.

As to that, our law—our constitutional law and our legislation—at present requires no warrant.

All I've come here to say to you is that a warrant is a relatively simple device. We have hundreds of years of experience with it. And a warrant—a legislative provision for a warrant for the use of the offering of an opportunity for crime, and the conduct of an undercover agent, would be a relatively simple legislative device.

The need for flexibility could be explained to the magistrate who administers the warrant.

Furthermore, I want to give a couple of details about the warrant.

It's been objected to on the grounds, for example, that the use of warrants is too rigid. That they require probable cause, which is a high standard.

I'm not asking for a high standard, because an undercover operation is often something which is used in order to try to obtain the kind of probable cause—that you would need to get a search warrant. Obviously, you need a lower standard for undercover operations.

Let it be reasonable suspicion.

I'm not terribly concerned about the standard. I'm concerned about the control that the judiciary should have, and that the legislature should have, with respect to the actions of law enforcement people.

It may be said, also, that emergency situations will arise in which an opportunity will arise, on the street, or in which, suddenly, a possibility of solving a criminal--the investigation of a criminal conspiracy will jump out of the situation. And it's an emergency.

Well, obviously, provisions can be made for emergencies.

Provisions are made for emergencies in current warrant law, that, for example, searches can be made under emergency conditions. And these guidelines provide for emergency conditions—when the guidelines can't be complied with.

There's nothing miraculous about legal provisions to cover emergencies.

Now that I've said that, I want to go back a step and talk about why I think this is so important.

I think the Abscam situation emphasized, for most of us, the fact that the problem isn't only one of legal entrapment, in which the law says, the definition that the law has come up with, in the last 50 years or so—is one of whether the person was predisposed to commit the crime.

And it may be that all of those cases—when they go up on appeal, it will be determined that some of the persons involved were predisposed, by some definition and, therefore, there is no entrapment.

That's not going to solve the problem of such opportunities for crime, for this Congress. The reason is that persons were selected—persons in political life were selected for temptation.

On what basis were they selected? Why did the law enforcement people decide that they wanted these people?

I don't know why.

Now, there may be an excellent reason. I venture to say there is an excellent reason. But the fact that we don't know what the reason is suggests that there may not be an excellent reason, and that, in other cases, it would not be at all difficult to construct a case in which particular——

Mr. EDWARDS. Professor Chevigny——

Mr. HYDE. May I ask you a question on that point?

I think your point is perfectly valid. But when you want a public exposition of the reasons why there was a reasonable suspicion, aren't you indicating somebody on hearsay, and other material which might never be admissible in court? But the word is that Congressman so-and-so is on the take, because somebody else's brother-in-law—and you don't want that.

The basis which would be—probably be inadmissible as evidence, but still provide enough suspicion to say: "Let's take a look at this guy."

Isn't that the problem?

Mr. CHEVIGNY. You mean the problem with the warrant system is that information would become public?

Mr. HYDE. Yes.

Mr. CHEVIGNY. The application for a warrant, prior to the time the warrant is executed, is ordinarily not public. It's usually sealed, for very good reasons; the targets want to find out about it, if it's public. So, if it isn't sealed, it doesn't work. There's no problem with sealing it.

There's a problem that the law enforcement people raise, about the confidence of the person who gives information. Are we going to expose him to possibly being killed?

The Supreme Court says that, for search warrants, the name of the informant doesn't have to be revealed necessarily, so long as a sworn affidavit can be supplied concerning the type of information he's given.

Now that, in itself, is something that is difficult to apply, and defense attorneys object to it. But let's take it on its face. The name of the informant doesn't have to be given for that very reason.

In other words, in search warrants, the Supreme Court and the Congress thought of that problem. They said: "OK. Let's not give the name. Let's describe the nature of the information."

Mr. HYDE. But would you support, then, a confidentiality on the basis of reasonable suspicion?

My point being that prejudices the defendant enormously to have not only what actually happened, but the basis for the "reasonable suspicion," on his back.

Mr. CHEVIGNY. I would support such confidentiality until the time that an arrest is made. And if, in fact, the problem goes away because the person resists the temptation, then I would not be opposed to continuing the confidentiality, with the possible proviso that under a Freedom of Information Act request or something, that the victim may someday find out whether an inquiry had been made against him.

Mr. HYDE. I'm thinking of public opinion that gets formed: Congressman A was arrested today, and so on, and so forth. The FBI spokesman said that "we had reasonable suspicion, because other people had told us he had demanded money to perform this function."

I'm just saying, you're putting a lot of information in there which is going to be a mosaic of the credibility and the integrity of this person, that might never be admissible; and add to his burden.

Mr. CHEVIGNY. That happened in the Abscam case, anyway; in the sense that, at the time they were arrested, the public was given some intimation as to the reasons for it. I don't know that it's entirely possible to control that.

Mr. HYDE. You want that public, though?

Mr. CHEVIGNY. If there's any way to keep it secret until the time of trial, I wouldn't necessarily be opposed to that.

But I'm not sure there is any way to prevent persons from talking about it, between the time of arrest and trial. At least, if you want to protect persons of whom an inquiry is made through investigative means, and who, in fact, do nothing wrong, this confidentiality within the warrant system seems to me to be essential. I'm all for that.

My point is, I don't think that is difficult to do. We have experience with protecting the confidentiality of the sources of warrants.

Mr. SENSENBRENNER. Would the gentleman yield?

Mr. HYDE. Just one more question. Do you see some value in the periodic testing of a group of people whose vulnerability or susceptibility or accessibility to such criminal acts is high? Let's say a bank teller who handles a lot of cash particularly, or cashier at

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racetracks or things. Do you see some therapeutic value to having them know that they're being tested occasionally?

Mr. MARX. First, it makes a difference whether or not people are told that such tests will be a part of the conditions of employment. I think when they're not told, it is inappropriate to use the tactic.

Mr. HYDE. I see great therapeutic consequences from Abscam, however, but——

Mr. MARX. I think it depends on your theory of crime causation. Why do people break rules? And if people are motivated to break rules, then the kind of test you're proposing may simply make them more clever. Maybe you'll deter some marginal people. I think there's always that question with any innovation in law enforcement. Does it simply up the ante a bit?

Mr. CHEVIGNY. I don't necessarily disagree with you about the therapeutic effect of Abscam, Congressman. But it would have had the same deterrent effect if a warrant system had been used. If you passed a law providing for an undercover warrant, I don't have any reason to think that a judge would deny it.

Mr. SENSENBRENNER. Would the gentleman from Illinois yield?

Mr. HYDE. Yes.

Mr. SENSENBRENNER. Building on that particular statement——

Mr. CHEVIGNY. Yes, sir.

Mr. SENSENBRENNER. I seem to recall that most of the details of the Abscan operation were leaked to the press before actual arrests took place. Don't you think that if there was a warrant system, the individuals who were arrested would be tried in the press to an even greater extent than they were before the case was even presented to a grand jury for indictment and trial took place?

Mr. CHEVIGNY. I don't see why. I mean, the risks ought to be about the same. The risks are always rather serious in our society. I think judges, especially Federal judges, are among the least likely people to do that. And if the record's been sealed, I never thought of this before, but if the records could be sealed under a court order, then the violation of that court order would be a contempt.

Whereas now, if it's just done by the law enforcement people, if somebody violates the rules and lets the cat out of the bag, what's going to happen? He's going to be disciplined, maybe, if the people feel strongly about it.

Mr. SENSENBRENNER. But the same sources in the Justice Department who seem to leak the gorey details of the Abscam scandal to the press also would have known of the existence of a warrant. So, the fact that the warrant was extant would have to be a part of those processory reports at the time the Abscam scandle broke. Would that not have further prejudiced a dissent by any Member of Congress who was caught in this net?

Mr. CHEVIGNY. It would have prejudiced it the same way in the sense they would have known there was an investigation going on. My point is, if you had a warrant provision and the judge forbade the persons involved in seeking the warrant to talk about it, then it would be contempt of court to talk about it, and the court would have some control over the leak of evidence. The present way, they don't have any control.

Mr. SENSENBRENNER. Except to cite someone for contempt, you've got to know who did it, and the former Attorney General, Mr.

Civiletti, had a rather extensive in-house investigation involving the U.S. attorney from Connecticut, to try and find out who did the leaking to the press, and there, as I recall, there was no real conclusive evidence linking a name or names with the leak.

So, who would the court cite for contempt under that circumstance?

Mr. CHEVIGNY. Sure, it may become an insoluble problem, but it seems to me it's the same problem in respect to the warrant. It's the same problem with or without a warrant provision, if you follow me. In other words, if somebody leaks the fact that an investigation is going on, or that a warrant has been sought, and you can't find out who it is, it seems to me that the damage to the reputation of the person you investigated is the same. Don't get me wrong, that I don't think it's terrible. I do think it's terrible, but I don't think that's a criticism of the warrant, of the idea of a warrant, if you follow me.

Mr. EDWARDS. Well, also, if the gentleman would yield. In a wiretap case, where a warrant is required, I don't think that we have been plagued with an epidemic of leaks so that reputations are damaged or the targeted person is advised or there are rumors about the warrant being issued, are there? I've never heard of any.

Mr. CHEVIGNY. There are a couple of cases where somebody was paid a bribe to tell, and did, at the local level. It has happened. Nothing works perfectly. I mean, there's no protection which is absolutely immune to corruption. There's no protection in law enforcement and there's no protection in—well, not only Congress, but I hasten to say, there's none in the judiciary. We have to do the things which seem as though they will give us the maximum possible coverage, it seems to me.

Mr. EDWARDS. Thank you. The gentlemen from Illinois, Mr. Hyde.

Mr. HYDE. Well, I want to compliment both witnesses. I think they made a great contribution to our understanding of the myriad of problems involved in undercover activities. I detect, from Professor Marx, a real distaste for undercover activities. And he mentioned psychosurgery as one of the tactics. I don't recall that the police or FBI uses psychosurgery too often. But it certainly is a possibility. We live in an enormously complex society. We are changing our traditional approaches to law enforcement. But society has changed rapidly, and it's much more sophisticated. We deal with the old, simple idea that, if we do away with poverty, we'll do away with crime. That doesn't answer computer crime and white collar crime and some of the very sophisticated examples of espionage that we've had. Narcotics cases involve classic money. And while undercover operations may be distasteful, I've talked to some people who say, we'll never lick that crime because of the amounts of money involved and the corruption of police officials. How many people have had a hundred thousand, two hundred thousand, five hundred thousand dollars put on the table in front of them and said, touch it and feel it. So, the police have to be sophisticated, too, if they are to maintain the balance that we all want. And I think of the definition of Woodrow Wilson at the Paris Peach Conference that someone portrayed that he was a virgin in a bawdy house yelling for a glass of lemonade. We can't have our police in a

similar situation. Meaning the FBI and the CIA and others in a very sophisticated world, where these crimes are not simple in their effect on society, if they're big enough. They can be profound.

So, it's a problem. My own solution is get the best guildlines you can, the fairest. But in the last analysis, you're going to need people to administer them and to implement sensitivity, judgment and perspective. That's true in just about everything in government.

Political dissenters, some Communist may be just a Marxist theoretician who is a dissenter. Somebody else might have much more activist motives in mind. And who's going to make that judgment? Do we treat them alike? And what are reasonable suspicions? You said police might infiltrate legitimate businesses. It's my experience that the police have such limited funds, that sometimes you need to build a fire under them to look at something that really ought to be looked at. The FBI, in particular, has budget problems of serious dimensions and there are areas I wish they'd get into. And I haven't been successful in getting any enthusiasm for legislation.

So, there are two sides to that, too. Professor Marx, would you say that undercover activities are just so inherently dangerous, they ought to be shelved by the FBI?

Mr. MARX. No, I would not say that. I think they have to be carefully supervised. I think distinctions have to be made between types of undercover activities. I think they should be tactics, really, of last resort. I think before using them, one should ask the question: is there an alternative way of getting this information? Is getting this information worth the risks that, in fact, are there? And a very important question which has not been addressed is: Does the tactic work? Is it, in fact, effective?

Even if you held apart all of the civil libertarian concerns, I think there's a cost effective, pragmatic question. Is this a good way to go about law enforcement? It would be hard to do a broad cost analysis of it. Anti-fencing operations for example, may have a stimulative effect. Where police pose as fences and they run these operations for 6 months, an enormous amount of crime may be generated as a result of that activity. Then, you have expenses of renting the store or paying the salary of the undercover people who do it. Then, you recover a lot of stolen property. You have to balance out how much crime was stimulated by your being there, offering that opportunity, and what effect would then have been if the resources were used in some other way?

Mr. MARX. It's fairly hard to measure deterrence. You can look at crime rates, in a similar situation and see what happens. But measuring crimes that weren't committed because of a fear of detection and prosecution is hard to measure. Using before and after measures a deterrent effect has not been found.

Mr. HYDE. What about Operation Lobster?

Mr. MARX. I think there's not been sufficient data on that to reach any informed judgments. After the initial activity, it did go down. But we don't know if it was displaced. It might have gone down in the New England area. Did it go up in the New York area or in the Midwest? Displacement is a very, very big issue. If you stop people——

Mr. HYDE. You've got a catch 22 situation then. If the rate goes down, you say it was displaced or it might have been displaced. The former Assistant Attorney General said that the rate of hijacking decreased two or three per day to only one in the 6 months following the arrest. But you say there may have been displacement.

Mr. MARX. What happened during those 6 months; did hijacking increase during the period when Operation Lobster was in effect and people suddenly had a ready market? Congressman Hyde, let me respond to a couple of earlier comments that you made. In talking about psychosurgery, I wasn't suggesting that it was literally a police tactic. I was trying to say that how we control people in our society is a general phenomenon. At an abstract level what the FBI or police or private detectives do, can be seen as equivalent to what doctors and teachers are doing. And control, generally in our society, may be shifting in terms of becoming more intrusive, precise and scientific. As far as society changing, yes, it's changing. But it seems to me that we don't have to simply sit back and watch it change. That we have a moral responsibility to try and guide that change and to structure it as best we can.

Mr. HYDE. Well, you've been very generous with time. I did find both of your presentations fascinating and well worth studying. I don't find an omnipresent police presence stultifying crime in this country. I think the Chief Justice had a few points the other day which were perhaps in the other direction, but the dangers are there. I thank the Chairman.

The subcommittee has direction and obligation to examine all of the activities of the FBI. That's our job. Certainly, that includes the guidelines. Like in years past, we examined with great care the domestic security activities of the FBI and with them, in a very friendly fashion, worked out where they developed guidelines in cooperation with Attorney General Levi, so that they were able to reduce their caseload from several hundred thousand down to fewer than one hundred. There is no complaint from the FBI or Department of Justice that they're getting out of that type of investigation. It wasn't one of the best things they'd ever done, especially as Mr. Hyde points out, they have very few agents now compared to what they really feel they need. They have fewer than 8,000 agents to cover the 50 States. And that's a lot of responsibility.

But the guidelines are there and it's our job to examine them. It's our job to see how well they're working and to suggest improvements, if they need improvements. And certainly, Professor Chevigny's point that 6 months is a long time without checking, that is a long time. And internal security guidelines, they must be reviewed, I believe, by preliminary investigation, after 30 days. This is all internal. But 6 months is a long time. Professor Chevigny, you have first-hand experience because of your suit brought against the New York City Police Department, special services division.

Mr. CHEVIGNY. Yes, sir.

Mr. EDWARDS. You were able to get a settlement for your clients which creates a control mechanism over the use of undercover operations. The court imposed this mechanism on the New York City Police Department, isn't that correct?

Mr. CHEVIGNY. Yes, sir.

Mr. EDWARDS. Just like a court could impose a mechanism on the FBI guidelines, if the court found that they were legally required, is that correct?

Mr. CHEVIGNY. Yes.

Mr. EDWARDS. How do the mechanisms established in your case against the New York police differ from those provided in the FBI guidelines?

Mr. CHEVIGNY. Well, in detail, as guidelines, they differ in the sense that the New York City court order deals with undercover operations in one of the sensitive areas, you might say, which is to say political cases. That is, cases of persons who are exercising their First Amendment rights. They may also be committing crimes, of course. That presents the case in which the police think there is a mixed bag of crime and political expressions. In that case they're supposed to apply to this authority that's been established, two policemen and a civilian, for approval to continue such an investigation. Now, as guidelines, those were merely guidelines. The difference is that there is a court order in New York. Here, obviously, you don't have the power to impose a court order because you're not a court. You do have the power to impose a law. Although it is not as good as a law. A court order is better than guidelines because it has teeth. It can't be changed at will. And a violation is contempt of the court. But there isn't such a case pending against the FBI so far as I know.

Mr. HYDE. In Chicago. There's one in Chicago where a settlement was reached similar to yours. I don't know the details of it.

Mr. CHEVIGNY. That's a police case, though, I believe.

Mr. HYDE. I think it's the FBI. The FBI was involved in it.

Mr. CHEVIGNY. You may be right. I'll look into it and try to get—maybe the FBI can help us on it. In any case, if history had been different, there might have been such a court order. I feel some teeth have to be given to these guidelines. I just want to say, I'm not opposed to all police undercover work; emotionally, for me, that's really water under the bridge. We've passed that point in history. But I do agree with Mr. Marx as strongly as I can, that we cannot just let it go on at the discretion or even subject to guidelines of law enforcement people. I think essentially that society has to have control over it. Traditionally, we have done that through judges. I don't see as a result there should be any less undercover work. I just think that the choices ought to be made by people like you, in a position like you, as to whether it would be done. That's all.

Mr. HYDE. I agree completely with you. You can't leave the autonomy of that to—I don't like one agency being the investigator, the prosecutor, the judge, the jury and the embalmer and all that. Somebody from the outside should look over their shoulder from a more objective perspective.

What's the matter with having an FBI informant join an organization that occasionally claims credit for planting bombs here and there? The FALN or, you know, everytime a building goes up, you get the phone calls from Puerto Rican nationalists who have said what they're going to do. What's the matter with having somebody join that?

I mean, a newspaperman could do it and win a Pulitzer Prize. Why not have an FBI man just to go to the meetings and make a report?

Mr. CHEVIGNY. I'm all for that.

Mr. HYDE. That isn't spying on civilians.

Mr. CHEVIGNY. I'm not necessarily opposed to surveillance on civilians in cases where it's justified; I just think a neutral person ought to decide whether it's justifed. In the Puerto Rican cause, one of the things that happened—I can't swear to this—but the evidence that I have indicates that the police did join Puerto Rican organizations. They didn't join the FLAN. They couldn't find it for a long time. So, they joined all the Puerto Rican organizations. If that be necessary and a judge says, OK, there's no other way, then in an isolated case, maybe you would have to do that. But somebody's got to make a neutral decision. I don't think that the policeman should have the power to should say, oh, my God, the papers are on our backs. We've got to do something about it. Go down on the lower east side and do something about it, words to that effect.

All kinds of stuff may get pulled in and surveillance may go on for a year.

Mr. HYDE. You would have the judge—OK. Supposing if they have a member who is Puerto Rican and of the FBI, and who would be accepted in some of these organizations before they could join a Puerto Rican political study group, that might lead them to inform with the FALN. You'd have a judge OK that?

Mr. CHEVIGNY. Yes. I think they ought to have a little something to go on to indicate which ones are merely political and which ones have some tradition of violence. Otherwise, it's the same thing as joining all the political organizations in town. But I don't think a very high standard ought to be required, because if you raise it to anything approaching possible cause, then you're making it too hard.

Mr. HYDE. Thank you.

Mr. EDWARDS. If the gentleman will yield. The warrant is pie in the sky, especially under present circumstances, with the climate that is in this country. So we are going to ask you, as expert witnesses and other witnesses, what can be done to improve the present situation without going as far as a warrant.

Mr. MARX. Well, I think with respect to the weaknesses in the guidelines that I noted, if we are going to have guidelines as the main supervisory principle, then the guidelines have to address some of these other issues that I mentioned. The question of the unwitting informer, questions of the damage to third parties, questions of how long you let the thing go on, are central. And I think by making distinctions between types of undercover activity, you may have rather different standards.

For example, it seems to me you need a different standard where you have a courageous FBI person pretending to open a garbage collection business in the hopes of being the victim of extortion, from what would be needed to infiltrate a respectable business in search of wrongdoing.

Mr. EDWARDS. You suggest that at least the undercover operation review committee that is established in the guidelines should be

beefed up, so that it would have more responsibility to look into what the plans are and how things are going, is that correct?

Mr. MARX. Yes, and to more closely relate standards to the type of operation.

Mr. EDWARDS. Mr. Lungren, it's a pleasure to have you aboard.

Mr. LUNGREN. Thank you, Mr. Chairman. Unfortunately, I had another meeting that, as they say, took precedence, and as a result, I wasn't able to hear in person the testimony. I do intend to look at it and study it and unfortunately, I don't think I'm prepared at this time to ask any questions.

Mr. EDWARDS. Thank you.

Mr. CHEVIGNY. I'd like to say a word about the pie in the sky, if I may, Congressman. I hope you're wrong. I recognize you may be right, but my experience of life tells me to hope that you're wrong. But if you're not wrong, 6 months is way too long to intrude on people's lives. The other thing is, there ought to be some kind of post-oversight set up by this body. I know that when the investigations were done by the FBI, there were ways of doing it so that there weren't intrusions on privacy.

For example, files would be selected at random, names could be blanked out and those files could be read to determine what happened in those cases without intruding on the privacy of the persons. These are pretty awkward ways on checking on whether the guidelines are being complied with and they're expensive. But they've been done in connection with the FBI as part of an investigation. They could be done by this body. If you think that's feasible, that would be a lot better than nothing. But I really think that a warrant is so simple and we have so much experience with it, that it's essential.

Mr. EDWARDS. I'm sure that there would be no objection by any member of the committee that we pursue our oversight in the traditional way, through the General Accounting Office, which was the agency that we used in the audit of domestic security cases. Confidentiality of investigative files is insured. And I think that's the way we will continue, because we have a rather large obligation in this particular area.

We have not been able to get even an estimate of the damage to innocent people that might have been done in the country as a result of the undercover operations to date. In your testimony, Professor Marx, you mentioned many, many billions of dollars in lawsuits as a result of Operation Front-load, where the civilian agent of the FBI issued all of the performance bonds illegally and got the insurance companies into the trouble. And in my home town of San Jose, Calif., there's a guy that thought he was getting a loan to buy the San Jose Earthquakes, a soccer team, from someone involved in an undercover operation. It resulted in him losing his wife, his house, and his job. He had counted on a rich heir to put up the money and, of course, the heir didn't exist. How are you going to keep control of these agents, these middlemen, purveyors, who don't know they're working for the FBI or the police organization?

Mr. MARX. My sense is you can't keep control of them and they probably should not be used. Where the guidelines and the restrictions cannot be made clear to a person, then I think it's holding

matches to dynamite to use such people. They run a number on everyone. They increase the possibility of all sorts of suits against the Government. They can do damage to third parties. It violates some basic notions to set people—whose profession is deceit—loose in the name of government and law when they, in fact, don't know that they are a part of a law enforcement operation. Unwitting informers present major problems. They should be used sparingly, if at all. I think as you move from having police play the undercover role to civilian informers to unwitting informers, things become evermore problematic.

The issue really is even in the case of witting informers supervision. Informers may be in a position to deceive police. One reform is to have more than one agent involved in supervision of informers. Whenever there's a meeting with the informer or suspects, the agent should take notes. This forms part of the record to determine that the person was predisposed and that you really are dealing with people engaged in serious criminal activities. Such a process does not appear to have been followed in many of the Abscam cases.

In one of the Abscam cases, an unwitting informer was told that he could earn $6 million by helping Arab businessmen invest their money and "make friends in high places." Now, with apologies to Congressman Hyde. I like lemonade, but if somebody offered me $6 million to do something that was questionable, I'd like to think I'd do the right thing. But, the temptation is certainly there.

Mr. HYDE. If I may, there are a couple of rejoinders to that. You quoted Vonnegut as saying we must be careful who we pretend to be because we tend to become that person. I'm told there was an actor McGlynn years ago who played Lincoln. He started to wear Lincoln's clothes off the stage and it was said that he wouldn't be satisfied until he got assassinated. Didn't you give the FBI a tremendous inprimatur to Abscam when you said God tested Job? If God did it, why can't the FBI do it?

Mr. MARX. Yes.

Mr. HYDE. That's all.

Mr. EDWARDS. Mr. Kastenmeier?

Mr. KASTENMEIER. I have no questions.

Mr. EDWARDS. Mr. Lungren?

Mr. LUNGREN. Nothing.

Mr. EDWARDS. Counsel?

Ms. COOPER. Mr. Chevigny, I'd like to clarify the difference between the role that the magistrate or a judge can play in this process versus the role that is assigned to the approving authorities under the guidelines, specifically, the undercover operation review committee. It seems to me that the magistrate's role is primarily one of deciding whether or not there is a sufficient amount of evidence to proceed. It's a question of degree of suspicion, whereas the committee is primarily performing a balancing act, a question of balancing the various values, various risks, the various intrusions. It's not so much an evidentiary question. If that's the case, then, if you create a warrant system, how does that deal with the problem of balancing the values that are at stake and the question of whether or not to authorize an undercover operation?

Mr. CHEVIGNY. You mean, for example, that the review board has a list of cases and issues that are called sensitive, and, accordingly, they are treated in a slightly different way from issues that are not called sensitive. Ordinarily, under a warrant system, the magistrate just makes a decision about the evidence. To some extent, the value judgment is made by the establishment of a warrant system. In other words, we say that by establishing a warrant system, all the undercover operations represent intrusions. And to control the intrusion, we establish a neutral magistrate.

Now, history has resolved the value judgment by saying we think it's all an intrusion. That's why we asked for a judge. It's very rare in legal practice that before something can be done, a triggering mechanism from the judiciary is required. That's an unusual thing and important. But at this time, there's no such law, so we really are talking about pie in the sky. There's no reason that a statute providing for undercover warrants could not provide for the magistrate to take "sensitive factors" into account. There's just no statute at present.

Mr. EDWARDS. I'll make it clear that I agree with you, except that it's just not feasible. That was the point I made.

Mr. CHEVIGNY. Yes. It's the question she asked me. The feasibility question is another question.

Ms. COOPER. Well, what I'm getting at can be illustrated in a hypothetical. Assume the subject is a politician or a member of the media or something like that. It's that kind of sensitive circumstance. Plus, you've got one or more of the risks that are enumerated in the guidelines. But there's a lot of evidence that there's some illegal activity going on or a predisposition to——

Mr. CHEVIGNY. An informer who has previously taken a bribe, that kind of thing. What's the question, then?

Ms. COOPER. Well, would the decisionmaking be any different? Wouldn't the magistrate just be deciding on the question of the weight of the evidence or whether or not he supports an undercover operation and really not be considering the sensitive factors and the risks that are present?

Mr. CHEVIGNY. I think that yes, the decisionmaking process is similar to what you describe. But I think that a judge, when he sees a case involving a political person, whether that political person be in or out of office, he says, is there a first amendment problem involved here? And in the case of a person in office, is there an interference with office? That's one of the values that underlies the protections which are contained in our fourth amendment provisions and in a warrant requirement. And so, the decisionmaking process is similar, yes. But it's important that the decisionmaking process be done by somebody who is not in the law enforcement establishment. Because, as we see from recent history, very often the decisionmaking process doesn't get done by the law enforcement people. They just don't follow the guideline. And if they find the requirement onerous, they just change the guidelines. And finally, there are plenty of other difficulties with acting as both judge and jury, as Mr. Hyde said, that don't exist with a neutral magistrate.

Ms. COOPER. As far as bringing outsiders into the decisionmaking process, do you see any value in trying to broaden the base of the

undercover operation review committee? As it's described now, it includes only some unspecified number of criminal division lawyers and FBI personnel. It does not include personnel from the other divisions, nor does it include anybody from outside the Justice Department system.

Mr. CHEVIGNY. I think it would be wonderful if it could include somebody who's genuinely outside the Justice Department system.

Mr. HYDE. A consumer, a Hispanic, a black, a homemaker, you know, the usual, a Catholic and a handicapped person, right?

Mr. CHEVIGNY. All of those things would be terrific. But that really is pie in the sky, Mr. Hyde.

Mr. LUNGREN. How about a Republican?

Mr. HYDE. Well, let's not go too far.

Ms. COOPER. Professor Marx, it seems to me that the guidelines are based on a view of undercover operations as being relatively static. The guidelines require prior approval only before various operations are begun or before various inducements are offered. But from your analysis of the way operations actually operate, and from what we know from reading the trials of recent cases, they're not that way. They're very organic. They're very changeable. The agents are constantly improvising. Is that your view of the reality of the typical undercover operation, and if so, do the guidelines make any sense?

Mr. MARX. I think it makes more sense to have them than not to. I think some situations are probably, if not impossible, very, very difficult to regulate. You're right. The situation is highly fluid. And one of the problems, of course, is that the undercover person, whether it's a sworn police agent or it's an informer, has a strong vested interest in seeing this thing go forward and seeing prosecutions.

If a lot of Federal time and money are spent and no case emerges, it doesn't help the agent. In the case of the informer who may be facing charges, who may stand to earn vast amounts of money from the operation, there's a strong incentive that crimes occur. And I think we have, to some extent, been misled by hearing about the virtues of video taping in such operations. This can give a false sense of certainty. We don't know what goes on off the tape or to what extent what is on the tape is deceptively stage managed. When there's suddenly a break in the tape, was that because the informer stopped it, or was it because of natural causes? Daily monitoring of informers is required. The supervision of the informers in the Abscam cases apparently left much to be desired.

Another factor conducive to accountability is having the informer introduce a sworn agent into the situation rather rapidly. This offers much more control than having to rely on the accounts of informers. Doing this of course, can be difficult, too. One of the problems with some of the high roller kinds of activities, going after high status offenders is that it appears to be much more difficult to introduce a Government agent into those situations, than it is in street situations. In street situations, the operative policy is often to introduce a sworn agent into the situation as soon as possible.

Mr. EDWARDS. Should there not at least be, as there is required in wiretapping, a public announcement made yearly about the

number of undercover operations that the FBI has in that particular fiscal year? Otherwise the public would not know what the trend would be. Since this technique is so new to our country and imposes such problems, that information is very important. Do you agree?

Mr. MARX. Yes. I think it's crucial to have that kind of documentation and also, as you suggested earlier, to have some analysis of it. What are the costs and what are the benefits coming out of this? How do you weigh the prosecutions that emerge as against the damage that may be done to third parties? And in weighing the cost, a crucial thing to look at are the investigations that don't go anywhere. I know of four or five large and costly investigations that were stopped because there was a leak.

And one of the disadvantages of undercover work relative to conventional police practices is they're more vulnerable to leaks. The large investment in an investigation can literally disappear overnight once the operation loses its cover. That's a cost factor that is rarely considered. And one of the interesting things about a number of the investigations where the cover's been blown, is that these tend to involve people of very high status. It's admirable to go after offenders, regardless of who they are if, in fact, they're engaged in serious rule breaking. However, when the investigation points to people in high places, and then the investigation is called off because of a leak, that may be even worse, than no investigation at all.

Ms. COOPER. On the question of the need for evaluation, you stated earlier that one of the problems was that the Justice Department, among others, was not very cooperative about providing the kinds of data you need to make these kinds of judgments.

What would you, as a social scientist, need?

Mr. MARX. When you do evaluations, they're never perfect. They're obviously better than shooting from the lip. When you do one, it's best to have information about the state of things before you begin your intervention, before you start your experiment. So, you'd want to know about crime patterns. You'd want to know about what criminal intelligence says about the problem. You'd want to know about how law enforcement resources were being used before you start your intervention. Then you start your intervention. You do it in one area and not in another equivalent area. You also look at the intervention while it's going on. At the end of it, you collect information about displacement, to other areas or crimes, as well as about the crime in question. What we have now, basically, is a measure after the fact. We don't really know what went on beforehand. We don't know about the process involved during the operation. And what happens now when you are forced to do an evaluation 6 months after the operation is over is you've taken the context away. All you have is what's on paper, what's on tape. With all due respect, things may get cleaned up. So, I think it's important to have an ongoing evaluation. And if you would take the logic of the current evaluation, which is to come in 6 months after things are over and apply it to any of the large Federal programs that are evaluated in sophisticated ways, it would be severely criticized. You don't evaluate things 6 months after they're gone. People are transferred. They've forgotten what happened.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. Thank you, Mr. Chairman.

Professor Chevigny, assuming that there's no magic to the 6-month period, and as the chairman suggested, 30 days under other systems has been used, what do you view as being an appropriate period of time before an undercover investigation should incur some sort of review?

Mr. CHEVIGNY. It's awfully hard to make those decisions, like 12 people on a jury; 30 days or 45 days seems to be a good number. That doesn't mean the surveillance has to stop, it just means somebody has to review what's going on. Another important thing about that is an aspect mentioned by Mr. Marx in these hearings, and that is that a report should be made. Now, this could be done under these guidelines. It would be enormously helpful that a written report should be made. I am assuming that one or more of these agents are going to write daily reports on what goes on. That's not unusual. I assume they do that or that they call in and someone else takes it down. Those daily reports should be taken in hand by the review committee and kept, because there's always a controversy in these cases about what really happened. Unless someone is wearing a bug all the time, which is incredibly dangerous, then we've got to take the informers word as to what happened. And now, obviously, an informer can tailor his testimony on a day-to-day basis. But it's extremely difficult to see what's going to happen the next day, but whereas in retrospect, it's real easy to tailor your testimony.

But if every 30 days you get all of those records and impound them, and the review—I'd rather it were a judge, but skip it, it's pie in the sky. If the review committee would keep it under lock and key and make sure they've got that record, that would be enormously helpful.

I'd like to say it would be enormously helpful to law enforcement, too, because in the cases where there's a story about entrapment or about the fact that they took me out and wined and dined me and got me drunk, if that's a lie, then those reports would be enormously credible evidence in establishing that it is a lie. Whereas, at a trial, there's an enormous risk that some informer who's an informer and being cross-examined by some able defense attorney will be blown to pieces.

And there will be an acquittal in a case where, in fact, a person is guilty. I'm not in this to protect defendants or prosecution's rights. Because I would like to see the things done in a rational way and the truth to come out. So, I'm for a 30-day limit for all those reviews, but if it's 45, it wouldn't be the end of the world.

Mr. BOYD. These guidelines, as I understand, have already been used by some defense counsel for purposes of cross examination.

Mr. CHEVIGNY. Oh, sure.

Mr. BOYD. You indicated also that you have problems with lack of disciplinary action in the event these guidelines are violated.

Mr. CHEVIGNY. Lack of what?

Mr. BOYD. Disciplinary action in the event these guidelines are violated. How would you prefer to see that disciplinary action

initiated, and what sort of procedure do you want to follow? How do you perceive that action?

Mr. CHEVIGNY. It's very hard. You obviously can't put somebody out of the Bureau for violating a new set of guidelines, particularly if it's a minor violation. All I'm saying is that it's too heavy a sanction.

Mr. BOYD. Should good faith be a defense?

Mr. CHEVIGNY. Not in a disciplinary proceeding. It seems to me that what ought to be done is that the guidelines ought to be announced. They ought to be periodically announced. We've done this in cases involving the police, in which the courts have made orders. The order has to be brought to the notice of everyone who's liable to act in pursuance of it. Periodically, it's got to be reannounced. That might be kid stuff as far as the FBI goes, but in any case, it's got to be brought to their notice and if there's a factor of people forgetting or it's becoming customary to do it a little differently, then it should be reannounced. Then, we're sure everybody knows and every Bureau office ought to have a copy and post it and announce it and make sure that the people know about it. Then you can have a rational disciplinary proceeding and try somebody. Why didn't you follow the darn things? A person may be fined a few day's pay for a minor violation.

I'm not asking for the world. But the point is that a psychological set has got to be created in a bureaucracy whereby people feel that the agency takes it seriously and they're going to crack down on people who don't follow it. I mean, I gather in the FBI, that in the old days, the problem was that people said that the black bag jobs had to stop, but eveybody sort of knew that they didn't have to stop. And they went on. And there have been some disciplinary proceedings about that.

There's a problem with that that I'll come to in a minute. But the point is the FBI agents feel that that's not fair. That they had these announcements and they didn't mean it and we all knew they didn't mean it and now we get discipline for something they didn't mean. That's another problem. You've got to take it seriously and consistently so the people can't say this ain't fair later on and have the public feel that they are sincere. Another thing is that I'm not saying that names ought to be named as to who is disciplined, and so on. But I think the public ought to be made aware that there are such disciplinary proceedings and that at least some statistical report ought to be made of the fact that it occurred. Otherwise people tend to feel—well, they say there's a disciplinary proceeding going on, but we don't really know. Some kind of public annoucement has to be made without naming necessarily who it was, but a statistical report or a disciplinary report.

Mr. BOYD. After the fact?

Mr. CHEVIGNY. Yes, because after those disciplinary proceedings with respect to the FBI agents from the old days, it was said that New York—I think it was the New York director—announced the disciplinary proceedings had been undertaken with respect to those people. We never knew what had happened. We didn't know whether they had been fined, whether they had been cashiered, what the dickens happened. So, there was a feeling, I mean, there

was a public feeling that we don't know whether it was a serious matter or it wasn't a serious matter.

So, to summarize, if you're going to make guidelines work at all, you've got to have a tight system of internal review. You've got to have a consistent set of disciplinary rules. You've got to follow them and enforce them. You've got to make sure that everybody knows about it and that they continue to know about it on a periodic basis. And you've got to make the public aware that you are taking it seriously and that you are enforcing it and that disciplinary proceedings are being carried out. I know law enforcement officers hate this. They say it's a terrible system of harassment and it's constant gumshoeing around them, and so on. I'm tempted to say better them than us, but I don't really mean that. It's a characteristic of that kind of public work that there's going to be a lot of oversight and I don't see any alternatives. There are too many temptations.

And accordingly, it is a characteristic of law enforcement work that there's going to be a lot of oversight from the higher-ups. I don't see any real alternative to that.

Mr. BOYD. Thank you. I have no further questions.

Mr. EDWARDS. Along the same lines, don't you think that as this approval is given up the line—and that's what we're assured of by the guidelines—the higher it goes for approval, the supporting information should be furnished in writing so as to leave a paper trail? And the same kind of information ought to be furnished to the higher official in the FBI to justify the next step in the undercover operation that a magistrate would be furnished when a warrant is asked for?

Mr. CHEVIGNY. Absolutely. We can at least get the protection of the paper record through these guidelines. If we can't get a magistrate, we can at least get that protection that a record is made, which is, in effect, if you like, sealed in amber, in the sense that it cannot later be changed by the informer tailoring his testimony to fit the case.

Mr. MARX. I think one of the problems currently is the guideline says almost nothing about the conditions under which higher-level authorities can and should approve undercover operations. The guidelines basically affect and prohibit actions on the part of the local agent. They don't really tell us when higher officials should, in fact, use undercover work. I think it's crucial to spell out those criteria, not in a rigid way, but to say, here are the kinds of factors that would make it appear that this tactic is appropriate. That's a big lack.

Mr. CHEVIGNY. In answer to counsel's question about the disciplinary actions, there's an interesting point about discipline, and it's something that I observed in connection with discipline in the New York police, which we quarreled about for the past 15 years.

We tried to have outside review and didn't succeed, and they now have an internal review, which is pretty good, as internal reviews go. It has the characteristics that I mentioned. An additional one is that it has people who are—not independent in the political sense—but are structurally independent, who do the investigation in the sense that it has people assigned to that body, who do its

investigations and don't do anything else, unless they get transferred.

But a fatal mistake in the investigation is to send it, as it were, to the local commander. In other words, to send it tc the superior of the person involved for an informal review, seems to me a fatal mistake. Because there is a systemic bureaucratic tendency on the part of superiors to cover their people. It's natural. It's human.

Mr. BOYD. You're talking about internal affairs of public?

Mr. CHEVIGNY. Yes.

Mr. KASTENMEIER. My question is somewhat tangential, but out of curiosity, I was wondering why Professor Chevigny suggested a magistrate. I assume meaning the U.S. magistrate rather than a U.S. judge. Noting that many jurisdictions, district court jurisdictions, they either do not have magistrates or the magistrate's role is assigned by the U.S. judge. And generally, they are not categorically used rather than assigned specific tasks. I'm just curious.

Mr. CHEVIGNY. I'm sorry. I wasn't using it as a term of art. I meant it as a generic term. That is, as a judicial officer.

Mr. KASTENMEIER. Thank you.

Mr. LUNGREN. Mr. Chairman?

Mr. EDWARDS. Mr. Lungren.

Mr. LUNGREN. I have just one question. It's kind of a general question. But you were critical of the length of time which would go on before there would be a review of these programs and suggested a shorter period of time. Isn't there always the problem if you have people reviewing them too often, they become so familiar with what they're reviewing that they don't have the distance you want, so that they are not a part of the operation itself?

Mr. CHEVIGNY. Do you want to answer it?

Mr. LUNGREN. Aren't you talking about an independent judgment?

Mr. MARX. Life is complicated. There are always tradeoffs. Supervisors can be rotated and they should be subjected to review.

Mr. LUNGREN. That's not my point. My point is, they become so identified with it, they can't step back and see the whole picture. If you've got them reviewing every couple of weeks or maybe even every month, I don't know. I haven't seen enough evidence to what is reasonable. They become so identified with the ongoing investigation, they don't come in as a supervisor with some distance to look at different things than the people actually involved in the process would.

Mr. MARX. Partly, it may depend on the quality of the people doing the oversight. I think the key thing is not that you become too familiar with it, but that your overall career rewards are not tied into it. To the extent that supervisors are not going to be promoted or demoted as a result of the success or failure of the investigation, I think it's less of an issue.

Mr. LUNGREN. The other thing I'd like to just throw out is that we've been sort of analogizing this to the experience with the New York Police Department and other police departments. But it seems to me the FBI is somewhat different than those.

Mr. CHEVIGNY. Yes.

Mr. LUNGREN. The education level is certainly different. The type of investigations that they have ongoing is certainly different.

They're not involved in day-to-day street crime. And perhaps the analogy is not quite as valid as we might assume, just on the face of it.

Mr. MARX. I think because they're not as much involved in day-to-day street crime, where police are really familiar with who the bad actors are, these tactics become more problematic. Because FBI agents are unlikely to be involved in high roller activities as a matter of course, they are at a disadvantage relative to who are more likely to be close to local police, street crime. However, the broader constitutional principles and also the social aspects in terms of unintented consequences, in terms of what happens when you have secret operations, what happens with covert tactics, that those things are the same, regardless of the level of government.

Mr. LUNGREN. I understand. It strikes me at times that our concern often, as legislators, is with creating paper trails and creating many, many different boxes where you have broker jurisdiction, which almost takes the idea of checks and balances to such an extreme that, in fact, inertia sets in. But when you get down to it, it's the quality of the individuals involved, no matter how much you want to create various types of assistance. They may not look at this as types of assistance. But that's what you're basically saying. You're protecting them as well as protecting the operation and protecting the public.

Mr. CHEVIGNY. I'd like to say something about that, if I may. I think it is true that it depends on the individuals. But it seems to me from the history of the FBI, it seems to depend more on the character of the individuals than the character of the agents. In other words, the agents who are highly educated men were accused of what seemed to be terrible abuses. I haven't any doubt that they wouldn't have done those things on their own hook. But they did them because Mr. Hoover and others approved them or they thought they did, the atmosphere. That means something's got to be done about that atmosphere. You've heard what I think is the best thing. But obviously, guidelines can make a difference in the atmosphere. But there's got to be control over people at the top. If you've got control over policy, policy with respect to are we going to chase the left, which was one of Hoover's policies, I take it that's not an option that open any more. Those kinds of policies have got to be stopped.

Mr. EDWARDS. One last question. In the Abscam cases, there were four, five or six—I can't remember how many congressmen—absolutely turned all of the inticements down and practically said get out of my office. But they claimed they were damaged severely and the FBI regrets it in his offer to write letters, and so forth. Now, how would the guidelines have been improved so that this very unfortunate situation, where these reputations were greatly damaged by the actions of the unwitting purveyors in practically all the cases?

Mr. MARX. I think that's a crucial question. It gets to the point of how good is the evidence that someone is predisposed to this type of activity. The guidelines now talk in very general terms about this. They don't talk about degrees of predisposition, the relative merit of different kinds of evidence, or to what extent you have to cross check. So, I don't think they particularly speak to this prob-

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lem. In fact, in the testimony here last March, it was claimed that Abscam was done in a way that was very consistent with the guidelines.

Now, either the guidelines are lacking, or the operation wasn't done in a way that was consistent with them. Predisposition, is a very, very slippery kind of concept. I think it could happen again very easily, until it's made very clear how strong a predisposition has to be. It gets back to the issue of, are we trying to apprehend people who are corrupt? Or are we trying to see if someone is, in fact, corruptable? And as long as the latter is an operational standard, I think there are going to be the kinds of problems that you suggest.

Mr. EDWARDS. Well, especially when the person making the decision as to predisposition doesn't know that he or she is working for the FBI and thinks that he or she actually is working for a billionaire shiek.

Mr. MARX. Yes.

Mr. LUNGREN. I just wanted to see what point we are going on here. The fact that a number of people turned it down does not necessarily mean that the guidelines were improper. Unless you suggest that somehow you have to have 100 percent batting average. I mean that might even go to the justification for the manner in which they operate. That they did not intice people who otherwise would not have been inticed. That is, that these people turned it down. I don't see how that proves the case that somehow the guidelines weren't in operation or weren't being followed.

Mr. MARX. Yes; that's a good point. And people can differ about what batting average you have to have to conclude in the fact that someone was predisposed. It seems to me given the risks and the damage to the people involved, that they really ought to err in a much more conservative way. If half the people took it, I think there was insufficient evidence of predisposition. If it was higher, you might conclude predisposition was there. You also have to look at the quality of the temptation. If the temptation is so enticing and inviting, there may be no predisposition at all. You may simply be overwhelmed by the incredible opportunity you have to help your constituents and/or yourself.

Mr. EDWARDS. Further questions? Well, the witnesses have given us valuable in-depth information and we appreciate it very much.

Mr. HYDE. Indeed.

Mr. LUNGREN. Fine.

Mr. EDWARDS. So, we thank you very much.

Mr. HYDE. Excellent.

Mr. EDWARDS. Tomorrow, the committee meets with the Department of Justice.

[Whereupon, at 11:30 a.m., the hearing was adjourned.]

FBI UNDERCOVER GUIDELINES

THURSDAY, FEBRUARY 26, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2226, Rayburn House Office Building; Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards Kastenmeier, Lungren, and Sensenbrenner.

Staff present: Janice Cooper, assistant counsel, and Thomas M. Boyd, associate counsel

Mr. EDWARDS. The subcommittee will come to order. Today's witness is Mr. Paul Michel, Associate Deputy Attorney General of the Department of Justice.

In that position, Mr. Michel has become very familiar with the inner working of the FBI; that expertise proved invaluable to us last year when we began considering a legislative charter for the Bureau.

Equally complex and difficult will be the task of controlling problems associated with undercover operations. We have been studying undercover operations for many, many months and probably in the years ahead.

We have learned enough in the last few days of hearings to sympathize with the Justice Department's difficulties in devising guidelines. The nature of undercover work itself creates a tension with a desire for control.

However, the guidelines are definitely a step in the right direction. And today, we hope to learn more about what they are intended to mean. Before I introduce Mr. Michel, I recognize the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Chairman, I ask unanimous consent from the Subcommittee on Civil and Constitutional Rights that the House committee permit coverage of this hearing in whole or in part by television broadcast, radio broadcast, and still photograph or by any of such methods of coverage pursuant to committee rule 5.

Mr. EDWARDS. I thank the gentleman. I recognize the gentleman for any remarks he may care to make.

Mr. SENSENBRENNER. No remarks, Mr. Chairman.

Mr. EDWARDS. Mr. Michel, again, we welcome you and please read your statement in full, since we didn't receive it until late last evening and haven't had a chance to review it ourselves.

TESTIMONY OF PAUL R. MICHEL, ASSOCIATE DEPUTY ATTORNEY GENERAL, OFFICE OF THE DEPUTY ATTORNEY GENERAL

Mr. MICHEL. Thank you, Mr. Chairman, Congressman Sensenbrenner. I'm very pleased to be before the committee today to have the opportunity to testify on undercover matters and particularly about the recent developments in the Department of Justice policy governing FBI undercover operations. And I know that the primary interest of the committee is on the guidelines issued by Attorney General Civiletti on January 5, 1981.

The reason that I've been asked to appear before the committee to testify about these guidelines is that I participated, along with many others, in their preparation and therefore, I hope to be able to respond to any questions about their scope or intent or purpose.

Attorney General Smith and other senior department officials are presently reviewing the guidelines on undercover operations in order to determine whether any revisions may be necessary.

Last March, the subcommittee received testimony from the director of the FBI and the Assistant Attorney General in charge of the criminal division concerning undercover operations. There appearance followed completion and public disclosure of several major undercover operations, including ABSCAM.

Mr. Chairman, if I may, I would like to ask the committee to make part of the record of this proceeding, the statements and testimony of Director Webster and Assistant Attorney General Heymann from that session, because I think that they lay a foundation which is pertinent to the inquiry with regard to the guidelines.

Mr. EDWARDS. Is there objection?

Mr. SENSENBRENNER. No.

Mr. EDWARDS. Without objection, so ordered. (See appendix.)

Mr. MICHEL. Thank you. In the intervening time, there have been three major developments in the area of undercover operations. First, juries have convicted all of the defendants brought to trial on the basis of ABSCAM, although the controversy surrounding some aspects of that operation continues, both in the courts and in public debate.

Second, the undercover review committee which studies proposed undercover operations, was established and began to function and handle a great many of the cases.

Third, after 18 months of intensive collaborative effort, the Department of Justice and the FBI completed the guidelines on undercover operations. With Director Webster's concurrence, these guidelines were issued last month.

The guidelines do not change established practices and procedures in any significant way. These practices and procedures have been developed gradually and carefully over the past several years.

The procedures have as their centerpiece, the operation of that undercover review committee. Therefore, the implementation of the guidelines should not, in my view, cause any confusion or disruption in FBI operations.

I may say that with regard to possible disruption that your colleague, Congressman McClory recently sent a letter to Attorney General Smith. The letter, which was dated January 23, asked whether the guidelines would have an adverse impact on the operational effectiveness of the FBI, and particularly whether their use—whether the guidelines would make the use of undercover operations by the Bureau difficult, if not practically impossible. That possibility, of course, was much in our mind from the outset of efforts to develop the guidelines. I know that in reviewing this issue, and indeed, in preparing materials which will soon result in a responsive letter to Congressman McClory, Director Webster has indicated that the guidelines do not make the task of the Bureau more difficult.

I might also say, since there was some confusion about the implementation and at least one witness expressed difficulty or encountered difficulty in getting a copy, that the guidelines are just now in the process of being implemented and instructions are going out to all FBI field offices at this time.

Mr. EDWARDS. You mean by that that the field offices have been operating without guidelines all of this time?

Mr. MICHEL. The field offices have been operating for the entire period of extensive undercover work, which I guess is between 2 and 3 years without formalized guidelines.

That is not to say that they have been operating without carefully structured procedures. Because the procedures have been rather well structured and followed closely. What the guidelines basically did was to build on those procedures and to formalize them and if I can misuse a word, codify them into guidelines.

I might say with regard to questions of interpretation, since the guidelines are fairly lengthy and fairly specific and contain lawyer-like terminology, that I've been advised by FBI officials that there have been no significant questions of interpretation that have come to the surface to date.

Mr. Chairman, let me briefly describe the processes by which these guidelines were produced. It began in the early fall of 1979, when the Attorney General asked the Assistant Attorney General in charge of the criminal division to supervise the drafting of a number of possible guidelines on different topics, including undercover operations. The broad outlines for each of these guidelines were taken from the proposed FBI charter, which had been jointly developed in the preceding year by FBI and department officials.

Under the charter, the department would be required to issue guidelines on all major areas of investigative activity. Attorney General Civiletti determined, however, that the benefit of guidelines to the effectiveness of FBI operations had been sufficiently established by 5 years' experience with the three guidelines promulgated by Attorney General Levi, that additional guidelines ought not to await Congressional action on the proposed charter.

Although Congress didn't take action on the charter proposal, various committees, including this one, did hold hearings on many parts of the charter. These hearings sharpened the issues and tested the reasoning underlying each of the provisions in the proposed charter. The hearings also underscored the need for assuring that investigative activities are not only conducted vigorously and effectively, but also lawfully and reasonably.

The guidelines on undercover operations were put through innumerable drafts. The drafts were written on the basis of extensive consultation with FBI officials actually administering and supervis-

ing the organized crime, white collar crime and other investigative programs. The initial drafting was done by two departmental attorneys who were members of the Undercover Operations Review Committee. The drafts were reviewed by FBI employees at every level in both headquarters and in the field. This included the special agent investigator, the proverbial "brick agent." The written comments were prepared and became the basis of extensive discussion among members of the review committee.

That committee was chaired by the Assistant Attorney General in charge of the criminal division and it included among others, the FBI's Assistant Director of the Criminal Investigative Division, his deputy, the chiefs of the organized crime and selective operations units, the special assistant to the director, several career Justice Department prosecutors and myself. While the text did change somewhat during the long process, there was agreement from the start between FBI and department officials on all its basic provisions.

As the project proceeded, only relatively minor issues arose and all of them were resolved rather readily in a mutually satisfactory manner.

In fact, by the end, there was such complete agreement by everyone on the guideline committee, that not a single issue had to be submitted to Director Webster or the Attorney General for resolution. Both, of course, did personally review the final draft before the Attorney General promulgated the guidelines.

Now, the process followed in preparation of these guidelines was nothing new. We simply followed the basic model established in 1976, when a similar committee was commissioned by Attorney General Edward Levi. That committee developed various guidelines, including those ultimately promulgated, which were three, and as you know, they concern No. 1, Informants; No. 2, domestic security investigations; and No. 3, civil disturbance investigations. Indeed, some of the members of the earlier guideline committee also participated in the current project.

The guidelines on undercover operations like those on other topics, were drafted on the basis of certain underlying principles. Three of the most important of these are as follows. First, guidelines should not be a catalog of "do's" and "don'ts." Rather, they should focus on establishing or formalizing sound procedures to assure that critical judgments are made at appropriate levels of authority and are recorded and therefore, susceptible to subsequent review within the Bureau, by the department, and by the Congress.

Second, the guidelines must be clear enough to be readily understood and followed by all agents and must contain standards which are realistic enough so as not to interfere with effective and appropriate investigative activities.

Third, the guidelines should not merely meet the minimum requirements of constitutional and statutory law, but should also reflect sound law enforcement policy. I might say that these three principles, in my view, were precisely the same principles that formed the basis, a theoretical basis, for example, for the guidelines on domestic security investigations, which were issued in 1976.

And I would submit to the committee that if you lay the domestic security guidelines side-by-side with the undercover operations

guidelines, that while on the surface the language is different, because the subject is different, there are very striking similarities in the basic approach.

Now, no one could claim that the undercover guidelines are perfect. The issues they deal with are controversial and not everyone is going to arrive at precisely the same sense as to how to balance competing interests.

But I would submit that the guidelines are based on ideas that have been proven in practice, that their central design, of course, was to assure that investigations are conducted effectively, but also, appropriately and sensibly.

The latter considerations in the long run are as important as the former, because successful crime fighting ultimately requires acceptance of our work by the courts, including the appellate courts, which review convictions we obtain, and by the Congress which annually appropriates the funds we need and affords us authority for our activities.

Now, I would stress, Mr. Chairman, that the guidelines do not unduly hamper actual operations. And they do contain realistic but meaningful standards.

But I would readily admit that the guidelines are not immune from criticism.

There is, for example, one sense in which the guidelines might be viewed as far less than ideal. And that is that these guidelines—and, I would submit, any other version that could be written—can't absolutely guarantee that no undesirable incident will ever occur during the course of an undercover operation. I think the guidelines substantially reduce the risk, but they cannot eliminate it altogether.

Let me give just a brief example. It involves the circumstance in which a suspect is offered an opportunity to commit a criminal act. And the issue is, what sort of test ought to be met before that opportunity can be offered?

As you know, Mr. Chairman, the guidelines essentially provide that we can make such an offer only under these circumstances. One, a middleman, who may be a witting person cooperating with us, or may be unwitting, implicates and produces the suspect at our location. Or two, the suspect, having heard of our operation, brings himself in. In addition, once the suspect is there, any offer made to him must be clearly criminal in nature, must be one that is modeled on real-life situations, and must be one in which the incentive—for example, the size of a bribe—is not disproportionate to the service sought or the normal expectations for that type of criminality.

Now, some outside observers have suggested that the Government should be required to have probable cause of similar past crimes by a particular individual before it offers him an opportunity for crime. Our view is that this suggestion is impractical.

For one thing, we often do not even know the identity of the suspect until he appears at the location where the offer will be made. More fundamentally, such a suggestion, in my opinion, misunderstands the extent to which investigations are inherently and unavoidably evolutionary in nature.

They often begin with relatively uncorroborated suspicions. They progress to some corroboration or additional kinds of allegations of suspicions. And ultimately, they progress to the point of probable cause to arrest and indict.

To require probable cause before we even take the investigative step of making an offer is to trap the FBI in a catch 22. If we already had probable cause of the past crime, we could simply make an arrest and prosecute for that past crime. In fact, the very need for making the offer is to convert some reasonable indication of criminality into strong and clear evidence that would amount to probable cause or, indeed, more.

Mr. Chairman, if we looked at some of the recent undercover operations—and of course, I can't discuss specifics of Abscam that are under litigation, but in general, if we look at past operations, I would say that that kind of hindsight review would lead to this conclusion. The majority of suspects who were offered a clearly criminal opportunity and took it, accepted a bribe or whatever it was, were not people as to whom we had probable cause at the time of the offer. And therefore, if that were required, those investigations would have stopped on the spot.

Now, the fallback argument is, of course, well, if not probable cause, what about a somewhat lesser standard? Perhaps reasonable suspicion.

One problem with reasonable suspicion is that it is an analog to probable cause in this sense. Both, under elaborately developed case law, require, really, two things. The first is sufficient indication of criminality. But the second—and this is an indispensable test as much as the first—is that the information establishes to the same degree of certitude that the particular individual is the one involved.

Now, as I pointed out earlier, frequently the identity of the prospective bribee isn't even known. And therefore it would be impossible in those circumstances to meet even the test of reasonable suspicion, at least as defined in classic search-warrant law.

That's not to say that undercover operations ought to offer opportunities for criminality in the complete absence of reasons to suspect that the activity is going on and that the people who will present themselves or were presented and produced at the location in fact are involved in that kind of criminal business. We used in a charter, as you will recall, Mr. Chairman, the concept and the phrase "reasonable indication."

And that same notion is adopted in the guidelines and is mentioned. As I indicated earlier, we either have to have a reasonable basis for suspecting, a reasonable indication, that the individual in question is corrupt as a labor racketeer, or whatever the operation involves, or he has to identify himself by coming in, with no active role on our part.

Now, I would like to next just briefly touch on another aspect of the catch 22, and I have to be careful here about terminology. Keep in mind that sometimes the players wear more than one hat. We all talk, perhaps too facilely, about, well, you have suspects, and you have targets, and you have defendants, and you have informants, and so on. But in undercover operations particularly, sometimes they mix.

We often have a man who starts out as a suspect. Let's say an informant has come and told us that Mr. X, who is a police captain in some metropolitan city, is collecting bribe payoffs from gambling operators. Suppose then that the word goes out that a new gambling operation is being established. And the next thing that happens is, this police captain comes in. He indicates that his superior officer, Inspector Y, also shares in these bribes.

Well, at that point, the captain has shifted from being merely a subject, because of the informant allegation, to being an intermediary. But he is going to bring in the higher ranking officer. And of course, we're even more interested in trying to successfully prosecute that individual than the captain.

So he becomes a middleman. And he is not a witting middleman. Obviously, he has no idea that this gambling operation is phony and it's a setup in order to detect police corruption.

There are, of course, middlemen who are witting. They are referred to in FBI terminology as cooperating individuals. They present special problems because of obvious difficulties of total control by the Government. But it's important to recognize, I think, that in most situations the middleman is not being manipulated by the Government. The middleman himself doesn't even know that it's an undercover operation.

Now, in the case where the middleman is a cooperating individual, is fully knowledgeable, there is a risk that he will misrepresent the statements or activities of a suspect, that he will produce at our warehouse, or whatever the location might be, individuals who in fact are innocent. There is, therefore, the risk that an innocent individual may be offered the criminal opportunity. There are two reasons why this risk, even aside from guidelines protection, is not very great. The first is, if a cooperating individual, a middleman, brings in an innocent person, we quickly discover that he's either exaggerating or he doesn't know what he's talking about, so we no longer put so much faith in what he says. It corrects itself rather fast.

It is quite true, in the meantime, one or two individuals who are completely innocent might be drawn into the operation to the extent of having the offer made. But as, I think it was the second circuit, recently observed, that is not necessarily disastrous, because the honest man simply rejects the offer and departs.

It is a risk; it is undesirable. It is not a big risk, and the guidelines minimize it by, for example, stressing that the underlying criminal nature of the offer has to be made very clear and communicated directly to the suspect. No offers are made through third parties. They're face to face, and they're in clear terms.

And I might say that with regard to the clarity of the criminal nature, we frequently have had circumstances in actual operations where extensive script writing, in effect, was done by teams of lawyers from both the department and the FBI. So that the undercover agent who actually makes the offer—we don't let the middleman make the offer; the undercover agent makes the offer—does so in terms that are unmistakably clear that this is a crime that's being offered.

OK. Let me just make a couple general observations, if I may.

First, the guidelines emphasize procedures. But the emphasis on procedures is not to minimize the importance of the judgment calls that have to be made in these operations. It really is judgment that's the key here.

And in this regard, the fact that the FBI now has been conducting major undercover operations in all areas of its investigative jurisdiction for several years means that we have a lot of experience. We can benefit from this experience, and we are benefiting from the experience.

It is important, I think, to avoid the confusion that may have plagued one or more of your earlier witnesses. There are, in effect, three time zones. There was the first year or so of major undercover activities. That's the first time period.

The second time period is the last year or two, pre-guideline, but we had the committee, the review committee. We had the structures in place. They just hadn't been formalized.

And then, of course, the third time period is the future.

Some of the celebrated undercover operations in which, obviously, problems have come up fall in the first period, where there were neither the informal procedures nor the committee, and, obviously, not the guidelines. Operation Front-Load is an example of that. It happened because the review committee wasn't in place.

Now, the important thing, as I tried to make clear earlier, is that while there's a huge difference between the first time period, where there was very little structure or not enough structure, at least, and the second time period is a vast difference. But the difference between the second time period—the last year or two—and the immediate future is very little. It is mostly a question of formalizing structure and policies and practices already in place.

Now, with regard to how that all works, I would like to make this observation. The guidelines emphasize the approval process, because that is what we thought deserved the most emphasis. That is what is going to bring the judgment of supervisors and outsiders to the field office involved to bear on this.

And as you know, the guidelines provide for the operation to be recertified by the committee and the appropriate senior FBI officials under any one of three tests. No. 1, at a minimum, every 6 months, no matter what else. No. 2, anytime the nature of the operation changes; if it changes every month, then there's a whole new review every month. And No. 3, any time the operation spends more than a trigger sum, which is $20,000.

The practical effect of those three triggers of renewed scrutiny by the committee is that in the largest and most sensitive operations, the reviews aren't every 6 months; they're much more frequent than that. In addition to formal reviews by the committee, however, there are reviews which sometimes are week-to-week, or even day-to-day in the most sensitive cases.

There are innumerable examples, for instance, where the Director of the FBI himself, personally reviewed whether a particular circumstance, as to a particular suspect, warranted the making of an offer of a criminal opportunity.

So, the control of these operations, and minimizing the risks of untoward events occurring, rest as much on this ongoing supervi-

sion at all levels of the chain of command in the FBI, as they do on the committee proposal certification process.

Now, I'd also ask the subcommittee, in reviewing the undercover operations guidelines, to keep in mind that those guidelines do not form the entire system for controlling undercover operations.

The guidelines perhaps could be analogized to the keystone of an arch. But there are other stones in the arch and they're important stones. There are court decisions, statutes enacted by Congress.

You're familiar, for example, with limitations in our appropriations on using money in certain undercover operations contexts. Because these other provisions were already well established, formalized, written down, being followed, we didn't repeat them all in the guideline.

For example, the courts have elaborately developed and closely defined the law of entrapment. In the guideline, we don't repeat all that or try to even summarize it. We just say, of course, stay far away from entrapment.

Now, another point that I think bears keeping in mind in reviewing the guidelines is that they, of necessity, have to apply to an extraordinary variety of different kinds of operations. One of the troubles with the terminology, undercover operations, is that it might lead some to think that they're largely similar or that there may be two or three major categories. In my opinion, if you break it down into categories, you get into dozens or hundreds, and some of them are extremely different from others. The guidelines have to be designed to cover all of them.

It is also important to keep in mind which operations are essentially typical, and which are atypical.

The fencing sting-type operations are typical. And operations like Abscam are typical. I do not think that this is the best viewpoint to look at the guidelines, only or primarily from the standpoint of how they would effect one particular operation. The real question is: How do they effect the whole range of operations?

Now, in conclusion, I would urge members of the committee and the Congress to reserve judgment on the guidelines.

I'd suggest that the issues about whether these guidelines should be changed, whether they should be codified, if so, whether they should be codified in this form or some other form—all should be reserved.

For one thing, we need substantial experience actually operating under the guidelines before we'll all have a sound basis for making final conclusions on these kinds of matters. For another thing, Attorney General Smith certainly should be given the opportunity to reach his own conclusions concerning these guidelines. I would suggest that what matters is how they actually work in practice. That's how they should be judged. Experience is really the best test.

I know that you've had eminent lawyers, and law professors, and scholars testifying about the guidelines, and I've carefully reviewed their prepared statements. And I think that observations of all interested and knowledgeable parties can be helpful. But I would suggest to the committee that law professors and lawyers—so I'm including myself—have an inherent tendency to microscopically

examine language and to think that that's the most important thing.

I would suggest with regard to these guidelines, that's not the most important thing. The most important thing is: How do they actually work in practice?

After an appropriate period of trial and error, looking back in actual cases where they were applied, do the results seem to be satisfactory, or not?

I think that the process followed with regard to the Levi guidelines maybe serves as a good model. They were put into effect. They were followed for an extensive period. And then the evaluation activity began to really come to bear. I would suggest that the approach adopted by Congress regarding the Levi guidelines might also be the best approach regarding these undercover operations guidelines.

Mr. Chairman, that concludes my statement. And I want to apologize about the fact that we got it to the committee so late. But we are in still a transitional circumstance at the department, and there were a number of reasons why it was difficult to provide the statement earlier.

I'd like to stop now, because I've talked for so long, and perhaps too long. I would ask if it meets with your approval, Mr. Chairman, if at some point after responding to questions by the members, I might have just a few minutes to quickly respond to a few selected points made by Professors Seidman, Chevigny, and Marx.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Michel. It is always a pleasure to have you here.

[Mr. Michel's prepared statement follows:]

PREPARED STATEMENT OF PAUL R. MICHEL, ASSOCIATE DEPUTY ATTORNEY GENERAL, OFFICE OF THE DEPUTY ATTORNEY GENERAL

ATTORNEY GENERAL'S GUIDELINES—UNDERCOVER OPERATIONS

Chairman Edwards and members of the Subcommittee on Civil and Constitutional Rights; I am pleased to have the opportunity today to testify before the Subcommittee on recent developments in the Department of Justice policy governing FBI undercover operations, and particularly on the Guidelines issued by Attorney General Civiletti on January 5, 1981. I have been asked to testify about the Guidelines at this time because I participated in their preparation and can respond to any questions about the scope and purpose of the current Guidelines. Attorney General Smith, along with other senior Department officials, is presently reviewing the Guidelines in order to determine whether any revisions may be necessary.

Last March, the Subcommittee received testimony from the Director of the FBI and the Assistant Attorney General in charge of the Criminal Division. Their appearance followed completion and public disclosure of several major undercover operations, including ABSCAM. In the meantime, juries have convicted all the defendants brought to trial on the basis of ABSCAM, although the controversy surrounding some aspects of that operation continues in the courts and in public debate. Also, the Department and the FBI, after 18 months of intensive collaboration, completed Guidelines on Undercover Operations. With Director Webster's concurrence, these Guidelines were issued by Attorney General Civiletti on January 5, 1981.

The Guidelines do not differ significantly from established procedures and practices. These practices and procedures were gradually and carefully developed over the past 2 years. Thus, implementation of the Guidelines should not, in my view, cause confusion or disruption. Indeed, I have been advised by FBI officials, including the Assistant Director of the FBI's Criminal Investigative Division, that the FBI has no significant questions of interpretation and anticipates no real problems. This fact

came as no surprise because of the careful and cooperative process which produced the Guidelines.

In the early Fall of 1979, the Attorney General asked the Assistant Attorney General in charge of the Criminal Division to supervise the drafting of possible Guidelines on various topics, including Informants, General Criminal Investigations and Undercover Operations. The broad outlines of these Guidelines were taken from the proposed FBI Charter which had been developed in the preceding year by FBI and Department officials, working together. Under the Charter, the Department was required to issue Guidelines on major areas of investigative activity. The Attorney General determined, however, that the benefit of Guidelines to the effectiveness of FBI operations had been sufficiently established that additional Guidelines should not await Congressional action on the proposed Charter.

Although Congress did not take action on the Charter proposal submitted in the Summer of 1979, various committees, including this one, did hold hearings on many parts of the Charter. The hearings sharpened the issues and tested the reasoning underlying each of the provisions in the proposed Charter. The hearings underscored the need to assure that law enforcement activities are not only conducted vigorously and effectively, but also lawfully and reasonably.

The Guidelines, like the Charter, were put through innumerable drafts which were circulated widely for comment. The drafts were written on the basis of extensive consultation with the FBI officials administering and supervising the Organized Crime, White Collar Crime and other investigative programs. The initial drafting was done by Departmental Attorneys who were members of the Undercover Operations Review Committee which is composed of FBI and Department Officials. The drafts were then reviewed by FBI employees at every level in both Headquarters and in the field. This included the Special Agent/Investigator, the proverbial "brick agent". Written comments were prepared and became the basis of extensive discussion among members of the Guideline Review Committee. Chaired by the Assistant Attorney General in charge of the Criminal Division, it included, among others, the Assistant Director of the Criminal Investigative Division, his deputy, the Chiefs of the Organized Crime Section and the Selective Operations Unit, the Special Assistant to the Director, several career Department prosecutors and myself.

While the text changed somewhat during this long process, there was full agreement from the start between the FBI and Department officials on all basic principles. As the project proceeded, only minor disagreements arose and all of them were resolved rather readily in a mutually satisfactory manner. In fact, by the end, there was full agreement by everyone of the Committee. Not a single issue had to be submitted to Director Webster or the Attorney General for resolution. Both personally reviewed the final draft which the Attorney General promulgated.

The process followed was not invented for this particular project. We simply followed the basic model established in 1976 when a Committee commissioned by Attorney General Edward Levi developed Guidelines on Informants, Domestic Security Investigations and Civil Disturbance Investigations. Indeed, some of the members of the earlier Committee also participated in this project. A prime example is Inspector John Hotis of the FBI who, in addition, along with former Deputy Assistant Attorney General Mary Lawton of our Office of Legal Counsel, was a principal draftsman of the proposed FBI Charter.

The Guidelines on Undercover Operations, like those on other topics, were drafted on the basis of certain underlying principles. The three most important of these are:

First, the guidelines should not be a catalogue of "do's and don't's". Rather, they should focus on establishing or formalizing sound procedures to assure that critical judgments are made at appropriate levels of authority and are recorded and susceptible to subsequent review. Second, the Guidelines must be clear enough to be readily understood and followed by all agents and contain standards which are realistic enough so as to not interfere with effective and appropriate investigative activity. Third, the Guidelines should not only meet the requirements of Constitutional and statutory law, but also should reflect sound law enforcement policies.

The Guidelines Committee sought to follow these three basic principles. No one would claim that the Guidelines are perfect. But they are based on ideas which have been proven in practice. The design of the Guidelines is to insure that investigations are conducted both effectively and lawfully. The latter consideration is as important to the continuing efforts of the Government to combat crime as the former because crimefighting ultimately requires acceptance of our work by the courts, including the appellate courts which review the convictions we obtain and the Congress which annually appropriates the funds we need and affords the authorities for our activities.

There is, however, one sense in which these Guidelines (or any other possible version) could be found unsatisfactory: the Guidelines cannot guarantee that no

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undesirable incident will ever occur. They vastly reduce the risk, but they do not and cannot prevent it from ever happening.

Two examples will illustrate this point. The first involves the provisions establishing the tests which must be met before a suspect may be offered an opportunity to commit a criminal act. While the Guidelines cannot guarantee that an honest person will never receive such an offer, they do make it unlikely. Some outside observers have suggested that the Government must have probable cause of similar past crimes by an individual before it offers him an opportunity for crime such as a bribe. This is impractical. The effect would be to immunize from investigation probably the majority of those who in past operations actually accepted such offers. There are other problems too. For one thing, we often do not know the identity of the subject until he appears at the location where the offer will be made. More fundamentally, this suggestion misunderstands the evolutionary nature of investigations. They ordinarily begin with suspicion and end with probably cause to arrest and indict. To require probable cause before we can make an offer is to trap the FBI in a "Catch-22". If we already had probable cause of a past crime, we could simple arrest and prosecute for the past crime. The reason for making the offer is to convert a reasonable indication of criminality into evidence amounting to probable cause.

The second example involves the provisions governing the handling of intermediaries. Often, all we have to go on when we first focus on an individual is the word of a middleman that he has been criminally involved with the individual in the past or that individual indicated an interest in such involvement. But his credibility will rarely be beyond question. What is law enforcement to do?

Often the only way to corroborate the middleman's assertion is to make the offer. If the middleman brings in innocent individuals who refuse our offer, we will quickly realize we cannot trust him. There is some risk in the meantime that one or more innocent individuals will be offered a criminal opportunity. Under the quidelines, we can generally make the offer only under these circumstances: (1) a middleman implicates and produces the suspect, or (2) the suspect, hearing of our operation, comes in on his own. Moreover, once the suspect is there, the offer made to him must be clearly criminal, one that is modeled on real life situations and one in which the incentive, such as the size of a bribe, is not disproportionate to the service sought. The honest man, of course, simply refuses and departs.

We cannot entirely prevent this anymore than we can prevent any innocent person from ever being investigated with conventional techniques such as interrogation of witnesses and examination of documents. Indeed, even searches with warrants, which are far more intrusive of privacy and which do require probable cause, sometimes are directed at persons who turn out to be innocent. Nor can we forego using middlemen, relying only on Special Agents with undercover identities, since it is the real life con men who know and are known by the criminals while our undercover agent, a stranger, would rarely be admitted to the confidences of the criminal suspect.

The Guidelines intend to minimize the risk that middlemen will misstate or exaggerate what a suspect has said or done. There is simply no practical way to eliminate such possibilities altogether.

There is, however, an impractical way—that is to require that every such preliminary conversation between a suspect and a middleman be recorded. If such requirement were imposed, a wary criminal could then insist on face to face meetings and search the intermediary, knowing that if the suspected middleman is cooperating with the Government he will be wearing recording equipment and if he is not, he cannot possibly be cooperating with the FBI. Consider too, the risk to the cooperating individual. How many persons will cooperate and act as an intermediary if required to always wear recording equipment, which if detected may result in his being killed?

Finally, I should like to point out that the Guidelines attempt to provide a rational structure for the careful exercise of judgment by requiring increasingly sensitive matters to be reviewed by increasingly higher levels of authority. The emphasis on procedures, however, does not minimize the importance of the judgments themselves. Now that the FBI has been conducting major undercover operations in all areas of criminal activity within its investigative jurisdiction for a number of years, this exercise of judgment will benefit from these experiences. Therefore, we are confident that a few unfortunate events which may have occurred in a few of the past operations are unlikely to be repeated. In fact, we systematically analyze all major operations upon completion precisely for the purpose of refining our undercover techniques. The lessons which can be learned from the past are being learned and applied in present cases.

In the Subcommittee's review of the Undercover Operations Guidelines, it should keep in mind that the Guidelines are not the entire system for controlling such operations. In addition to the Guidelines, there are statutes and court decisions applicable to various aspects and there are also internal working papers of the FBI and the Department. Accordingly, the Guidelines build on but do not repeat provisions already established elsewhere. For example, the Guidelines do not contain lengthy or detailed provisions on entrapment. The reason is that the law is well settled by the courts and this subject, therefore did not further development and exposition in the Guidelines.

It is also important to keep in mind that the Guidelines were designed to apply to all kinds to undercover operations—fencing operations, drug purchases, commercial entities such as bars and waste disposal companies and all the rest. These are the typical operations; ABSCAM was atypical. Thus, the Guidelines should be viewed from the standpoint of whether they adequately control, but not unduly encumber, the entire range of undercover operations.

In conclusion, I would urge Members to reserve judgment on the Guidelines in their present form or some modified form and whether to codify them until we have had more experience under them. In addition, Attorney General Smith should be given the opportunity to reach his own conclusions concerning these Guidelines. I submit that how they actually work in practice is what should be judged. Experience is the best test. Rather than evaluating them, as law professors or lawyers might be inclined to do, by closely analyzing the precise language in the text, I suggest instead that we wait and see how they work in real cases. That was the approach adopted by the Legislative Branch regarding Guidelines previously promulgated by Attorney General Levi, and, I would suggest, is also the best approach regarding these Guidelines.

Thank you.

Mr. EDWARDS. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Michel, how long do you think it will be before the Attorney General is able to review these guidelines and to respond to Congressman McClory's letter of January 23?

Mr. MICHEL. Congressman, there are really two questions there, and I can only answer one, and that is the second one. That is I know with regard to responding to Congressman McClory's letter, Director Webster has sent material to the Attorney General and I believe that the Attorney General will have that material today.

Therefore, I'm sure that Congressman McClory will promptly receive a substantive response from Attorney General Smith on the points raised in his letter.

Your first question about when will the Attorney General complete his evaluation or review of the guidelines, I really just have no basis of making a guess on that. I wouldn't think too long because I know it is a matter of importance to him. But I really can't give a time frame, because I have no way of predicting.

Mr. SENSENBRENNER. Mr. Chairman, in order to make the record complete, I would ask unanimous consent that the Attorney General's response to Congressman McClory be included in the record of these proceedings.

Mr. EDWARDS. Without objection, so ordered.

[Information follows:]

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Ninety-seventh Congress

January 23, 1981

Honorable William French Smith
Attorney General of the United States
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Smith:

In the past few days, I have been able to review the Department's Guidelines on FBI Undercover Operations which were issued by former Attorney General Benjamin Civiletti before his departure. It is my understanding that these proposals were marketed as being consistent with current practice and with the FBI Charter proposed by the Department two years ago. Nevertheless, I feel compelled to request that they be reevaluated in light of the effect they might have on the operational effectiveness of the FBI.

Specifically, I am concerned about the extent to which flexibility has been removed from the special agent in charge (SAC) and from the Director of the FBI himself. I am also concerned about the wide distribution given undercover operations proposals within the Department. In light of the recent ABSCAM investigation, and the leaks to the press attendant thereto, I believe it is unwise to involve too many people in the approval process.

Further, while I am sensitive to the risks which the Undercover Operations Review Committee should examine relative to the effect of the undercover operation proposal on private citizens, I would hate to see such operations become so difficult as to make their use by the Bureau difficult if not practically impossible.

I have been informed that the Judiciary Subcommittee on Civil and Constitutional Rights intends to hold hearings on or about February 16, and I would hope that by that time you will have been able to reach your own conclusions on the validity of my request.

I look forward to seeing and meeting with you at that time.

Sincerely,

Robert McClory
Ranking Minority Member

RMcC:tbh
cc: Director William Webster,
Federal Bureau of Investigation

Office of the Attorney General
Washington, D. C. 20530

February 5, 1981

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Honorable Robert McClory
Ranking Minority Member
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Bob:

Thank you for your letter of January 23, 1981, with respect to the recently issued Guidelines on FBI Undercover Operations. I appreciate your expression of concern as to whether the Guidelines may or may not have an impact on the Bureau's operational effectiveness.

Promptly after my confirmation, I have undertaken a review and evaluation of recently proposed Guidelines. I too am concerned that the appropriate balance be struck between the rights and liberties of individuals and the Bureau's need to engage in effective undercover operations. I assure you that this is a matter receiving my personal attention.

I genuinely appreciate your expression of interest and concern in this important matter, and I too look forward to working with you in the weeks and months ahead.

Yours sincerely,

Bill

William French Smith
Attorney General

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Mr. SENSENBRENNER. Second, Mr. Michel, it is my understanding that there is some litigation going on in New York, which addresses some of the points this committee has received in testimony from earlier witnesses.

Is that the case, and could the Department make available, at least, those parts of the transcript which are relevant to the earlier testimony, for inclusion in the record?

Mr. MICHEL. Congressman Sensenbrenner, I think that the testimony, which was extensive—as you know, there were several weeks of hearings—isn't presently available. But I assume it will become available before too long and certainly, we can make sure that the committee and its staff has access to it, and that it is made a part of the record of the committee. I just don't know how fast we can do it, but we'll certainly do it.

Mr. SENSENBRENNER. I have no further questions.

Mr. EDWARDS. Mr. Lungren?

Mr. LUNGREN. No questions.

Mr. EDWARDS. Well, Mr. Michel, I'm sure you know that this subcommittee is supportive of the guidelines. I would point out, though, that when you mentioned the guidelines on domestic security, that Attorney General Levi worked very closely with this subcommittee in the drafting of the guidelines. In contrast we saw these guidelines only after they already had been promulgated, and presumably sent to all the field offices early this year. Of course, we are reserving judgment, but we have our responsibilities, too.

I might also point out that at a hearing just about a year ago, March 1980, the Director of the FBI Webster and the Assistant Attorney General Heyman testified that there was total control of the undercover operations at that time, that all the decisions made in connection with the undercover operations that this subcommittee was inquiring into had been supervised by the Bureau and Department of Justice on a daily basis.

Yet your testimony today points out, and rightly so, that that was not quite the fact. You have stage 1, stage 2, stage 3. You were in stage 1 at that time. Is that correct? And some problems did arise?

Mr. MICHEL. No, Mr. Chairman. The testimony of Director Webster and Mr. Heymann on March 4 of 1980, was describing circumstances in the immediately preceding months. And those months are in the period I categorized as period number 2.

The procedures were in place. The Undercover Operations Review Committee was functioning. So that in terms of what the current situation was, in late 1979 and early 1980, all the controls were in place at that time.

They had not been in place back in the period 1977, 1978, and perhaps into parts of 1979.

Mr. EDWARDS. In other words, Operation Front-Load was in stage 1?

Mr. MICHEL. That's correct.

Mr. EDWARDS. What you're saying is Abscam was in stage 2?

Mr. MICHEL. Most of Abscam was in stage 2. I believe the very beginnings of it were in stage 1.

Mr. EDWARDS. You mentioned one of the key elements in those undercover operations, the risk of middlemen, often unwitting

agents of the Federal Government, approaching innocent persons and sometimes doing damage to innocent persons.

Often, these middlemen are conmen or people with long criminal records, and sometimes they are in the pay of the Bureau or of the Department of Justice. Is that correct, also?

Mr. MICHEL. That's correct. There are both types. The first type is the far more common.

Mr. EDWARDS. Is there no auditing done? How do you control these people, these people floating around? One of them got as far as San Jose, Calif., and did great damage to an innocent businessman.

How do you stop them from approaching one person after another and then approaching the same person again, and enticing the same innocent person again and again and again? And going to the neighbors of an innocent person and saying, do you know anything about this guy, and so on?

Mr. MICHEL. Let me take it separately. With regard to the unwitting conman, there is no way we can stop them. And we didn't start them. He was already out there doing that.

Mr. EDWARDS. No, but you're paying him money to continue.

Mr. MICHEL. No, no, not the unwitting conman. He thinks that he's working with criminals and at both ends, and so, he's just operating in his normal fashion.

And we didn't put him into that business, and we're not in a position to put him out of that business, so that it just isn't a question of how can the Government let him do that? The Government ordinarily has little capacity to stop him from doing that.

Now, in the case of the witting intermediary, who is being paid, in some instances, by the FBI, certainly is receiving direction from the FBI, that's quite a different circumstance. In that case, there's a lot that we can do and do do to minimize as much as possible, the risk of innocent people being drawn into this web, if you will.

One of the things we do is that we require, to the extent possible, that his contacts with people that he says are corrupt, or are racketeers, or whatever the nature of the enterprise is, we require him to develop the best possible evidence.

For example, if there are telephone conversations between the witting conman and the suspect, those conversations may be recorded with consent of the cooperating individual. So that we aren't dependent on his word that the suspect showed an interest in committing a crime. The words of the suspect himself or herself are available to us. So that eliminates the risk that the middleman is lying in that kind of circumstance. Now, it is not always practical to have tape recordings done. But that's done where it can be done.

Another device we use is that the witting middleman is questioned closely after each material meeting or contact with a suspect. And he reports or produces information, detailing precisely what was allegedly said.

Sometimes, the specifics in these reports can be corroborated through independent investigations, so that would serve on a check that the conman is conning us and lying about someone being interested in committing a crime.

So those are the principal protections that prevent an innocent person from ever getting to the stage of being at one of our locations.

And then, as I mentioned earlier, the second line of defense, the second safety net, is our strong emphasis on making it absolutely clear that we're talking about crimes and make sure that the contact is directly between the agent and the suspect, and no one is speaking for the suspect. He's speaking for himself.

And in that way, if there was anything that slipped through and an innocent person gets in there, then when he's face to face across the table with the undercover agent, who makes it clear that they're talking about outright criminality, well, then he leaves.

It's not perfect. It's not risk-free. But neither is any other investigative technique.

You talked about businessmen or public figures who were innocent, being embarrassed or injured in their public or business life. No. 1, I have to point out that the injury comes almost always not from the fact of the investigation, but from the leak. The problem is leaks.

Second, those same kinds of injuries occur even in the most limited sort of investigations, investigations that depend only on questioning witnesses. The same thing happens.

He comes in and tells us Congressman so and so is corrupt. He takes bribes. And it may not be true. We do an investigation. So there's nothing—there's no danger that's of the sort that you focus on, that's increased by the fact that we do undercover operations. The danger is already there and it is real danger. We do everything we can to minimize it. But in no context is criminal investigation an entirely safe and fool-proof enterprise.

Mr. EDWARDS. Well, we do not agree, Mr. Michel, on the question of whether the danger is increased when there's a thug, a con man and he or she is being utilized as a middleman by the Bureau by another undercover agent of the Bureau. Based upon discussions with the undercover FBI agent, who the middleman thinks a big businessman or something, the middleman is egged on or promised good things by the FBI undercover agent.

As a result, the middleman continues in business and perhaps increases the amount of his business.

Isn't that correct?

Mr. MICHEL. I think the answer—I hate to give this kind of answer. I think the answer is no in a way and yes in a way.

When you say he's in business because the FBI is egging him on, I don't think that's quite right. He was in business before the FBI came on the scene. And likely—I can't prove it in every case—but likely, he would have remained in whatever that business is, whether or not he became involved with the FBI.

There is a danger that if excessive inducements are offered to this unwitting con man, that that may increase the risk of innocent people being brought in. But as I said before, there's a certain self-correcting mechanism. If the con man keeps bringing in people who are—who don't go through with the deal, then he loses face, loses credibility with the FBI guy who he thinks is a criminal associate.

So there's a disincentive for him to be wrong very often. But there are risks there and they just can't be eliminated.

Mr. EDWARDS. I don't want to take all the time. Do you have some questions, Mr. Lungren?

Mr. LUNGREN. No.

Mr. EDWARDS. Counsel?

Ms. COOPER. I'd like to ask a few questions about the Undercover Review Committee. The description in the guidelines of the committee's makeup is somewhat vague. It talks about appropriate employees of the FBI designated by the Director and attorneys designated by the Assistant Attorney General for the Criminal Division. What does this mean in terms of numbers, first of all?

Mr. MICHEL. The committee is basically six or seven individuals, two departmental attorneys, career attorneys, long experience, extensive prior involvement in undercover operations. One is a section chief and the other is slightly below that level. The FBI members, including the Deputy Assistant Director of the Criminal Investigation Division, and I believe the head of the Selective Operations Unit; that is, in effect, the undercover unit and senior officials of the program involved. If it's a property crime matter, then they sit on it. If it's an organized crime matter, then people from that section sit on it, and so on.

Ms. COOPER. So when it sits, it might have anywhere from six or seven to three or four people, making a decision?

Mr. MICHEL. I think ordinarily, the range is about 5 to 10 members on a given proposal.

Ms. COOPER. Well then, is it an established membership? Are people definitely on the committee or definitely sometimes on the committee?

Mr. MICHEL. Some of each. The committee is chaired by the Deputy Assistant Director of Criminal Investigative Division. He is always on it. The two departmental attorneys are always on it. Some of the FBI membership changes, depending on which investigative program a particular proposal falls in. But most of the members of the committee are, in fact, permanent members.

Ms. COOPER. It is just the permanent members, then, that would function in the way of receiving the annual reports, for example; is that right?

Mr. MICHEL. Well, they would be the formal receivers. They may share all kinds of studies and reports with other people. But I think the answer to your question is yes.

Ms. COOPER. OK. The guidelines provide for a decision being made by a consensus of the members. What does that mean if there's a substantially changing or at least possibly changing number and makeup on the committee?

Mr. MICHEL. Well, let me highlight what really the most important function of the committee is. It's not a rejection committee. And it's not a rubber-stamp committee. It is a double check on the judgment of officials down the chain of command. It is a check that brings to bear some expertise.

When you're talking about the committee including the Chief of Selective Operations Unit, permanent member, here's the individual who probably more than anybody else in the whole FBI, all day

long, lives undercover operations and all their problems and benefits and issues. So he is just a critical party.

Now, what happens is, a proposal comes in and if these officials with their various perspectives see a flaw in it, they modify it. They send it back to the field. They say it was not quite satisfactory in this fashion. See if you can come up with a safe way, with fewer risks.

Often a proposal will bounce back several times before it is finally judged to be sufficient. That's why at the final moment of decision, it really is a consensus. It isn't something where they have a vote and say 6 to 5, it's approved or rejected. It's a consultative process.

A consensus develops because, where there's problems, changes are ordered. So that's why the reference in the guidelines to consensus.

Mr. EDWARDS. Can I ask a question? How often does the committee meet?

Mr. MICHEL. It varies, Congressman, depending on the volume of new applications and renewals. It meets normally I think in the FBI headquarters. And I think it meets on a very regular basis. I can't tell you if it's weekly or biweekly or what. It meets on quite a regular basis.

Mr. EDWARDS. Have you ever attended a meeting?

Mr. MICHEL. I have not.

Ms. COOPER. Does the committee keep minutes?

Mr. MICHEL. Let me back up and answer both, to counsel's earlier question and something you alluded to, Mr. Chairman, the committee also includes senior officials from the FBI's Office of Legal Counsel and it's service divisions, technical services, or whatever. So that all viewpoints and operations are brought to bear in that one setting, all the various kinds of expertise.

Ms. COOPER. Well, it seems to me that it's very hard for this oversight committee to really know what's going on. It sounds like sometimes, OLC or other divisions of the FBI or the Justice Department are included, but maybe not all the time.

Mr. MICHEL. No, no. The membership is the same except that added to the normal membership, in the case of a particular proposal, would be one or two or perhaps three individuals whose background relates to that particular proposal or the program it came from. But the committee itself is not a rotating membership. It's the same people and the same units of the FBI are represented at all sessions of the committee, such as Legal Counsel.

Ms. COOPER. Well, what about the Office of Legal Counsel? The operations that come to the Review Committee come to it because of the existence of sensitive circumstances. Doesn't that normally require some sort of evaluation of the legal and ethical problems that are involved in the operation?

Mr. MICHEL. It's certainly a good idea. And the process actually begins at the field office level. Every field office has its own in-house legal adviser. When an undercover proposal is first fashioned in the field office, that lawyer reviews the legal implications. Then it's submitted to FBI headquarters, either as you say because of some indicia of sensitivity, or if it involves substantial dollars,

whether or not there's other kind of sensitivity, and then there's further legal review there.

Now, where the committee, despite having some lawyers on it, it's got the two prosecutors and it's got the FBI headquarters' legal adviser on it, where even those lawyers have doubt about whether the legal issue has been well enough analyzed, they take matters up with the Justice Department's Office of Legal Counsel. And they get formal opinions where necessary.

So I think the legal base is rather thoroughly covered in the process.

Ms. COOPER. My question is, why aren't such members a permanent part of the committee, if these questions are occurring and constant in the policy decisions that are presented before the committee, rather than leave it to the permanent members who have a different perspective than other divisions and parts of the Department?

Mr. MICHEL. The FBI's Legal Counsel Division is represented on a committee in all of its meetings.

Ms. COOPER. One of the permanent members is a representative from the Office of Legal Counsel?

Mr. MICHEL. Of the FBI, yes.

Ms. COOPER. What about the Justice Department's?

Mr. MICHEL. No. Because our experience has been the majority of cases, we don't need to refer to the Justice Department's Office of Legal Counsel. No one from that office sits on the committee. Where necessary, issues are referred by the committee to the Department's Office of Legal Counsel for advice and sometimes for formal written opinions.

Ms. COOPER. What about the Office of Professional Responsibility of the Justice Department and the FBI? Are they permanent members of the committee?

Mr. MICHEL. No.

Ms. COOPER. Why not?

Mr. MICHEL. Because it's not viewed as necessary. I don't even recall any discussion of that, because the whole approach is to have rather clear procedures now embodied in guidelines. And where the direction is clear and appropriate, you avoid ethical questions. You don't need somebody who's an expert in judging ethical failures, because you avoid failures in the first place by having sound and clear limits set forth.

Ms. COOPER. Well, what's the purpose of having people of special expertise on the committee if it isn't to have special sensitivity about discerning the presence of those issues, a sensitivity that other people might not have?

Mr. MICHEL. Well, I don't agree if you're suggesting that all those officials from the Department and the FBI that I identified lack judgment to grapple with the issues of sensitivity. I don't think that's the case.

I think quite to the contrary; that the committee has demonstrated a very great sensitivity and a very fine judgment. In fact, the FBI should get credit apart from its role in the committee. That is, FBI headquarters frequently will not approve a proposal from the field, at least not without changes, and they send it back on their own. It never even gets to the committee. So that the committee's

time is reserved for projects that are in rather good shape. I think that supports the notion I'm suggesting, that there is good sensitivity among the membership of the committee.

Ms. COOPER. Well, I'm only suggesting that people who work in one area have more knowledge and more sensitivity about the area that they're used to working in.

Let me give you another example. One of the sensitive circumstances is the possibility or the probability of civil liability arising out of an undercover operation.

That suggests, it seems to me, an awareness on the part of the Justice Department and Attorney General that this is a serious risk in many, if not all, undercover operations.

Why then does the committee not have a permanent member from the Civil Division?

Mr. MICHEL. It is not a serious risk in many or all undercover operations. The truth is the opposite. That it is rarely a substantial risk that there will be appreciable civil liability.

And the reason is that we are very careful about that. There were a few very bad experiences, such as Front-Load, back in earlier years.

But the kind of operations being undertaken now, rarely involve substantial questions of civil liability.

Now, with regard to expertise in the Civil Division, that is available and resorted to, much in the same fashion as we sometimes, when needed, refer matters to the Office of Legal Counsel.

Ms. COOPER. Let me ask you again what you didn't get a chance to answer. Are minutes kept of the meetings of the committee?

Mr. MICHEL. Records are kept of its determinations. I don't believe that minutes are kept in the sense that a court reporter is making a verbatim record of everything that we say.

Ms. COOPER. Would those records indicate who was participating?

Mr. MICHEL. Oh, sure.

Ms. COOPER. Is anybody who is participating part of the group that reaches a consensus? I don't want to say vote, because it doesn't sound like it's that formal.

But if someone is drawn into the committee from the Civil Division, for example, or some other part of the FBI or—the Justice Department normally doesn't sit on the committee. Do they take part in the final decisionmaking?

Mr. MICHEL. Well, they take part in the sense that the committee will endorse a proposal and forward it to the Assistant Director or the Director, who is really the final approving authority, unless anyone present and participating has substantial problems with it. So whether or not a sometime member of the committee technically has a vote, it really isn't relevant. If he has problems with it, it's unlikely that it will be endorsed by the committee and sent to the Assistant Director or the Director for final approval.

Ms. COOPER. Maybe I missed part of your answer. Did you indicate whether or not the records that are kept indicate who participated in the deliberations of the committee?

Mr. MICHEL. I believe that they do. But I've not inspected the records and so I can't be positive about that.

Ms. COOPER. And would the records also indicate how often, at what precise dates, the committee met in deliberating?

Mr. MICHEL. I assume so.

Ms. COOPER. What kind of data is presented to the committee from the field? What is the form of it?

Mr. MICHEL. Well, it is in writing, and it's gone through prior reviews and the views of reviewing officials are also recorded.

The level of detail and the extent of the written discussion of issues varies enormously, according to the particular operation and how major and sensitive it is.

Mr. EDWARDS. Well, they just don't meet and chat about the issue and reach a consensus. A careful record is kept of exactly what went on and the views of the different people, and so on, is that correct?

Mr. MICHEL. I think that's several yesses. I think in general, good records are kept concerning the committee's review of a project. I know that the facts about the project are elaborately written up. And I would think that they are the most important part of the matter because they discuss the issues.

And they get into matters like why the officials at lower levels who approved it think the risk is acceptable, or that such and such a problem has been controlled.

So that I think that if the question is: Could someone, looking back at the total record with regard to operation X, be able to reconstruct what issues were considered and how fully, and what sort of thinking served as a basis of their resolution, I think the answer is "Yes."

You would get a rather full picture.

Mr. EDWARDS. I think that's something that you ought to check and advise us about, though, because I'm not sure that you're certain of that.

Mr. MICHEL. I'm not certain what the minutes of the meeting, as we're calling it, show, because I've not inspected them.

I am certain of the level of detail of the application papers, so to speak, because in several particularly sensitive operations, I have, among some other Department officials, reviewed the full package. And they are exceedingly detailed and thorough, and contain a lot of analysis and discussion.

They frequently, for example, reflect extensive analysis by the U.S. attorney in the District. That's part of the paperwork that accompanies the package when it comes into headquarters in major cases, at least.

Mr. EDWARDS. Thank you. Mr. Boyd?

Mr. BOYD. Thank you, Mr. Chairman. Have there been any civil claims filed in connection with Abscam, Mr. Michel?

Mr. MICHEL. I don't know.

Mr. BOYD. We're all familiar with the leaks which came out during the early stages of the Abscam investigation and of former Attorney General Civiletti's attempts to find the sources of those leaks.

Could you tell us what has been done to eliminate the future possibility of leaks, given the number of people involved in the approval process?

Mr. MICHEL. Well, the first thing I would like to observe, because it's been raised before, is that the implementation of the guidelines will not add to the number of people with access to the facts of

sensitive undercover operations. That number will remain about the same as before the guidelines.

Second, that number we always try to keep to a minimum, just as in the context of classified information, agents try to limit access by following the well-known need-to-know principle.

Third, as a result of some experiences in the past, some additional steps have been made to eliminate marginally needed access.

Mr. BOYD. Those experiences you're talking about are the leaks?

Mr. MICHEL. Among others, yes.

Mr. BOYD. With regard to the guidelines and the potential violation of those guidelines, or a prior policy with regard to undercover activities, what types of disciplinary procedures are normally followed, and what kinds of sanctions?

Mr. MICHEL. I'm glad you raised that. One of the witnesses yesterday went into some length in his statement, to suggest that guidelines weren't taken seriously, weren't complied with, weren't enforced, had no sanctions, and so forth.

I believe that the witness was actually talking about guidelines involving New York City's police department rather than FBI guidelines. But in any event, he raised that issue. I think that two observations are in order on that score.

The first is, whatever other criticisms the FBI gets, or may even deserve in some occasions, it is not an organization of rogue elephants who go around breaking the rules. It's been suggested by Prof. James Q. Wilson in a thoughtful article on undercover operations, that second only to the U.S. Marine Corps, the FBI is the most rigidly disciplined organization from the standpoint of absolute compliance with internal rules and regulations.

By the way, Mr. Chairman, that article you might want to consider. I wouldn't request it. It's really up to you, you might want to consider making that article by Professor Wilson a part of the record.

It's called "The Changing of the FBI, the Road to Abscam." And it appeared in the Public Interest in a recent issue.

The second observation, I make, Mr. Boyd, is that where an FBI—excuse me, let me finish one other aspect first.

We've really had one very major compliance check on existing guidelines. That was a check done at little more than a year ago, I believe, of compliance with the undercover—I'm sorry—the informant guideline. And that was a study done by some academic people. I believe that the committee is familiar with it.

My recollection is that, that that study concluded, no surprise to me, that the level of compliance was extremely high, and that the occasions found where the guidelines were not followed were very few, and very peripheral, and obviously, basically innocent in nature.

So, I think, No. 1, that the guidelines are taken seriously, and they are followed, and we have proof of that.

No. 2, there are sanctions. The real sanction that's involved here is you can get fired. And FBI Directors have not hesitated to fire people who committed substantial wrongdoing.

And my own opinion is that that's probably much more effective than lots of other sanctions, if your job is on the line for breaking

the rules, and you're a disciplined professional, I think the reaction is going to be that you'll follow the rules.

Mr. BOYD. Let me interrupt for a second to note that FBI personnel are excepted personnel and are subject to being fired without cause unlike many Government employees.

Mr. MICHEL. Thank you.

Mr. BOYD. I have one other question.

Mr. EDWARDS. Take your time. Sure.

Mr. BOYD. With regard to disciplinary activity for violations of the guidelines, since these guidelines are rather new, there probably haven't been too many investigations for violations of them.

But if, in the future, when there are violations of these guidelines, there are investigations which result in sanctions, is it going to be the policy of the Department to announce to the public, after the fact, that investigations have taken place and that remedial action has been taken?

Mr. MICHEL. I don't know what the policy on public announcement might be. I think with regard to congressional oversight, that the Department, as before, would provide some reasonable form of access for committees and staff of how the rules and regulations are enforced.

But I have no idea what the future policy might be on public announcements about such inquiries.

Mr. BOYD. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Michel, section (B)(f) precludes the special agent in charge from initiating an operation when an undercover employee or cooperating private individual will be required to give sworn testimony in any proceeding in an undercover capacity.

Do you mean that in some cases, the witness might be testifying under oath, without revealing his real identity?

Mr. MICHEL. Well, the purpose of section B is to establish a trigger of what things have to be sent to headquarters. That's what that list of factors does—if one of those is likely to be present. Then the matter has to go to headquarters. Can't be decided only by the SAC.

Mr. EDWARDS. Well, under any circumstances, could the witness be authorized to commit perjury?

Mr. MICHEL. I think that the answer to that, under the Archer cases and other cases, is basically no.

And I don't believe that listing this as a trigger factor was intended to suggest that we're looking for opportunities to have witnesses testify improperly.

Mr. EDWARDS. Now, guidelines also permit the Director to approve operations that will involve the commission of crimes by the agent or informant.

Is there any limit to what kind of a crime might be authorized? Does it go as far as robbery, murder, or anything like that?

Mr. MICHEL. Of course not. And the point of reference would be to the informant guidelines.

You'll recall that the informant guidelines provide that informants are to be told they may not engage in violence.

So, the general rule is a prohibition on violence. And the exceptions are limited.

And certainly, we are not going to have people going around participating in armed robberies.

Mr. EDWARDS. Crimes are committed by agents from time to time, I guess in fencing operations or gambling or minor drug operations, aren't they?

Mr. MICHEL. Those are good examples and common examples. Ordinarily, they are relatively minor. Ordinarily, they are nonviolent and ordinarily, our role in the criminal activity is primarily passive in nature.

Mr. EDWARDS. Now, would these guidelines immunize the agent who has committed the crime from prosecution by a State or Federal court?

Mr. MICHEL. No. They couldn't as a matter of law and they certainly weren't intended to.

Mr. EDWARDS. Mr. Lungren?

Mr. LUNGREN. The only thing I'd ask, Mr. Chairman, is I have not had a chance to see Professor Wilson's article and I imagine some other members of the committee haven't. So I wonder if I could ask that that be included in the record.

Mr. EDWARDS. Without objection, so ordered.

[See appendix 3.]

Mr. MICHEL. Thank you, Mr. Lungren.

Ms. COOPER. In your testimony, you indicate that the Justice Department and the FBI has:

> Systematically analyzed all major operations upon completion precisely for the purpose of refining our undercover techniques. The lessons that could be learned from the past are being learned and applied in present cases.

My question is, Is the Justice Department now or does it intend to review the record that is now being created in the undercover operations cases which are being subjected to due-process violations analysis? Reviewing that record with the eye toward determining whether or not the guidelines or the principles embodied in the guidelines have, in the past, been followed, or can be applied? Are they realistic guidelines?

Mr. MICHEL. Well, our approach is to turn to all available sources of information to help us improve our techniques. And that includes not only our internal records about an undercover operation, but as in the case you referred to, the court records as well.

Ms. COOPER. The reason I ask is because, frankly, I read your testimony today as not giving any credence to the kinds of assertions and evidence that have been presented in the Abscam due-process hearings. There is factual evidence that has been submitted in those cases, which may or may not rise to the level of due-process violation, but which certainly indicates serious problems with the way the case was administered; for example, the failure to keep written records, the failure to control informants in the conversations they had with the subjects, the ambiguity, sometimes deliberate, caused by the failure of both informants and agents in presenting inducements to make it clear the criminality of the offer being made to the subject.

All these things have been presented to the courts. Now, again, they may not reach the level of a due-process violation, but they do indicate that there have been problems.

Does the Justice Department categorically deny those are problems that ought to be considered in refining the guidelines?

Mr. MICHEL. Counsel, the statement that I submitted to this committee today was not intended in any way whatsoever to reflect opinions about the facts alleged in the court proceeding. No. 1, I don't know in detail the facts alleged. No. 2, I haven't formed opinions myself. And No. 3, you, in any event, can't take any position on that, while the matter is still under active litigation, which it is.

So, please don't misunderstand. Nothing in my statement was intended to reflect judgments on the credibility of witnesses who testified in that court proceeding.

With respect to whether the FBI is interested and the Justice Department is interested in undesirable events, even if they fall short of running afoul of the law, the answer is yes, of course we are.

I testified earlier that one of the principles on which the guidelines were written was to not only meet the requirements, the mandatory requirements set forth in the Constitution, but over and above that, to have practices that avoided to the maximum extent possible, untoward incidents and reflected sound law enforcement policy.

Ms. COOPER. What is the body that would be or is there a body that would be revising or considering revisions to the undercover guidelines?

Mr. MICHEL. I don't know the answer to that question.

Ms. COOPER. Is the committee that you're on still intact?

Mr. MICHEL. No.

Ms. COOPER. I'd like to get a bit of clarification about the function of guidelines. You stated that you don't think that one of the guiding principles was that the guidelines ought to be a catalog of do's and don'ts. Rather, it ought to formalize sound procedures.

Now, in other guidelines, such as the domestic security guidelines, there are certain do's and don'ts listed, certain techniques that are not to be used at certain stages that may be used in other stages. It's not a question of simply affixing that responsibility on higher authorities. There are definite do's and don'ts. Aren't there?

Mr. MICHEL. You're referring to the domestic security guidelines?

Ms. COOPER. Yes.

Mr. MICHEL. There are limitations in those guidelines on techniques that can be used in less-than-full investigations. And the limitations were imposed because of the peculiar risks in the context of investigating groups that maybe involved extensively or primarily in lawful activity.

And also because those guidelines, to a great extent, focus on what we call future crime. That is, the group under investigation under a domestic security guideline may not yet have committed any crime, even an incipient crime like conspiracy.

Therefore, there are risks that are unique to that circumstance. And those kinds of risks do not appear or appear to the same degree in undercover operations.

Ms. COOPER. But there are other risks that, in fact, are enumerated in the undercover guidelines?

Mr. MICHEL. There certainly are risks in undercover investigations and in other kinds of investigations, too. And if the question is, well, since there are risks, there should be absolute do's and don'ts, and our analysis, that for 18 months, developing these guidelines, led us to the conclusion that unlike the domestic security context, in the undercover context, it was neither feasible, nor desirable or necessary, to have categorical prohibitions.

Ms. COOPER. Well, let me move on to another area. From the perspective of this committee and the Appropriations Committee, as well as the whole Congress, the most important, overriding question is: Is it worth it? Do undercover operations really produce results which justify all the intrusions and risks that the guidelines so well identify? And do they justify the expense and the use of resources, which is increasing steadily at the Federal level, and probably also on the State and local level?

We heard testimony from a sociologist who asserts that neither the Justice Department nor anybody else really is making any kind of objective, empirical analysis of whether or not these kinds of operations deter crime or whether particular investigations can be reached by more conventional methods.

What has the Justice Department done in the past to evaluate the effectiveness of undercover operations?

Mr. MICHEL. Well, first, much of what Professor Marx said clearly had to do with State and local police authorities and not with the FBI. The FBI has a very limited jurisdiction. And it's engaging in undercover operations on an extremely selective basis.

Less than 1 percent of the FBI's annual budget is devoted to money specifically earmarked for undercover operations. The operations are ones in which an assessment is made on a case-by-case basis that it's worth it, though—it's worth the trouble, the money, that the risks are not unduly high, that the benefits will justify the whole enterprise. That's made in every case on a determination of the facts of that particular case.

Ms. COOPER. But those judgments are made before the operation starts, right? It's not an evaluation after the fact as to what kind of results you're getting.

Mr. MICHEL. Well, keep in mind that the officials making the judgment on how worthwhile undercover operation No. 2 might be, are the same officials who just reviewed what happened in undercover operation No. 1 that just finished, and they are the same officials who authorized No. 1 in the first place.

So we would have to be asleep to not benefit from each operation during its progress. And once it's completed, we do review them. And we review them from many standpoints, including how worthwhile it was.

Now, I don't think there is anything that I can say that would materially add to the testimony of Director Webster or the Assistant Attorney General in charge of the Criminal Division before this committee nearly a year ago. They gave examples of past undercover operations. And it seems to me clear on the facts of those particular operations, that the benefits were enormous and the risks were manageable and reasonable.

And my own opinion is it's not even a close question. That in those particular questions, Operation Lobster and the rest, they were clearly worthwhile.

Ms. COOPER. That's right. They presented that evidence. Since then, there has been a good deal of subsequent analysis and evidence to indicate that those conclusions may not be entirely valid; for example, the Director talked about stolen certificates of deposit that were recovered in a recent case. There is evidence, although it's not proven yet, that those stolen certificates of deposit were, in fact, created by an informant for the FBI in Operation Lobster, the case which the Assistant Attorney General spoke about.

He also told the subcommittee about evidence that the crime rate had fallen dramatically subsequent to the raids made in that operation. What we don't know is whether that was a long-term effect of the operation or whether there was any displacement. So we don't have all the evidence on that.

The Dr. Marx who was here yesterday, told the subcommittee about a reevaluation of study that was done by the Justice Department that measured the effectiveness of antifencing sting operations, which showed a decrease in the level of crime. That reanalysis was very critical of those conclusions.

We haven't seen that yet. So I can't evaluate it. But there does seem to be a good deal of controversy about whether or not there really is any body of evidence that the Justice Department has collected to indicate the effectiveness of undercover operations in general; not the measure of an undercover operation by the number of indictments or convictions, which, of course, all successful operations must lead to, but the question of how really it affects the level of crime in a community.

Mr. MICHEL. Let me just make one response, which applies both to the questions you've just asked and some that you asked immediately before. The question is: Compared to what?

You say that there are risks to undercover operations, civil liability, leaks, et cetera. All quite true. But those risks also are present in most other forms of investigation.

Second, in terms of measuring the benefits, I don't find it myself very convincing to say, well, we had 10 sting operations in a 2-year period in city *x*. And at the beginning of the period, the burglary rate was so and so, and at the end of the period, the burglary rate was so and so, plus 5 percent. Because, again, the question is: Compared to what?

It may very well be that if the undercover operation had not put all those burglars and fences in jail, that the burglary rate at the end of the 2-year period would have not been 5 percent more than at the beginning, but it would have been 100 percent more. So you have to be awfully careful that you don't deceive yourself with analysis.

Now, I think that studies that may be done by scholars, by research organizations, by the Department or by others, can be valuable. And certainly, we would like to know more about the impact of our investigative programs and prosecutions than we sometimes know. I have no argument against that and I don't minimize the potential value of that.

I do know that those studies and testimony of experts tends to be valuable in proportion to the focus on accurately describing the facts of real cases. I think it's so easy to be long on speculation and long on analysis and short on facts. And where that's the case, it's not very instructive.

Ms. COOPER. Why do you think that your undercover operations are effective in controlling crime?

Mr. MICHEL. I don't mean to be flip, but in a sense, the answer could be because they put people in jail, and they do it better than other techniques. They do it better because the odds of conviction are even higher. They do it better because the odds of pretrial motions resulting in the case never getting to an adjudication of guilt or innocence are vastly reduced. They do it better because they focus on major actors and criminal enterprises by stripping away the layers that ordinarily insulate those actors from effective investigative pursuit.

I may say, too, that I do not agree about the implication of some and the explicit testimony of Professor Chevigny that undercover operations are more intrusive. It seems to me that they are far less intrusive than most other significant techniques.

Again, I ask my question: Compared to what? Yes; an undercover operation can, in some circumstances, be fairly intrusive. But compared to what? Compared to wire tap? It seems to me a wire tap is far more intrusive. The wire tap gets everybody who uses the telephone. It gets every conversation. It's inherently indiscriminate. An undercover operation doesn't normally get into somebody's political or religious beliefs.

When people come to our sting operations or our other operations, they come to talk about crime. We don't get involved as we would dealing through informants, in peripheral aspects of their life.

The part of the value of undercover operations is it allows us to focus only on the criminal part of that person's life and not have to be involved in the other part, which is of no use to us and involves problems of privacy.

Mr. EDWARDS. I'd like, Mr. Michel, to get back just for a minute, to the middleman. I'm not satisfied that these middlemen are uncontrollable or that the guidelines have anything to say about how these middlemen are uncontrollable.

And I think we have good evidence of it in certain aspects of Abscam. We're certainly not going to discuss any of the specific cases, except that one or two of these purveyors did go in a completely uncontrollable way and try to get certain people over and over again and offer a lot of money over and over again, The mere approaching and offering damaged these people who happened to be in public life, personally, with their families, with their constituents, with their neighbors.

Now, what steps have been taken so that that kind of loose-cannon operation won't take place in the future?

Mr. MICHEL. Well, to some extent, the problem of cooperating individuals can't really be solved, because people who make good cooperating individuals or who make good informants usually are criminals or closely involved in criminal activities themselves and often are people of questionable traits.

But crime-fighting is inherently a little bit of a messy business. You can't find useful informants who are boy scouts, who are upright citizens. So, you, in the end, to some extent, face the choice of you're either not going to fight crime, because there are these unsavory characters who in giving you a report may be exaggerating or fabricating or doing crazy things themselves, or you proceed, but you try to limit the risks. You try to hedge your bet.

Now, both with regard to classic informants situation and with regard to cooperating individuals in undercover circumstances, we proceed and we try to minimize the risks.

I think that you're correct, that the cooperating individual poses special problems. That is part of the reason why, where we can, we prefer to have the middleman an unwitting middleman.

Look at some of the advantages to us of the unwitting middleman. If the unwitting middleman says that he can get a State legislator to take a certain action in return for money, then we're insulated from the implication that we had it in for that guy. No one can say that we picked on Mr. So and So for some nefarious reason, because we didn't identify him to begin with. The unwitting individual did and did it having no idea that he's really talking to the FBI, so the unwitting individual in some ways is safer and provides a kind of insulation to charges of improper target selection. On the other hand, he's a little bit harder to control than the cooperating individual.

And I think that the key point perhaps is this: We need to be very sure that our cooperating individuals are not themselves making any offers. If we can limit their role to being a middleman in the sense of a broker who brings together two parties, then we can get past the fact that the middle man may be lying or exaggerating or distorting or he's got it in for somebody and he's just trying to get the fellow in trouble for some personal vindictive reasons.

So we need to put very heavy emphasis on limiting the role of the middleman and by being sure that all the operative conversations are ones that are taking place between the suspect and undercover FBI agents, and not just between the middleman and the suspect. I don't think that there's anything more that we can do.

And again, I think it's important to remember that the harm to those individuals that you're referring to really was harm from leaks. Whether or not there had been an undercover operation as opposed to another kind of investigation, once there's an allegation that so and so is corrupt, the harm to that person, where he's totally innocent, someone is just misdescribing his activities, comes from the leak more than from the method that the allegation was acquired by.

So I think that much of the protection for wholly innocent people has to come through further efforts to avoid leaks as much as through further efforts to make sure that the controls on middlemen are as tight as they can feasibly be made.

Mr. EDWARDS. I'm sure that you recognize the danger and that you're substantially reexamining this particular situation.

Mr. MICHEL. Yes, we are.

Mr. EDWARDS. The scam within the scam has done great damage and the cases that I referred to earlier are regrettable, and I'm

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sure you regret them. Have you had high-level discussions in the Department of Justice about this new philosophy?

When I was an agent many years ago, there weren't any such operations. Mr. Hoover was very much against them because he thought of what it might do to the agents themselves, what it does to society. It is a sort of new philosophy, as some of our witnesses have pointed out, in American law enforcement.

There are dangers of one American becoming suspicious of another. A husband suspicious of his wife, employer, employee, a business person wary of his competitor across the street, because the competitor might have a secret agent in his storeroom or something.

Now, are you thinking about things like that over at the Department and studying them, and are there courses given at Quantico to FBI agents by professors and others so that in-depth thought can be given?

Mr. MICHEL. I think the answer to all of those questions is yes. And I think that the whole motivation behind the guidelines was to respond to the undeniable fact that there are risks and risks mean that, in some circumstances, innocent people can be damaged. And it's very important to reduce that to the smallest possible amount or to eliminate it entirely, where that's possible.

I think it's ordinarily not possible to eliminate it altogether. But I think it is possible to reduce it to an absolute minimum.

I think that when you read the guidelines, they reflect the concern of the FBI and the Justice Department at all levels with making sure that there are appropriate controls and procedures and that we have minimized the risks.

Mr. EDWARDS. Well, an operation can go on for 6 months?

Ms. COOPER. Without approval.

Mr. EDWARDS. Without approval again. How do you know what's going on in an operation in 6 months? Under the Domestic Security Guidelines there is a review after 30 days, as I recall.

Mr. MICHEL. There is a little point of confusion on that, Mr. Chairman. The review by the Attorney General or his designee of ongoing domestic security investigations occurs annually.

Mr. EDWARDS. But an investigation has to stop after 30 days if something further hasn't developed.

Mr. MICHEL. Where you have a preliminary investigation only, there's a time limit on it. Most investigations that amount to much, under the domestic security guidelines, are full investigations. And they then come under that annual review.

I think the answer to your question, though, is that undercover operations are under continuous review and not just within the field office. As Director Webster indicated, the most sensitive ones resulted in his being briefed on a very frequent basis about specific details of a particular operation.

And needless to say, at only slightly lower levels of the FBI there is continuous scrutiny of what's going on in those undercover operations.

So there are parallel tracks. There's the committee review track, which focuses on events like initiation of the operation, and a major change where it switches to a different compass course. But

the other track is the regular chain of command supervision within the FBI, and that's a very lively, fast track.

I think from my own experience that the FBI officials at headquarters keep an exceedingly close watch on undercover operations. The more sensitive they are, the closer the watch.

So if we sit back and say, hell, they only look at this every 6 months, that really isn't the case at all. They look at it every week, sometimes every day. And they should.

The guideline's references to 6 months really was simply to have some automatic provision. Remember I said there were three triggers? If the purpose changes, the scope changes, then you have a review immediately, no matter if it's only been approved for 30 days or 50 days or whatever.

Second, if you're spending a significant amount of money, automatically you have a review. So the 6-month provision was just to have some automatic device, so that at a minimum, the operation would get a complete new look at 6 months. But they are under very close scrutiny on an ongoing basis, really on a daily basis.

And it's a shame, in a way, that the guidelines don't refer to that, because it's easy to forget on just reading the text of the guideline how close and frequent the review is.

Mr. EDWARDS. Mr. Boyd.

Mr. BOYD. With regard to sting operations as opposed to Abscam tape operations, you indicated sting operations are the most frequently used type of undercover operation. And I think you would agree that there are other factors beyond the control of the FBI which influence the effect which these operations have on deterring crime.

I wonder if the Department or if the Bureau has access to or has compiled any statistics to indicate, for example, with regard to the sting operation in Washington, before the Abscam operation, the percentage of convictions which were gained as a result of indictments flowing from that operation, the number of recidivists who were convicted, the extent to which these individuals were sentenced and the actual time spent incarcerated. Because individuals released after spending a short period of incarceration or time in jail often are in a position to commit more crime.

Mr. MICHEL. Well, the answer to your question is, "Yes, those are important things." Yes, we do some analysis of that sort. Anything else, it's limited in scope and in coverage because our resources are stretched very, very thin.

There are 800 or 900 fewer agents today than there were 5 years ago. But the crime rate even of Federal crimes didn't go down. It went way up. And with our increasing effort to go after higher level criminals and to get into some of the most difficult areas of investigation, which are very time consuming, that just adds to the burden on th , resources.

So that, to some extent, like the committee, the Justice Department has to depend on studies done by scholars and think tanks, and so forth. But sure, we're interested in those things.

We do some of that kind of analysis and, as I think you may have been suggesting, one of the benefits of undercover operations, in addition to increasing the odds of convictions, is that they result

in higher level figures, and I think generally result in much longer sentences.

Mr. BOYD. Thank you. I have no further questions, Mr. chairman.

Mr. EDWARDS. Ms. Cooper?

Ms. COOPER. Thank you. I'd like to return to a point made by the Chairman about the sensitive circumstances listed in section B. At least on its face, the guidelines leave an inference that the sensitive circumstances are not prohibitions. They're simply sensitive circumstances that require an operation to be reviewed by higher authorities. And therefore, it leaves the possibility that any one of these sensitive circumstances can be approved. That is, an operation which has a possibility or probability of or certainty of employing one or developing one of the sensitive circumstances can be approved.

Now, when the chairman asked you about the Archer situation, about the possibility of an undercover employee perjuring himself, you indicated that you thought that that could not—that was against the principles of the case and, therefore, could not be approved. Are there any other circumstances listed here that you think fall into that category?

Mr. MICHEL. Well, first and most important, the guidelines are not intended to and do not and could not authorize activity that is against the law. The FBI, in effect, has to follow the law and also follow the guidelines. Nothing in the guidelines is in derogation of our obligation to follow the law.

So I was astounded by what I thought was one of the suggestions of one of the prior witnesses that the guidelines authorize the FBI to do things that are clearly illegal. I think that's preposterous.

That's certainly not what they're intended to do. They're intended, in fact, to prohibit, as a matter of policy, some things which would be legal, but which are too risky or are undesirable or unnecessary.

So the guidelines basically are intended to be more restrictive than the case law and the statutes, not less.

Ms. COOPER. Let me ask you about section H, which has to do with undercover employees posing as attorneys, physicians, clergymen or members of the media. With the approval of the higher ups, it seems that it is possible that those impersonations can be used to develop a confidential relationship, one that is ordinarily privileged under law.

Do the guidelines sanction an agent violating his own ethical and professional responsibilities? For example, if the agent is an attorney himself, posing as someone else's attorney and thereby getting into a confidential relationship with the subject?

Mr. MICHEL. I guess the question is whether the guidelines overrule the cannons of ethics. The answer is "no."

Ms. COOPER. OK. Let me ask you something on a different issue. During stage 2, which you described, where there were principles but not formal guidelines, principles that were enunciated before the subcommittee last March, how was the field made aware of those principles? The field, that is, that was engaged in undercover operations?

Mr. MICHEL. Well, by the normal FBI communications that you're familiar with, airtels and letters and conversations, telephone calls, meetings of various kinds, field inspections, special visits on particular visits, conversations with Justice Department officials here in Washington and with U.S. attorneys in the field.

Ms. COOPER. Is that the same sort of process you expect to use with the formal guidelines?

Mr. MICHEL. I don't understand the question.

Ms. COOPER. How are you going to educate the people in the field about the guidelines and make sure that they do understand them?

Mr. MICHEL. The FBI is transmitting the text of the guidelines to all field offices and units and engages in training of personnel in those offices and units whenever there is some new policy or a clarification of an existing policy or practice. And so that's the procedure that will be followed here.

The full text will be disseminated and it will be the subject of training and seminar-type discussions. And it will, in due course, become the subject of inspections, visits of field offices to be sure that they're following them.

Ms. COOPER. Has the FBI's Inspection Division ever considered undercover work other than from the perspective of whether or not the agents are complying with regulations or understand the regulations and guidelines?

Mr. MICHEL. I don't know.

Ms. COOPER. Is there any reason why they shouldn't?

Mr. MICHEL. I don't know the answer to that question or the question whether there is any reason why they should. I guess the considerations are how are all the other techniques they use working? How well they work. And I'm not an expert on that subject and I don't have any well-informed views. So I don't think I ought to just speculate or guess.

Ms. COOPER. Finally, Professor Marx speculated yesterday that at least in some circumstances, undercover tactics may, actually, amplify the level of crime in an area, both by generating a market for stolen goods, by generating capital which could be used in other sorts of crimes, by generating motives, by creating scarce skills and resources, and so forth and so on.

How does the Justice Department know whether or not this is happening or do you care?

Mr. MICHEL. Of course we care. And we know how it's happening because, for example, if there is a given city that has very little burglary and no fencing operations, there is no point in us setting up our own undercover fencing operation in that city. The kind of place that's likely is one where we have clear information that there are already 10 of them out there.

We're not creating a market. The market's already there and the business is flowing. We're stepping in to cut it off.

Now, it may be that for a very short period after we step in and before we lower the boom and put everybody in jail, that it's possible that the number of fenced items would go up for that short period. But our experience, I believe, has been that in the longer run, there is a big drop in the traffic because a lot of the operators are put out of business, put in jail.

Ms. COOPER. Do you base that last conclusion on evidence that the Justice Department has put together?

Mr. MICHEL. We base it on information that we have access to through local police and sometimes through our own files. We don't, as I tried to indicate in answer to Mr. Boyd's question earlier, conduct a lot of very comprehensive or detailed studies, because we're not equipped to do that.

Mr. EDWARDS. Thank you very much, Mr. Michel, for very useful testimony. We appreciate your coming up here today.

Mr. MICHEL. Thank you.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

APPENDIXES

APPENDIX 1

ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS

The following guidelines on use of undercover operations by the Federal Bureau of Investigation are issued under authority of the Attorney General as provided in 28 U.S.C. 509, 510, and 533. They are consistent with the requirements of the proposed FBI Charter Act, but do not depend upon passage of the Act for their effectiveness.

INTRODUCTION

The FBI's use of undercover employees and operation of proprietary business entities is a lawful and essential technique in the detection and investigation of white collar crime, political corruption, organized crime, and other priority areas. However, use of this technique inherently involves an element of deception, and occasionally may require a degree of cooperation with persons whose motivation and conduct are open to question, and so should be carefully considered and monitored.

DEFINITIONS

An "undercover employee," under these guidelines, is any employee of the FBI—or employee of a federal, state or local law enforcement agency working under the direction and control of the FBI in a particular investigation—whose relationship with the FBI is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity.

An "undercover operation" is any investigative operation in which an undercover employee is used.

A "proprietary" is a sole proprietorship, partnership, corporation, or other business entity owned or controlled by the FBI, used by the FBI in connection with an undercover operation, and whose relationship with the FBI is not generally acknowledged.

GENERAL AUTHORITY

(1) The FBI may conduct undercover operations, pursuant to these guidelines, that are appropriate to carry out its investigative responsibilities in domestic law enforcement.

Under this authority, the FBI may participate in joint undercover operations with other federal, state, and local law enforcement agencies; may seek operational assistance for an undercover operation from any suitable informant, confidential source, or other cooperating private individual; and may operate a proprietary on a commercial basis to the extent necessary to maintain an operation's cover or effectiveness.

(2) Undercover operations can be authorized only at the "full investigation" stage in Domestic Security Investigations.

AUTHORIZATION OF UNDERCOVER OPERATIONS

All undercover operations under these guidelines fall into one of two categories: (1) those undercover operations that can be approved by the Special Agent in Charge (SAC) under his own authority, and (2) those undercover operations that can only be authorized by the Director or designated Assistant Director, upon favorable recommendations by the SAC, Bureau headquarters (FBIHQ), and the Undercover Operations Review Committee. Undercover operations in the latter category are those that involve a substantial expenditure of government funds, or otherwise implicate fiscal policies and considerations. (Paragraph A). Also included in this latter category are undercover operations that involve what are termed "sensitive circumstances." In general, these are undercover operations involving investigation of public corruption, or undercover operations that involve risks of various forms of harm and intrusion. (Paragraph B). Of course, in planning an undercover operation, these risks of harm and intrusion will be avoided whenever possible, consistent with the need to obtain necessary evidence in a timely and effective manner.

A. Undercover operations that may not be approved by the special agent in charge because of fiscal circumstances

(1) Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation if there is a reasonable expectation that:

(a) The undercover operation could result in significant civil claims against the United States, either arising in tort, contract or claims for just compensation for the "taking" of property;

(b) The undercover operation will require leasing or contracting for property, supplies, services, equipment, or facilities for any period extending beyond the September 30 termination date of the then current fiscal year, or with prepayment of more than one month's rent; or will require leasing any facilities in the District of Columbia;

(c) The undercover operation will require the use of appropriated funds to establish or acquire a proprietary, or to operate such a proprietary on a commercial basis;

(d) The undercover operation will require the deposit of appropriated funds, or of proceeds generated by the undercover operation, in banks or other financial institutions;

(e) The undercover operation will involve use of proceeds generated by the undercover operation to offset necessary and reasonable expenses of the operation;

(f) The undercover operation will require indemnification agreements for losses incurred in aid of the operation, or will require expenditures in excess of $1500 for property, supplies, services, equipment or facilities, or for the construction or alteration of facilities;

(g) The undercover operation will last longer than 6 months or will involve an expenditure in excess of $20,000 or such other amount that is set from time to time by the Director, with the approval of the Attorney General. However, this expenditure limitation shall not apply where a significant and unanticipated investigative opportunity would be lost by compliance with the procedures set forth in paragraphs D, E, F, and G.

B. Undercover operations that may not be approved by the special agent in charge because of sensitive circumstances

Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation that involves sensitive circumstances. For purposes of these guidelines, an undercover operation involves sensitive circumstances if there is a reasonable expectation that:

(a) The undercover operation will concern an investigation of possible corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious or political organization, or the activities of the news media;

(b) The undercover operation will involve untrue representations by an undercover employee or cooperating private individual concerning the activities or involvement of an innocent person;

(c) An undercover employee or cooperating private individual will engage in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime—except this shall not include criminal liability for the purchase of stolen or contraband goods or for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary;

(d) An undercover employee or cooperating private individual will seek to supply an item or service that would be reasonably unavailable to criminal actors but for the participation of the government;

(e) An undercover employee or cooperating private individual will run a significant risk of being arrested and seeking to continue undercover;

(f) An undercover employee or cooperating private individual will be required to give sworn testimony in any proceeding in an undercover capacity;

(g) An undercover employee or cooperating private individual will attend a meeting between a subject of the investigation and his lawyer;

(h) An undercover employee or cooperating private individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will be led into a professional or confidential relationship with the undercover employee or cooperating private individual as a result of the pose;

(i) A request for information will be made by an undercover employee or cooperating individual to an attorney, physician, clergyman, or other person who is under the obligation of a legal privilege of confidentiality, and the particular information would ordinarily be privileged;

(j) A request for information will be made by an undercover employee or cooperating private individual to a member of the news media concerning any individual with whom the newsman is known to have a professional or confidential relationship;

(k) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant;

(l) There may be a significant risk of violence or physical injury to individuals or a significant risk of financial loss to an innocent individual.

C. Undercover operations that may be approved by the special agent in charge

(1) The SAC may authorize the establishment, extension or renewal of all other undercover operations, to be supervised by his field office, upon his written determination, stating supporting facts and circumstances, that:

(a) Initiation of investigative activity regarding the alleged criminal conduct or criminal enterprise is warranted under the Attorney General's Guidelines on the Investigation of General Crimes, the Attorney General's Guidelines on Domestic Security Investigations, the Attorney General's Guidelines on Investigation of Criminal Enterprises Engaged in Racketeering Activity, and any other applicable guidelines;

(b) The proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; this should include a statement of what prior investigation has been conducted, and what chance the operation has of obtaining evidence or necessary information concerning the alleged criminal conduct or criminal enterprise;

(c) The undercover operation will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner;

(d) Approval for the use of any informant or confidential source has been obtained as required by the Attorney General's Guidelines on Use of Informants and Confidential Sources;

(e) There is no present expectation of the occurrence of any of the circumstances listed in paragraphs A and B;

(f) Any foreseeable participation by an undercover employer or cooperating private individual in illegal activity that can be approved by a SAC on his own authority (that is, the purchase of stolen or contraband goods, or participation in a nonserious misdemeanor), is justified by the factors noted in paragraph I(1).

D. Approval by Headquarters (Undercover Operations Review Committee, and Director or Designated Assistant Director), with concurrence of U.S. attorney or Strike Force Chief, where sensitive or fiscal circumstances are present

The Director of the FBI or a designated Assistant Director must approve the establishment, extension, or renewal of an undercover operation if there is a reasonable expectation that any of the circumstances listed in paragraphs A and B may occur.

In such cases, the SAC shall first make application to FBI Headquarters (FBIHQ). See paragraph E below. FBIHQ may either disapprove the application or recommend that it be approved. A recommendation for approval may be forwarded directly to the Director or designated Assistant Director if the application was submitted to FBIHQ solely because of a fiscal circumstance listed in paragraph A(b)-(e). In all other cases in which FBIHQ recommends approval, the application shall be forwarded to the Undercover Operations Review Committee for consideration. See paragraph E. If approved by the Undercover Operations Review Committee, the application shall be forwarded to the Director or designated Assistant Director. See paragraph G. The Director or designated Assistant Director may approve or disapprove the application.

E. Applications to Headquarters

(1) Each application to Headquarters from a SAC recommending approval of the establishment, extension, or renewal of an undercover operation involving circumstances listed in paragraphs A and B shall be made in writing and shall include, with supporting facts and circumstances:

(a) A description of the proposed undercover operation, including the particular cover to be employed and any informants or other cooperating persons who will assist in the operation; a description of the particular offense or criminal enterprise under investigation, and any individuals known to be involved; and a statement of the period of time for which the undercover operations would be maintained;

(b) A description of how the determinations required by paragraph C(1)(a)-(d) have been met;

(c) A statement of which circumstances specified in paragraphs A and B are reasonably expected to occur, what the operative facts are likely to be, and why the undercover operation merits approval in light of the circumstances, including,

(i) for any foreseeable participation by an undercover employee or cooperating private individual in activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime—but not including the purchase of stolen or contraband goods or making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary—a statement why the participation is justified by the factors noted in paragraph I(1), and a statement of the federal prosecutor's approval pursuant to paragraph I(2);

(ii) for any planned infiltration by an undercover employee or cooperative private individual of a group under investigation as part of a Domestic Security Investigation, or recruitment of a person from within such a group as an informant, a statement why the infiltration or recruitment is necessary and meets the requirements of the Attorney General's Guidelines on Domestic Security Investigations; and a description of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity.

(d) A statement of proposed expenses;

(e) A statement that the United States Attorney or Strike Force Chief is knowledgable about the proposed operation, including the sensitive circumstances reasonably expected to occur; concurs with the proposal and its objectives and legality; and agrees to prosecute any meritorious case that is developed.

(2) In the highly unusual event that there are compelling reasons that either the United States Attorney or Strike Force Chief should not be advised of the proposed Undercover Operation, the Assistant Attorney General in charge of the Criminial Division, or other Department of Justice attorney designated by him, may substitute for such person(s) for purposes of any authorization or other function required by these guidelines. Where the SAC determines that such substitution is necessary, the application to FBIHQ shall include a statement of the compelling reasons, together with supporting facts and circumstances, which are believed to justify that determination. Such applications may only be authorized pursuant to the procedures prescribed in paragraph F, below, whether or not consideration by the Undercover Operations Review Committee is otherwise required, and upon the approval of the Assistant Attorney General in charge of the Criminal Division.

(3) An application for the extension or renewal of authority to engage in an Undercover Operation should also describe the results so far obtained from the operation or a reasonable explanation of any failure to obtain significant results, and a statement that the United States Attorney or Strike Force Chief favors the extension or renewal of authority.

F. Undercover Operations Review Committee

(1) There shall be an Undercover Operations Review Committee, consisting of appropriate employees of the FBI designated by the Director, and attorneys of the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division, to be chaired by a designee of the Director.

(2) Upon receipt from FBIHQ of a SAC's application for approval of an undercover operation, the Committee will review the application. The Justice Department members of the Committee may consult with senior Department officials and the United States Attorney or Strike Force Chief, as they deem appropriate. If the Committee concurs in the determinations contained in the application, and finds that in other respects the undercover operation should go forward, see paragraph F(3) and (4) below, the Committee is authorized to recommend to the Director or designated Assistant Director, see paragraph G, that approval be granted.

(3) In reviewing the application, the Committee shall carefully assess the comtemplated benefits of the undercover operation, together with the operating and other costs of the proposed operation. In assessing the costs of the Undercover Operation, the Committee shall consider, where relevant, the following factors, among others:

(a) the risk of harm to private individuals or undercover employees;

(b) the risk of financial loss to private individuals and businesses, and the risk of damage liability or other loss to the government;

(c) the risk of harm to reputation;

(d) the risk of harm to privileged or confidential relationships;

(e) the risk of invasion of privacy;

(f) the degree to which the actions of undercover employees or cooperating private individuals may approach the conduct proscribed in paragraph J below; and

(g) the suitability of undercover employees' or cooperating private individuals' participating in activity of the sort contemplated during the Undercover Operation.

(4) If the proposed undercover operation involves any of the sensitive circumstances listed in paragraph B, the Committee shall also examine the application to determine whether the undercover operation is planned so as to minimize the incidence of such sensitive circumstances, and to minimize the risks of harm and intrusion that are created by such circumstances. If the Committee recommends approval of an undercover operation involving sensitive circumstances, the recommendation shall include a brief written statement explaining why the undercover operation merits approval in light of the anticipated occurrence of such sensitive circumstances.

(5) The Committee shall recommend approval of an undercover operation only upon reaching a consensus, provided that:

(a) If one or more of the disignees of the Assistant Attorney General in charge of the Criminal Division does not join in a recommendation for approval of a proposed undercover operation because of legal, ethical, prosecutive or Departmental policy considerations, the designee shall promptly advise the Assistant Attorney General and there shall be no approval of the establishment, extension, or renewal of the undercover operation until the Assistant Attorney General has had the opportunity to consult with the Director;

(b) If, upon consultation, the Assistant Attorney General disagrees with a decision by the Director to approve the proposed undercover operation, there shall be no establishment, extension, or renewal of the undercover operation

until the Assistant Attorney General has had an opportunity to refer the matter to the Deputy Attorney General or Attorney General.

(6) The Committee should consult the Legal Counsel Division of the FBI, and the Office of Legal Counsel or other appropriate division or office in the Department of Justice about any significant unsettled legal questions concerning authority for or the conduct of a proposed undercover operation.

G. Approval by Director or designated Assistant Director

The Director or a designated Assistant Director shall have authority to approve operations recommended for approval by the Undercover Operations Review Committee, provided that only the director may authorize a proposed operation if a reasonable expectation exists that:

(a) There may be a significant risk of violence or physical injury to individuals;

(b) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant or confidential source, in which case the Director's authorization shall include a statement of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity; or

(c) A circumstance specified in paragraph A(b)-(e) is reasonably expected to occur, in which case the undercover operation may be implemented only after the Deputy Attorney General or Attorney General has specifically approved that aspect of the operation in accordance with applicable law.

H. Duration of authorizations

(1) An undercover opration may not continue longer than is necessary to achieve the objective of the authorization, nor in any event longer than 6 months without new authorization to proceed.

(2) Any undercover operation initially approved by a SAC must be reauthorized by an Assistant Director or the Director, pursuant to paragraphs D–G, if it lasts longer than 6 months or involves expenditures in excess of the amount prescribed in paragraph A(g).

I. Authorization of participation in "otherwise illegal" activity

Nothwithstanding any other provision of these guidelines, an undercover employee or cooperating private individual shall not engage, except in accordance with this paragraph, in any activity that would constitute a crime under state or federal law if engaged in by a private person acting without the approval or authorization of an appropriate government official. For purposes of this paragraph, such activity is referred to as "otherwise illegal" activity.

(1) No official shall recommend or approve an undercover employee's or cooperating private individual's planned or reasonably foreseeable participation in otherwise illegal activity unless the participation is justified in order:

(a) to obtain information or evidence necessary for paramount prosecutive purposes;

(b) to establish and maintain credibility or cover with persons associated with the criminal activity under investigation; or

(c) to prevent or avoid the danger of death or serious bodily injury.

(2) Participation in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime—but not including the purchase of stolen or contraband goods or the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary—must be approved in advance by an Assistant Director on the recommendation of the Undercover Operations Review Committee pursuant to paragraphs D–G, except that the Director's approval is required for participation in any otherwise illegal activity involving a significant risk of violence or physical injury to individuals. Approvals shall be recorded in writing.

A recommendation to FBIHQ for approval of participation in such otherwise illegal activity must include the views of the United States Attorney, Strike Force Chief, or Assistant Attorney General on why the participation is warranted.

(3) Participation in the purchase of stolen or contraband goods, or in a nonserious misdemeanor, must be approved in advance by the Special Agent in Charge. Approvals by the SAC shall be recorded in writing.

(4) The FBI shall take reasonable steps to minimize the participation of an undercover employee or cooperating private individual in any otherwise illegal activity.

(5) An undercover employee or cooperating private individual shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts, or use unlawful investigative techniques to obtain information or evidence for the FBI (e.g., illegal wiretapping, illegal mail openings, breaking and entering, or trespass amounting to an illegal search).

(6) If it becomes necessary to participate in otherwise illegal activity that was not foreseen or anticipated, an undercover employee should make every effort to consult with the SAC. For otherwise illegal activity that is a felony or a serious misdemeanor, the SAC can provide emergency authorization under paragraph N. If consultation with the SAC is impossible and there is an immediate and grave threat to life or physical safety (including destruction of property through arson or bombing), an undercover employee may participate in the otherwise illegal activity so long as he does not take part in and makes every effort to prevent any act of violence. A report to the SAC shall be made as soon as possible after the participation, and the SAC shall submit a full report to FBIHQ. FBIHQ shall promptly inform the members of the Undercover Operations Review Committee.

(7) Nothing in these guidelines prohibits establishing, funding, and maintaining secure cover for an undercover operation by making fales representations to third parties in concealment of personal identity or the true ownership of a proprietary (e.g., false statements in obtaining driver's licenses, vehicle registrations, occupancy permits, and business licenses) when such action is approved in advance by the apropriate SAC.

(8) Nothing in paragraph I (5) or (6) prohibits an undercover employee from taking reasonable measures of self defense in an emergency to protect his own life or the life of others against wrongful force. Such measures shall be reported to the SAC and the United States Attorney, Strike Force Chief, or Assistant Attorney General as soon as possible.

(9) If a serious incident of violence should occur in the course of a criminal activity and an undercover employee or cooperating private individual has participated in any fashion in the criminal activity, the SAC shall immediately inform FBIHQ headquarters shall promptly inform the Assistant Attorney General in charge of the Criminal Division.

J. Authorization of the creation of opportunities for illegal activity

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would otherwise not be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in illegal activity, the approving authority should be satisfied that

(a) The corrupt nature of the activity is reasonably clear to potential subjects;

(b) There is a reasonable indication that the undercover operation will reveal illegal activities; and

(c) The nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.

(3) Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that that particular individual has engaged, or is engaging, in the illegal activity that is properly under investigation. Nonetheless, no such undercover operation shall be approved without the specific written authorization of the Director, unless the Undercover Operations Review Committee determines (See paragraph F), insofar as practicable, that either

(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in illegal activity, shall be based solely on law enforcement considerations.

K. Authorization of investigative interviews that are not part of an undercover operation

Notwithstanding any other provision of these guidelines, routine investigative interviews that are not part of an undercover operation may be conducted without the authorization of FBIHQ, and without compliance with paragraphs C, D, and E. These include so-called "pretext" interviews, in which an FBI employee uses an alias or cover identity to conceal his relationship with the FBI.

However, this authority does not apply to an investigative interview that involves a sensitive circumstance listed in paragraph B. Any investigative interview involving a sensitive circumstance—even an interview that is not conducted as part of an undercover operation—may only be approved pursuant to the procedures set forth in paragraphs D, E, F, and G, or pursuant to the emergency authority prescribed in paragraph N, if applicable.

MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

L. Continuing consultation with United States Attorney or strike force chief

Throughout the course of any undercover operation that has been approved by Headquarters, the SAC shall consult periodically with the United States Attorney, Strike Force Chief, or Assistant Attorney General concerning the plans and tactics and anticipated problems of the operation.

M. Serious legal, ethical, prosecutive, or departmental policy questions, and previously unforeseen sensitive circumstances

(1) In any undercover operation, the SAC shall consult with Headquarters whenever a serious legal, ethical, prosecutive, or Departmental policy question is presented by the operation. FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of any such question and its proposed resolution.

(2) This procedure shall always be followed if an undercover operation is likely to involve one of the circumstances listed in paragraphs A and B and either (a) The SAC's application to FBIHQ did not contemplate the occurrence of that circumstance, or (b) the undercover operation was approved by the SAC under his own authority. In such cases the SAC shall also submit a written application for continued authorization of the operation or an amendment of the existing application to Headquarters pursuant to paragraph E.

Whenever such a new authorization or amended authorization is required, the FBI shall consult with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with the Department of Justice members of the Undercover Operations Review Committee on whether to modify, suspend, or terminate the undercover operation pending full processing of the application or amendment.

N. Emergency authorization

Notwithstanding any other provision of these guidelines, any SAC who reasonably determines that:

(a) an emergency situation exists requiring the establishment, extension, renewal, or modification of an undercover operation before an authorization mandated by these guidelines can with due diligence be obtained, in order to protect life or substantial property, to apprehend or identify a fleeing offender, to prevent the hiding or destruction of essential evidence, or to avoid other grave harm; and

(b) there are grounds upon which authorization could be obtained under these guidelines, may approve the establishment, extension, renewal, or modification of an undercover operation if a written application for approval is submitted to Headquarters within 48 hours after renewed, or modified. In such an emergency situation the SAC shall attempt to consult by telephone with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with a designated Assistant Director, FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of the emergency authorization. In the event the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation shall be submitted to the Director, who shall inform the Deputy Attorney General.

O. Annual report of Undercover Operations Review Committee

(1) The Undercover Operations Review Committee shall retain a file of all applications for approval of undercover operations submitted to it, together with a written record of the Committee's action on the applications and any ultimate disposition by the Director or a designated Assistant Director. The FBI shall also prepare a short summary of each undercover operator approved by the Committee. These records and summaries shall be available for inspection by a designee of the Deputy Attorney General or of the Assistant Attorney General in charge of the Criminal Division.

(2) On an annual basis, the Committee shall submit to the Director, the Attorney General, the Deputy Attorney General, and the Assistant Attorney General in charge of the Criminal Division, a written report summarizing: (a) the types of

undercover operations approved; and (b) the major issues addressed by the Committee in reviewing applications and how they were resolved.

P. Preparation of undercover employees

(1) The SAC or a designated supervisory agent shall review with each undercover employee prior to the employee's participation in an investigation the conduct that the undercover employee is expected to undertake and other conduct whose necessity during the investigation is foreseeable. The SAC or designated supervisory agent shall expressly discuss with each undercover employee any of the circumstances specified in paragraphs A and B which is reasonably expected to occur.

Each undercover employee shall be instructed generally, and in relation to the proposed undercover operation, that he shall not participate in any act of violence; initiate or instigate any plan to commit criminal acts; use unlawful investigative techniques to obtain information or evidence; or engage in any conduct that would violate restrictions on investigative techniques or FBI conduct contained in Attorney General Guidelines or other Department policy; and that, except in an emergency situation, he shall not participate in any illegal activity for which authorization has not been obtained under these guidelines. When the FBI learns that persons under investigation intend to commit a violent crime, any undercover employee used in connection with the investigation shall be instructed to try to discourage the violence.

(2) To the extent feasible, a similar review shall be conducted by a Special Agent with each cooperating private individual.

Q. Review of undercover employee conduct

(1) From time to time during the course of the investigation, as is practicable, the SAC or designated supervisory agent shall review that actual conduct of the undercover employee, as well as the employee's proposed or reasonably foreseeable conduct for the remainder of the investigation, and shall make a determination whether the conduct of the employee has been permissible. This determination shall be communicated to the undercover employee as soon as practicable. Any findings of impermissible conduct shall be promptly reported to the Director, and consultation with the Director shall be undertaken before the employee continues his participation in the investigation. To the extent feasible, a similar review shall be made of the conduct of each cooperating private individual.

(2) A written report on the use of false representations to third parties in concealment of personal identity or the true ownership of a proprietary, for establishing, funding, and maintaining secure cover for an undercover operation, shall be submitted to the SAC or designated supervisory agent at the conclusion of the undercover operation. A written report on participation in any other activity proscribed by federal, state or local law shall be made by an undercover employee to the SAC or designated supervisory agent every 60 days and at the conclusion of the participation in the illegal activity.

R. Deposit of proceeds; liquidation of proprietaries

As soon as the proceeds from an undercover operation are no longer necessary for the conduct of the operation, the remaining proceeds shall be deposited in the Treasury of the United States as miscellaneous receipts.

Whenever a proprietary with a net value over $50,000 is to be liquidated, sold, or otherwise disposed of, the FBI, as much in advance as the Director or his designee shall determine is practicable, shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or other disposition, after obligations are met, shall be deposited in the Treasury of the United States as receipts.

RESERVATION

These guidelines on the use of undercover operations are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

BENJAMIN R. CIVILETTI,
Attorney General.

APPENDIX 2

FBI OVERSIGHT

TUESDAY, MARCH 4, 1980

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL
RIGHTS OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., in room 2141, of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Kastenmeier, Seiberling, Drinan, Volkmer, Hyde, and Sensenbrenner.

Also present: Representative Rodino.

Staff present: Thomas P. Breen, counsel; Catherine LeRoy and Janice Cooper, assistant counsel; and Thomas Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I will ask unanimous consent that these proceedings may be open to television and other camera and video.

Mr. EDWARDS. Without objection, it is so ordered.

The hearing today has to do with the undercover operations of the Federal Bureau of Investigation. The subcommittee is presently considering the budget of the FBI for 1981, and the budget for 1981 has an increase in undercover expenditures from $3 million up to $4.8 million.

We have two witnesses today, and I suggest that the judge, the Director of the FBI, will go first, and then Mr. Heymann, and then we will have questions after that, if that is agreeable with the witnesses.

At this time I yield to the very distinguished chairman of the House Judiciary Committee, the gentleman from New Jersey, Mr. Rodino.

Chairman RODINO. Thank you very much, Mr. Chairman.

I am pleased to welcome the Director of the Federal Bureau of Investigation, Mr. Webster, and the Assistant Attorney General in charge of the Criminal Division, Mr. Heymann, this morning.

I consider this a very important responsibility of the Judiciary Committee, and especially of this subcommittee that is so ably chaired by Mr. Edwards, the Subcommittee on Civil and Constitutional Rights, and I believe that that subcommittee was appropriately named because it has been a bulwark of strength in attempting to assure that the agencies of Government entrusted with law enforcement recognize that they have a very principal responsibility; that is, not to overly intrude into the rights that are guaranteed in the Constitution, the civil liberties that we all hold and cherish so dearly.

This particular hearing, I believe, which is a hearing that was scheduled some time ago by the chairman of the subcommittee, is one that is, I think, very significant because it comes on the heels of investigations that were conducted by the Department of Justice and the FBI where many, many questions have been raised.

This committee, first of all, prides itself on—and I am talking about the full Judiciary Committee—prides itself on acting responsibly in all cases, and I think that the committee, as a matter of fact, showed that it cannot only act responsibly, but is certainly very, very anxious that the whole world know. This committee had before it, 2 weeks ago, a resolution of inquiry, which the committee felt was not responsible, which the committee reported adversely, and the Congress, acting pursuant to the recommendation of that committee, did act also responsibly. I think the whole tenor of the argument was that while we want to assure that the Justice Department is guaranteed all the tools necessary, and the funding, to go forward, to ferret out criminal conduct in order to protect our society; at the same time I think that we have the principal responsibility of assuring, however, that the Department does not abuse that authority.

So I am especially interested, Mr. Director and Mr. Heymann, in what you have to say. I say that because on July 31, as the sponsor of the FBI Charter, I made the following statement prior to my introducing that proposal.

I stated at that time that I was very pleased with what you are attempting to do, and I direct this to you, Mr. Webster, because the FBI had come under some criticism—and I think justly so—for its past actions over the many years, and I stated then, and I'd like to merely repeat that statement:

> It would appear to me that the goals of the American people are as follows: that the focus of all FBI investigations is criminal conduct, and not activities otherwise protected by the Constitution.

I went on to say that I did have concerns and reservations generally about the absence of specific guidelines dealing with matters such as the identity of informants, the use of various techniques in investigations, the retention and use of information, and the Bureau's criminal records, and other areas which touch on sensitive questions of civil liberties.

Then I also added:

> Therefore, I am particularly pleased that the charter calls for the promulgation of guidelines which will set forth with particularity the work rules in these and other important areas.

I am confident that the Attorney General's guidelines, work on which I have been made to understand has already begun, will protect the full enjoyment of all constitutional rights, the freedom against unreasonable intrusions, by whatever technology, while at the same time providing safe, sound, and effective law enforcement.

I must say, Mr. Director, that while I made that statement in full confidence that the work rules were going to be such that they would deal with specificity, I would like to know at this time, and during the course of the questioning, after listening to your statement, whether or not you have, because I do have some grave reservations in my mind as to whether or not if you do not have specific guidelines, you can operate and do the job that is necessary in the area of law

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enforcement, at the same time guaranteeing the constitutional rights of individuals without intruding on their liberties.

Thank you very much, Mr. Chairman.

[The complete statement follows:]

STATEMENT OF CHAIRMAN PETER W. RODINO, JR.

I am pleased to have the opportunity to participate in this important aspect of the work of the Committee on the Judiciary,

There has been some concern expressed to the effect that the Congress, and this Committee, should do nothing until the current investigative effort of the Department of Justice is complete. This view, if it prevailed, would mean an abdication of this Committee's constitutional obligations to authorize funds for and exercise legitimate oversight over the Department of Justice.

This Committee will not interfere with the process of pending cases, nor will it tamper with or prematurely attempt to examine any evidence in such cases.

We have in the past and will continue to look at the priority programs of the Department of Justice and the Federal Bureau of Investigation. If we are to provide appropriate funding, we must understand the programs of the Department.

Undercover operations are difficult, often dangerous and, by their nature difficult to control. Since these operations often involve activities by persons not directly employed by the government we must assure ourselves, to the extent possible, that all logical steps are being taken to control their activities. The danger of improperly involving or implicating innocent citizens in these sensitive investigations is a result which we have a duty to prevent if at all possible.

This Subcommittee has been deeply involved in hearings on the FBI Charter. In July, when the Charter was initially introduced, I stated that certain concepts which are embodied in the Charter would make the work of the FBI more nearly conform to the desires of the American people. Two of the concepts which I discussed were (1) that investigative techniques be examined with the requirement for minimal levels of intrusiveness into protected activities and (2) that periodic review of investigative activities be addressed.

These two concepts, I believe, go hand in hand, for without ongoing review and guidance of investigative activities, there is the risk of intrusivensss and violation of protected activities.

When I introduced H.R. 5030 (the proposal for the FBI Charter), I particularly emphasized that the focus of all FBI investigations should be criminal conduct and that the proposed Charter provides a method for systematic accountability by the Bureau. Our purpose today is to examine these precepts in detail to see if undercover activities conducted by informants adhere to the Charter's standards and to such guidelines as the Attorney General has established for protecting the constitutional rights of persons being investigated with respect to electronic surveillance and all other aspects of undercover activities.

I am particularly concerned about the degree of ongoing review which the Bureau and the Department utilize in their undercover activities. The process through which the FBI Charter as introduced was forged involved detailed analyses of, among other things, undercover operations. I will be very interested to hear from our witnesses today about the degree to which current operations have conformed to the proscriptions in the draft Charter. If there are inadequacies in the Charter from a realistic day-to-day undercover operations perspective, it is imperative that we understand these inadequaices.

I welcome the opportunity to hear from our distinguished witnesses on this subject and look forward to a continuing mutual effort to make our criminal justice system the best that fair minds can devise.

Mr. EDWARDS. Thank you, Mr. Rodino.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I would like to welcome Director Webster and Mr. Heymann, and express my gratitude to the chairman for his having scheduled hearings on the matter of the FBI's undercover operations, commonly referred to as sting operations.

We in the Congress have, as you know, Director Webster, only recently become sensitized to the potential impact of undercover operations, which the Bureau stages.

In fact, the chairman has been quoted as saying that the Abscam operation, just completed, would not have been possible under the proposed charter.

My reading of that document, however, indicates to me that proposed section 533(b) (1) specifically permits the Bureau to conduct an investigation on the basis of facts or circumstances which "reasonably indicate that a person has engaged, is engaged, or will engage" in a criminal activity.

I invite you to confirm or correct my interpretation of that section of the proposed bill.

In the course of this hearing, I expect to ask a number of questions designed to establish the overall effectiveness of these operations, the conviction rate relative to other investigations, and the investigative costs per conviction, and similar questions.

I suppose parenthetically it's too much to hope that the cost accounting that you will be required to make be applied to the Department of Housing and Urban Development, or HEW, but we can hope.

I am also quite concerned, as you might suspect, about the extent to which you do engage counsel to monitor these activities.

Now it seems to me that audio and video recordings, legally acquired during these sting operations, constitute the best evidence within the meaning of the rules of evidence, and most clearly demonstrate to a jury the actual events in the particular case at bar as they occurred. Video and audio recordings help to resolve many otherwise troublesome problems of identification, and exactly what was said or done, and under what circumstances.

We are also concerned about the leaks which may well have prejudiced the rights and the reputations of some, but also which sabotaged, rather effectively, your ongoing investigation.

I look forward to hearing your statement and your response to my concerns.

Mr. EDWARDS. The gentleman from Ohio, Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. Webster and Mr. Heymann, I have read your draft statements, prepared statements. I haven't read the final version. I presume there are no major substantive differences; is that correct?

Mr. WEBSTER. Yes.

Mr. SEIBERLING. I noticed that in both statements, it is pointed out that the FBI and the Justice Department are not prepared to back off or to curtail investigations of this type.

I think that is a bit of a strawman, because I don't know anybody who has suggested that you back off or curtail these investigations.

I certainly think that wherever you have any reasonable or probable cause to believe that officials or anyone elso are engaged in corrupt activities, you have the obligation to go ahead and investigate those, and pursue them to the end, as you say in your statement.

I am, however, concerned with some of the implications of the techniques used. Perhaps this is a novel approach or perhaps we just didn't know about it before now; but, in any event, we now have some curtains drawn aside, and we have had revealed to us some of the techniques that have been used in trying to ferret out possible violators and possible corrupt officials.

I think we should not try to explore your activities in connection with any of the people whom you have some reason to believe may have been corrupt, and I don't think this committee should, as long as there is a possibility of prosecution, but I do think that we can investigate the processes used in connection with those who were the targets of investigation and were not found to be corrupt, and those names have been revealed in the newspapers, again perhaps unfortunately, because it does put some kind of a cloud over them.

I think that we owe it to the Congress and to the country to explore the techniques and find out how it is that people who have turned out to have no predisposition, to have no corrupt motives, to have in effect not been enticed by any snares that were set, how they could have been brought into, first of all, an investigation posture; and second, how they could be brought to go to whatever houses or other places where you had these video cameras and so forth, and what was used to entice them. We have one case of a Senator who, as far as I can determine from the newspaper reports, was enticed by the prospect of perhaps a campaign contribution; a perfectly legitimate thing. Although when he found out that there was some sort of money for possible legislation, why, he immediately turned it down.

You have another one reported where a lawyer, not a Member of Congress, but a lawyer, was approached on the possibility of some Arab sheik hiring him on a retainer basis; again a perfectly legitimate thing; and when he found out what the other conditions were, he said, "Nothing doing."

Now we have other instances of Congressmen who were apparently intrigued into exploring promises that there were some big investors who wanted to invest in their district. Every single Member of Congress wants to have investments in his district to help the employment situation and produce an expanding economy, and that is a perfectly legitimate thing.

I really think we owe it to the country to explore to what extent honest motives were used to suck people in to what might have been a trap, had they turned out not be honest people. I think we ought to explore it only in the case of those who turned out to be honest and not to have corrupt motives. We must see how this could happen, because I think that those cases carry the most serious implication of all the very serious implications in this entire affair. If necessary, I think we should go into secret session, if otherwise we would be revealing methods of the FBI or embarrassing individuals.

I thank you, Mr. Chairman, for this opportunity to express my mind on this very, very important subject.

Mr. EDWARDS. The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. I'd just like to briefly say that I wish to renew my confidence in the Director, but I also have the same concerns as the gentleman from Ohio who has just spoken, and it's not with just how this applies to this one operation, but how it may apply to other operations with other people throughout the country who are, I would assume, innocent until proven guilty, and good people in their community, and how they, too, may be caught up into some type of operation, any type of operation, unless there is—and the thing I'd like to focus on sometime, if not today or tomorrow, maybe 6 months from

now, or sometime when it can be, as to the management of these operations and how detailed that management actually is, and the scope of involving people, because of the matter of Senator Pressler and how that came about, and how the—well, some way enticement was brought about, as the gentleman from Ohio has pointed out, purely legitimate.

To be honest with you, if somebody had walked up to me and said, "Harold, I know some people who would like to give you $1,000 or $500, even $100, for your campaign. There is a group of them down the street, I'd like for you to come down and visit with them and talk to them about your campaign," Mr. Director, I'm afraid that I'd say, "Sure, I'll be glad to go down."

I don't think there are very many Members of Congress that wouldn't. The same thing would apply to certain just private individuals, as well as other purposes, business investments and what-have-you. That's what concerns me.

Thank you very much, Mr. Chairman.

Mr. EDWARDS. Without objection, both statements will be made a part of the record in full, and I recognize the distinguished Director of the FBI, Judge William H. Webster.

[The complete statements follow:]

STATEMENT OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the subcommittee, I am pleased to be here today to discuss the role of undercover operations in federal law enforcement. I would first like to discuss why undercover techniques are so important to effective enforcement, and then to describe the legal and policy safeguards which we believe set an appropriate role for use of the technique.

1. THE UNDERCOVER TECHNIQUE IS A LONG-ESTABLISHED AND CRUCIAL LAW ENFORCEMENT METHOD

The term "undercover operations" embraces a wide variety of investigative techniques which can successfully ferret out and deter a broad range of significant crimes. Undercover operations span a gamut which may include: a police officer posing as an old woman vulnerable to mugging or more severe physical attacks in a park; agents infiltrating a drug-smuggling conspiracy intent on making controlled narcotics buys from large-scale dealers; a modest business front, such as a local tavern, susceptible to extortion by local organized crime elements or official inspectors seeking graft; or an elaborate, posh enterprise designed to recover expensive stolen art, jewelry and other valuables. Such an operation may include only a single agent or a single cooperating citizen or informant or it may involve many agents, the use of video and oral tape recordings, judicially-authorized wiretaps, cooperation by several private individuals or businesses, and a number of overt investigative techniques.

Undercover operations have been and will continue to be effective in capturing and convicting those engaged in both violent and economic crimes, including narcotics trafficking, terrorism, labor racketeering, truck hijacking, arson-for-profit, and white collar frauds, as well as political corruption. Judge Webster has noted some of the Bureau's most recent successful operations in these areas. Other federal investigative agencies such as the Drug Enforcement Administration, the Department of Agriculture, and the Bureau of Alcohol, Tobacco and Firearms, as well as local police forces also utilize undercover operations.

Judge Webster has mentioned the investigative advantages which undercover operations provide. In essence, they allow the investigators to pierce the carefully constructed walls of secrecy and layers of insulation behind which the most sophisticated and potentially dangerous criminals work. They permit investigators to discern types of "consensual" crime which generally go unreported and in which the victim is the public at large. If a night club owner bribes a local inspector to overlook fire code violations, in order to avoid more expensive repairs, neither

party is likely to report the criminal transaction. Without undercover techniques, the matter may never come to public attention or may come only after a fire has trapped and killed innocent patrons of the club. As one writer puts it, consensual crimes generally "do not announce themselves."

From the prosecutor's perspective, undercover operations are extremely effective in aiding us to identify, prosecute and convict the guilty and to reduce the chances that innocent parties will be caught up in the criminal process. Undercover operations permit us to prove our cases with direct, as opposed to circumstantial, evidence. Instead of having to rely on inferences from facts developed after the commission of a crime, we can rely on testimony from those who were direct observers before, during and after the attempted commission of a crime. Nor are we limited to the testimony of unsavory criminals and confidence men, whose credibility may be questionable and, in any event, can often be destroyed on cross-examination by able defense counsel. Instead, through undercover techniques, we can muster the testimony of credible law enforcement agents, often augmented by unimpeachable video and oral tapes which graphically reveal the defendant's image and voice engaged in the commission of crime. These techniques aid the truth-finding process by generally avoiding issues of mistaken identity or perjurious efforts by a witness to implicate an innocent person. With the aid of the direct perceptions of government agents and indisputable tapes, we are able to determine whom to indict and whom we should not charge. Similarly, a jury is aided in determining whether the charges have been adequately proven.

Recording the interplay of government agents and unsuspecting, putative defendants is also of considerable assistance to the courts. In many cases where a defendant seeks dismissal of an indictment or suppression of evidence on the ground of governmental misconduct, the court is forced to make difficult comparisons of credibility and accuracy of recollection between government witnesses and the defendant. But when the challenged law enforcement conduct is largely recorded, the court is in a superior position to determine whether the charges of impropriety are justified.

Not only do undercover techniques enhance our ability to investigate and prosecute crimes, but they also serve as a powerful deterrent against the commission of future crimes. Operation Lobster, which the Bureau conducted in conjunction with local law enforcement agencies under the supervision of the Justice Department's New England Organized Crime Strike Force, was an effort to combat truck hijackings plaguing the Northeast Corridor at a rate as high as two to three per day. The operation involved having a Bureau undercover operative pose as a broker of stolen bulk merchandise and run a warehouse where the hijackers could bring their trucks and fence their stolen goods. Video tape and sound recordings were used to monitor and record all business dealings at the warehouse. After approximately 22 months, the investigators believed they had identified all of the major hijackers and proceeded to arrest all those who had fenced stolen loads with us. As a result, we convicted 50 individuals and recovered $3 million in stolen property. But perhaps even more impressive is the fact that after the arrests were made last March, there was only one reported hijacking in the next six months. While the surcease stemmed in part from the fact that many of the major hijackers are now imprisoned, it is also true that hijackers have been made uncertain whether the fences needed to make their crimes profitable are genuine. They must worry that the fences may be in fact federal lawmen who will at some future date arrest and prosecute them.

The same deterrent value is achieved whenever criminal actors are given reason to fear that the person buying heroin, the businessman being extorted or the persons offering bribes may turn out in fact to be undercover government agents. The resulting risks and uncertainties will lead some to refrain entirely from the contemplated crime and others to be considerably slower and more cautious in dealing with strangers essential to the successful consummation of the criminal endeavor.

2. THE LEGAL REQUIREMENTS FOR UNDERCOVER INVESTIGATIONS ARE WELL-ESTABLISHED

Recognizing the strong societal interest in undercover investigations, the federal courts have repeatedly sanctioned use of the technique. For example, in *United States* v. *Russell*, 411 U.S. 423 (1973), the Supreme Court upheld a conviction for manufacturing illicit drugs even though the defendant had been supplied essential chemicals by undercover federal agents. The Court specifically rejected the defendant's claim that the Government was too deeply involved in creating the criminal

activity for which the defendant was convicted. Quoting *Sorrells* v. *United States*, 287 U.S. 435, 441, decided a half century earlier, the *Russell* Court noted: " 'that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution.' * * * Nor will the mere fact of deceit defeat a prosecution, * * * for there are circumstances where the use of deceit is the only practicable law enforcement technique available." 423 U.S. at 435.

This was what the *Sorrells* Court had recognized as well: "Artifice and stratagem may be employed to catch those engaged in criminal enterprises. * * * The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose would-be violators." 287 U.S. at 441–442.

In its most recent decision in the area of undercover operations, *Hampton* v. *United States*, 425 U.S. 484 (1976), the Court upheld the validity of an undercover investigation in which, according to the defendant, the Government had sold contraband heroin to the defendant through an informant, bought it back from him through undercover agents and then convicted him for the sale. In the decisive concurring opinion, joined by Mr. Justice Blackmun, Mr. Justice Powell wrote that the practical law enforcement problems posed by narcotics trafficking justified a flexible response in detecting would-be violators, even by supplying a contraband substance.

For the most part, in determining the propriety of undercover operations, the courts have focused on the issue of entrapment. Under this doctrine, the key test is whether the Government implanted the criminal idea in the mind of an otherwise innocent individual and induced him to commit acts he was not predisposed to commit. In entrapment, the focus is not so much on governmental conduct as on the mental state and prior behavior of the defendant caught in a criminal deed. As Chief Justice Warren stated in *Sherman* v. *United States*, 356 U.S. 369, 372 (1958):

"To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

The decisions of the Supreme Court suggest that if governmental conduct in an undercover operation reaches "a demonstrable level of outrageousness," such conduct could bar a conviction on due process grounds, even where the defense of entrapment is not technically available. But to date, the Supreme Court has noted that neither supplying essential materials for a criminal enterprise, nor supplying the very contraband whose sale was later punished, amounts to any such overreaching. As Mr. Justice Powell stated in *Hampton*, "The cases, if any, in which proof of predisposition is not dispositive will be rare." 425 U.S. at 495 n. 7. Neither the Supreme Court nor other federal courts have established general operational criteria for undercover operations. The courts have not required that there be any threshold showing of probable cause or reason to believe that a specific crime has been or will be committed or that a particular individual is involved before an operation can be commenced. Nor have the courts imposed any rigid rules on investigative agents with respect to their behavior in establishing and running an undercover operation.

Thus, under current case law, undercover operations will be sustained if they are not so outrageous as to offend the conscience and if they do not trap the unwary innocent.

3. THE DEPARTMENT HAS ADOPTED ADDITIONAL SAFEGUARDS AS A MATTER OF POLICY

As a matter of sound administrative policy, the Department observes considerably more restraints than the bare legal requirements in establishing, monitoring and executing its undercover operations. In the elaborate review process which Judge Webster has described, the Bureau and the Criminal Division strive to insure that each undercover operation is carried out in a manner which is fair, unambiguous, productive of successful prosecutions, and which minimizes the impact on or even the involvement with innocent persons.

As a first safeguard, we only initiate investigations, and we only use the undercover technique, when we reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur. If we open a store-front fencing operation, we do so based on reasonable indications that the theft and sale of stolen property is taking place in the area and could be effectively detected and

prosecuted through use of the technique. When a courageous FBI agent named Walter Orrell was sent on a detail to the Bronx in 1976 to pose as the operator of a new garbage collection business and to seek out customers, it was done based on an urgent suspicion that extortionate practices were occurring in the refuse collection industry. That suspicion was confirmed when the part-owner of a rival company came into Mr. Orrell's office and threatened to pitch Mr. Orrell out the window unless he stopped competing, a threat which was tape-recorded and helped convict the extorter.

We impose on ourselves the requirement that there be a well-founded suspicion of criminal activity in a sector or area before commencing an undercover operation, not only because fishing expeditions may be unfair but also for the practical reason that they would be wasteful of our scarce investigative resources. We are simply not in a position to commit precious manhours and resources to an elaborate undercover operation unless we are fairly confident that in the end we will be able to apprehend and convict those engaged in significant criminal conduct.

We do not impose on ourselves any rigid requirement that we know the particular individuals involved in the pattern of criminal conduct before we begin use of the undercover technique. Sometimes we will know the likely identity of a violator before undercover work isused. If a businessman comes to us and says that he has been offered stolen goods or that a licensing inspector has asked for a gratuity, we can use the undercover technique by having the citizen complete the transaction under surveillance. But in the real world, it is hard to intercept many ongoing criminal transactions in that fashion because, as noted, many serious crimes are consensual (such as drug trafficking, loan-sharking, and instances of official corruption), because the victim is afraid to come forward, or because the victim may not even realize he has been injured (such as a company shareholder whose company officers take kickbacks, or a union member whose funds has been embezzled). Even when the identities of particular persons involved in criminal activity are known, they will often only be intermediaries or lower echelon participants.

Effective use of the undercover technique instead often requires that the violator take steps to identify himself during the undercover operation. When we set up a store-front or warehouse operation, sellers we never even knew were in the business have come forward with stolen goods. When we put word out on the street that we will fence stolen truck cargo or stolen government food stamps, the thieves announce themselves and their livelihood by walking in the door. This self-identification can also occur through the intervention of criminal brokers or intermediaries, who gain a living by functioning as catalysts to illegal deals between prospective buyers or illicit goods and services and sellers looking for an additional outlet. One example of such match-making occured in an investigation in Pontiac, Michigan several years ago, where an undercover agent posed as an individual interested in starting a numbers operation. He soon was approched by a local union official who said that police protection would be required for the operation and who thereafter brought several interested police officers to see the undercover agent. Until that approach, we had not focused the investigation on official corruption nor suspected the particular police officials who were later convicted.

In some areas of law enforcement, it may be harder to structure an operation so that those with corrupt intentions take the initiative in coming forward, whether in person or through the agency of a broker. Where operators in a criminal sector are sophisticated and wary such as drug bankrollers who wait for drug importers to come to them for financing, undercover agents may have to make the first move and approach such possible financiers directly or through a broker. In cases where we do not know the identities of the violators in a perceived pattern of criminal activity and have to make the first move directly or through a broker, or where we are met by the representations of an initiating agent of uncertain reliability, we seek to take every possible precaution against involvement of the innocent.

Such precautions involve a careful evaluation of anything we are told by intermediaries about the possible interest of other persons in a criminal transaction, and an attempt to check such claims to the extent practicable. Most important, however, is the second major safeguard followed in every undercover operation, of making clear and unambiguous to all concerned the illegal nature of any opportunity used as a decoy. This provides the strongest possible protection against any unwitting involvement by individuals brought in by intermediaries or who are encountered directly. We attempt to structure our undercover decoy transactions by requiring overt participation on the part of all individuals. If a middleman offers to provide police protection for an undercover numbers parlor, we would seek a face-to-face encounter with the allegedly corrupt policeman at which the illegal nature of the quid-pro-quo would be made utterly clear. This precaution not only elicits the strongest possible evidence of the knowledge and involvement of principal offenders who usually insulate themselves through middlemen, but also provides an important protection against any attempt by a middleman to use the name of an innocent person and against any inadvertent involvement by persons located on the outskirts of an undercover operation. By making clear and unambiguous the corrupt nature of any offer we make, the chance of unwitting or gullible involvement by innocent individuals is strongly guarded against.

A third important safeguard in undercover operations is our modeling of the enterprise on the real world as closely as we can. The opportunities for illegal activity created in the course of an undercover operation should be only about as attractive as those which occur in ordinary life—because the object of a decoy undercover operation is to apprehend only those criminal actors who are likely to have committed or to commit similar criminal conduct on other occasions. Offering too high a price for stolen goods in a fencing operation, or pressing a licensing inspector too vigorously to "work something out" about a licensing violation are inducements we would avoid for fairness reasons. Fairness and practicality have an important coincidence here since overweening inducements or too attractive rewards are also likely to be not believable, potentially alerting criminal actors that something is amiss including the possibility of government involvement.

In view of these safeguards and restrictions in carrying out undercover operations, we believe that most of the concerns raised by recent commentators about undercover operations are easily answered.

Some commentators have suggested that undercover operations are improper when they "create crime." This objection is probably not meant in a literal sense, since whenever a local policeman walks through a park that night dressed as an elderly lady, in order to serve as a decoy victim for muggers, there is a risk that a "new crime" will be created. When we organized our Bronx garbage collection company as a decoy victim for extortion, again we were making likely the commission of an additional act of criminal extortion.

Rather the objection probably goes to the sense that law enforcement activity should never tempt into criminality persons who otherwise would have led law-abiding lives. The important safeguard observed in our undercover operations of modeling the operation on real-world situations—of making sure that any created illicit opportunities, rewards, and inducements are proportionate to the real-world illicit opportunities, rewards, and inducements an individual would be exposed to—meets the nub of the issue of "creating crime." For by this safeguard, we assure that the only individuals who take part in a decoy transaction are individuals who are likely to have engaged in similar criminal conduct on previous occasions or to have committed such crimes on future occasions. By observing this principle of proportionality—modeling the real-world—we avoid creating criminals out of law-abiding persons, and that is the most important part of the argument about "creating crime."

The other intuition underlying the "creating crime" argument is the strong sense that law enforcement activity, including undercover operations, should avoid harming or burdening third parties. Certainly any undercover activity which posed a direct threat to the safety or well-being of third parties would be exceedingly troubling. We are sensitive to this concern and are extremely careful to monitor our operations to prevent third party harm. We commonly close the operation if there appears to ba any significant chance of violent activity or severe uncoverable financial loss to individuals.

Another argument made by some commentators is that undercover operations are proper only when the decoy opportunity or solicitation attracts solely those perons guilty of a prior crime. The example usually given is that of a property sting, in which the bogus fence will presumably attract only those people who have engaged in the crimes of theft or receiving stolen goods. Again, I don't think the argument is intended to be taken literally, since a policeman dressed as an elderly lady has no way of knowing whether the mugger he apprehends engaged in any prior crime before the attempted assault, and yet such decoy operations are generally accepted, just as we may not know for sure in making an agreement to buy narcotics from a street peddler whether he already possesses the narcotics.

One might also note in passing that the intuition as to property fencing is not a perfect one; an individual may well condition his commission of a theft on the knowledge there is usable fence nearby and hence those attracted by a fence are not be definiton criminals prior to their interactions with the fence.

But the concern underlying the "prior crime" argument is again an important one, and is similar to the "creating crime" argument. We don't wish law enforcement activity of any sort to turn law-abiding people into new criminals. The attraction of a "prior crime" population to a bogus property fence seems consistent with this precept. But the concern is also met by our safeguard policies of keeping all decoy opportunities proportionate to those that exist in the real world and by making sure that the illegal nature of the opportunity is clear and unambiguous. These safeguards assure that the only individuals who take part in decoy transactions are individuals likely to have engaged in similar conduct on other occasions.

The same ethical intuition probably moves those commentators who have argued that a factual predicate of probable cause concerning an individual's involvement in criminal activity should precede any use of undercover techiniques. For the reasons explained above concerning the difficulties in detecting and identifying the parties to consensual crimes, we do not believe that a probable cause standard as to individual involvement is remotely practicable—not to mention that probable cause is the articulated standard for arrest and indictment rather than the beginning of an investigation. But the intuition underlying the "probable cause" argument—that the government should not make new criminals out of law-abiding persons nor test people at will with temptations not otherwise occurring in their lives—is again met by our safeguards of having all decoy opportunities and attractions approximate to those existing in the real world and of making clear and unambiguous to all participants in a decoy transaction the corrupt and illegal character of the activity.

4. THE UNDERCOVER TECHNIQUE IS NO MORE INTRUSIVE THAN OTHER INVESTIGATIVE TECHNIQUES

Although undercover projects are designed to pierce deeply into criminal enterprises, the operations are no more intrusive of the interests protected by the Bill of Rights than are other available law enforcement techniques. Compare, for example, a situation in which an individual voluntarily drives a truckload of stolen goods to fence at a videotaped undercover warehouse, with any of the following law enforcement methods: a search under judicial warrant of a home or business which is carried out against the will of the owner; grand jury or trial testimony compelled against friends and associates or even relatives; self-increminating testimony compelled from an individual after being granted use immunity by a court; a grand jury subpoena for voluminous documents, physical evidence or books and records which may concern an individual's private life; or court-authorized electronic interceptions of private conversations or telephone calls when neither party has consented to the interception. In comparison with these Constitutionally and Congressionally authorized techniques, undercover operations represent no greater intrusion into the zone of interests protected by the Fourth, Fifth, and Sixth Amendments of the Constitution.

The essence of the undercover technique is to make use of a subject's willingness to provide information and evidence voluntarily and intentionally to those who he thinks are his criminal confederates. It is the voluntary provision of information to a confederate who, even if a private person, could well be expected to reveal the information on some future occasion, see *United States* v. *White*, 401 U.S. 745 (1971), which makes this technique relatively unobtrusive. In addition, the ability of undercover agents to focus the investigation on the precise criminal conduct in question substantially limits the information gathered to that necessary to complete the investigation. The intelligent use of underocver techniques in an investigation can often produce sufficient evidence to prove a criminal case without forcing the Government to use intrusive investigative methods such as search warrants and court-authorized wiretaps.

The quality of evidence obtained by undercover operations adds substantially to the due process of criminal trials. Often video-taped and recorded, the crimes can be essentially recreated before the jury. Convictions are not centered on the testimony of informants or on the powers of memory of untrained witnesses. The certitude of the evidence improves the confidence of the public in the accuracy and fairness of the judicial process.

As noted, the one significant danger of undercover operation is the risk of bringing into the government-monitored criminal activities people who would not otherwise engage in similar activities. As the Director and I have explained, we strive to minimize these risks during the planning and execution of the operation. The Department will not authorize the prosecution of any individual unless we confidently believe that he committed the criminal acts without undue solicitation or is predisposed.

Finally, the defense of entrapment is always available to a defendant at trial where a jury can determine from all of the evidence, including perhaps videotapes of the defendant's conduct, whether in Chief Justice Warren's words, the defendant was "an unwary innocent"or "an unwary criminal."

5. UNDERCOVER INVESTIGATIONS OF POLITICAL FIGURES, WHILE POSING SPECIAL PROBLEMS, SHOULD NOT BE SUBJECT TO DIFFERENT RULES

Lastly, I would like to address the special and delicate problems posed for law enforcement in undercover investigations of public corruption. We are sensitive to the potential for abuse when there is an intrusion by the federal executive branch into the affairs of a co-equal branch of government, whether it be the legislature or the judiciary, as well as into the affairs of a state or local government. It would be intolerable if investigations were motivated by partisan or political considerations or if investigations intruded in any meaningful way in the lawful functioning of any branch of government. These concerns mean that law enforcement officials must act with scrupulous fairness, apolitically and cautiously, in carrying out their investigations.

But these concerns do not mean that we can or should abandon our responsibility to investigate and prosecute public corruption. Whether at the local, state or federal level and whether in the executive, legislative or judicial branches, public integrity has been and shall remain a high priority enforcement area of the Department of Justice.

The reasons for this are simple and compelling. In order for the public to have the necessary trust in its government, it is essential that corrupt misuse of public office and authority be effectively prosecuted. Unhealthy disrespect for law is generated when there is a perception of a dual standard, strict enforcement for ordinary people and lackadaisical attitudes or worse for the powerful or prominent. Further, our investigation of sophisticated organized crime, narcotics trafficking, and white collar fraud schemes reveals that official corruption is often indispensable to the success of these criminal ventures. Some investigations in these criminal areas may lead us to evidence or at least allegations of serious public corruption. Whenever the trail of an investigation leads to significant allegations of public corruption, we must and will follow the evidence, no matter where and to whom it may lead.

Often the only effective technique to investigate public corruption will be undercover projects. Because of the consensual nature of bribe transactions and other forms of corruption, it will often be very hard to gain evidence of the transaction, whether the transaction concerns the local police or Chicago electrical inspectors. Even if one of the consensual parties does report the matter, when the public official is a prominent, respected individual, reliance on the testimony of a disreputable briber or an unsavory middleman will frequently be unsatisfactory as proof. The testimony of a credible government agent, or a consensual recording or videotape of a transaction is far more probative and credible evidence.

In public integrity cases involving Congressmen, the recent Supreme Court decision in *United States* v. *Helstoski*, 99 S. Ct. 2432 (1979) has only compounded the difficulties of proving a corrupt transaction in the absence of undercover techniques. The usual way we would prove an allegation of bribery, outside a Congressional context, is to show that money was transferred more or less contemporaneously with the performance of an official act for which the money was promised. But *Helstoski* holds that under the Speech or Debate Clause references to an already performed legislative act by a member of Congress cannot be introduced in the government's case even in a prosecution for bribery. As the Supreme Court acknowledged, "without doubt the exclusion of such evidence will make prosecutions more difficult." 99 S. Ct. at 2439. In regard to past acts of illegal bribery, that prediction of difficulty is certainly true. For although we can prove that money passed (the quid), *Helstoski* prevents introducing evidence of the official act (the quo).

The only route of proof left open by *Helstoski* is testimony by a bribe-payer about the promise allegedly made by the Congressman. As noted above, an

avowedly corrupt bribe-payer will not enjoy much credibility as a witness. Hence, the use of the undercover technique, making possible testimony from more credible law enforcement agents and evidence collected by consensual surveillance, will take on central importance in any future investigation of alleged criminal abuse of office by a member of the Congress.

The safeguards and techniques which are employed in our undercover operations generally are and shall be utilized in investigations aimed at public corruption. After the careful internal review procedures are satisfied, we will initiate an undercover investigation only where we have a well-founded reason to believe that there is a pattern of criminality. There are only two ways in which any public official will become the subject of an undercover investigation: if he is the object of reliable, specific criminal allegations for which an undercover operation is an appropriate method of investigation; or if, by a process of self-selection, he voluntarily enters an operation. Just as we do not know which individuals will enter our undercover warehouse with a truckload of stolen merchandise, so we do not always know or even suspect which municipal building inspector will show up in our undercover bar to solicit a corrupt payment in return for a license. As in all undercover operations, any decoy transaction in a public integrity case should be structured so that its corrupt character is as clear and unambiguous as possible and should be modeled and proportioned as closely as feasible on the pattern of criminality we understand to exist in the community. We must be fully satisfied that the public official is soliciting and willing to accept an illegal payment in return for dispensing a political favor. If it appears that the individual lacks such intent and has entered the operation on an innocent misunderstanding, perhaps generated by the misrepresentations of a deceitful non-governmental middleman, we would not pursue the individual as a target of the investigation.

On the other hand, if we are satisfied of the individual's criminal intent, then we cannot and will not shirk our responsibility to continue the investigation and to prosecute, if warranted, regardless of how prominent or powerful the official may be. In essence, the same protections which preclude or minimize the possibility that innocent people will be caught up in any type of undercover operation are also used to prevent an honest public official from being implicated in any undercover operation directed against public corruption. There is no valid reason for any standards or procedures in political undercover operations different from those employed in any other types of undercover investigations.

CONCLUSION

The undercover technique has been used successfully in labor racketeering, white-collar crime, narcotics trafficking, political corruption, and many other kinds of significant crime. We believe that as administered by the Department, in conformity with the legal and cover policy restraints I have described today, undercover techniques represent a minimally intrusive, powerfully effective weapon to detect, combat and deter the most serious forms of crime in our society.

STATEMENT OF DIRECTOR WILLIAM H. WEBSTER, FEDERAL BUREAU OF INVESTIGATION

It's a pleasure to appear before you today to discuss the FBI's undercover activities.

The FBI makes use of the undercover technique in important cases where more conventional investigative techniques give little promise of success. The technique allows us to reach beyond the street to the manipulators, organized crime leaders, and others too guarded or insulated to be observed in criminal activity in public. A brief look at past undercover cases illustrates just how effective its use can be.

Our UNIRAC investigation, standing for Union Racketeering, was aimed at corruption in the Longshoremen's Union in several Atlantic and Gulf Coast ports. The principal violations here included racketeering and extortion: payoffs by shippers and warehousemen to union officials. It was a mutual arrangement and one that had been in existence for some time. Direct investigation of the suspects probably would have resulted in an attempt to cover up existing evidence. However, with the help of a source and undercover Agents in Miami, we were able to get hard evidence—tape recorded conversations of actual illegal transactions. Ultimately, this case led to the indictment of 120 persons. Sixty-nine of these

individuals, including many union officials and business executives (and among these, most recently, Anthony Scotto) have been convicted, and many others await trial. These activities impacted on millions of Americans who have been paying inflated prices on a multitude of items passing over the docks.

In another undercover case, a Weather Underground investigation, the stakes were different. We were dealing with a small insular cell of individuals committed to violent revolutionary acts. Two of our Agents were able to infiltrate the organization and remained members for four years. As a result, they were able to warn us of the organization's plan to bomb the office of a California State Senator. We made arrests shortly before the group put its plan into operation and effectively prevented the violence from occurring.

In another undercover operation entitled MODSOUN, we targeted the manumanufacturers and distributors of "pirated" tapes, records, and labels along with organized crime figures with ties to the recording industry in New York City. Working out of a store front export business operating at the retail sales level, the FBI was able to seize $100 million of counterfeit tapes and recording equipment at 19 different locations in five East Coast states. To date, four subjects have pled quilty, two others have been indicted, and additional indictments are anticipated.

Other examples of undercover operations include the original anti-fencing Sting operation in Washington a few years ago; another anti-fencing operation in Buffalo, New York, that led to the recovery of a stolen Rembrandt a joint FBI and ATF operation targeted against an arson-for-profit ring which utilized the RICO statute, eventually resulting in stiff sentences to 14 individuals, $273,000 in finds, and the forfeiture of over $450,000 in property; and one very important recent case. We named the case MIPORN to refer to an undercover investigation into the pornography industry in Miami and its ties to organized crime. That investigation began in August of 1977. It involved two undercover Agents who spent two and one-half years working their way into the confidences of allegedly some of the nation's major pornography business figures. Forty-five persons were indicted as a result of that investigation. The same case yielded indictments against another thirteen persons on film pirating charges.

I've given these examples to show the scale and character of criminal investigations to which we are applying the undercover technique. As I indicated, undercover operations are often used to reach those serious violations that otherwise may go undiscovered and unprosecuted. That is particularly true where we are dealing with consensual crimes. Not long ago, we completed an undercover investigation that led to the conviction of eleven individuals involved in a kickback scheme. Smaller firms that sold materials to a large shipbuilding company were paying off the larger company in order to keep its business. Without the use of the undercover technique, the FBI could not have gotten inside to get persuasive evidence of these transactions. As a matter of fact, twice previoulsy we had unsuccessfully attempted to investigate this scheme using conventional investigative techniques.

Undercover operations are effective. In Fiscal Year 1979, for example, undercover operations led to actual recoveries worth over $190 million. In addition, we estimate that almost $1.5 billion worth of potential economic losses were prevented. Arrests arising from these type operations in that fiscal year totalled 1,648 with 1,326 convictions. Our funding for undercover operations during Fiscal Year 1979 was $3 million, about one-half of one percent of our total budget. For Fiscal 1980, our funding was $3 million while our request for Fiscal Year 1981 is $4.8 million, about three-fourths of one percent of the total budget. This increased request for Fiscal Year 1981 is being made in order to continue our operations without being forced to prematurely terminate some operations because of lack of appropriated funding. Last year, 15 operations were terminated for this reason.

These operations, however, often raise sensitive issues which I recognize must be addressed. Therefore, the FBI has adopted specific undercover policies, and an extensive oversight machinery to insure that each undercover operation is carefully planned and conducted.

When an undercover project is proposed by a squad in one of our field offices, our field office managers, the field legal advisor, and the Strike Force or United States Attorney in that region review it and send their reports to Headquarters. We consider the project's goals, the worthiness of its objectives, its costs, whether the tactics proposed might involve entrapment or present other legal problems, and the general propriety of proposed project tactics.

Many projects are rejected either by field or FBI Headquarters managers. Those that survive are submitted to an Undercover Activity Review Committeee at Headquarters. This committee, comprised of representatives of our Criminal Investigative, Legal Counsel, Administrative, and Technical Services Divisions and of representatives of the Department of Justice, reconsiders the same issues before reaching a decision.

Many difficult questions come before this committee. One proposed operation presented a scenario in which the undercover Agent would pose as a "heavy" or "muscle." The committee considered the possibility that the Agent in this role might be encouraged to commit violent acts. The risks were weighed; the committee believed that violence could be avoided by taking certain steps if the possibility of violence arose. The committee approved the operation on the condition that the undercover Agent be instructed not to participate in any violent acts and that FBI Headquarters be advised of any potentially violent situations. In a second case, the field office proposed to use certain fraudulent documents as part of a proposed cover. The committee determined, however, that the risk that undercover Agents could lose control of the documents and that they might be used by someone who secured access to them to the detriment of an innocent third party was too great. The field office was directed to develop a different approach. In recognition of this particular problem area, a policy has now been adopted requiring that the use of all such documents must be approved by Headquarters.

In addition to this approval review process, special care is taken to ensure that our Agents are sensitive to the limitations and requirements of undercover work. Before an operation is undertaken, FBI supervisors, the Special Agents in Charge in the field, and program managers at FBI Headquarters carefully screen all undercover Agents to be certain that they are suited for their particular missions. We also provide special training for those selected, with emphasis on instruction in legal areas, including the issue of entrapment.

We take precautions to minimize potential problems. With adequate training, the Agents involved are alert to sensitive issue areas. We want them to recognize when lines are about to be crossed, and to know that when in doubt they must seek the advice of their supervisors.

Once the review committee approves a project, the Bureau monitors it, both at Headquarters and in the field. When electronic surveillance or closed circuit videotapes are used, we can examine the propriety of our Agents' conduct, and the quality of the investigation as it progresses. And, of course, the results of the surveillance and the tapes provide an opportunity for the courts to evaluate the Agents' actions should they subsequently be challenged.

Perhaps it is also appropriate to note at this point that the proposed FBI Domestic Charter contemplates the promulgation of guidelines for undercover operations. We are currently working with the Department of Justice on these guidelines and substantial progress has been made.

In the last few weeks, a number of concerns about undercover operations have been raised. When aimed at property crimes or crimes of violence associated with organized crime elements or terrorist groups, for example, few serious questions have been raised about the use of the undercover technique. There has been almost unanimous approval in cases where it has been used to recover stolen property, to identify persons who have committed known crimes of to prevent the commission of planned criminal activities. In fact, Congress itself has recognized the value of this technique by expressly providing for exemptions from certain statutory requirements through a certification process.

In cases involving consensual crime, however, particularly when public officials are involved, we recognize the need for special precautions. The investigation of wrongdoing on the part of a public official is a particularly serious undertaking. Our people are sensitive to the fact that reputations of public officials are delicate and even the hint of an investigation can be harmful.

Sometimes a project may initially target one type of criminal activity only to lead us into another equally as serious. When that occurs, even if it involves government corruption, the operation, after appropriate review and examination, expands its focus. If we were not to follow these leads, we could justifiably be open criticism for not doing our job.

We start our undercover investigations focused on criminality, not against individuals or institutions. By creating a setting in which those who are predisposed to criminal activity find it convenient to deal, we may develop new leads. The same basic criminal standard always applies. Before allowing an investigation to expand, the Undercover Activity Review Committee must be satisfied that

there is a sound basis for doing so. Therefore, it will again weigh all of the factors it would consider when presented with any new proposal.

We are also aware of the problems inherent in operations where our undercover Agents are investigating subjects who are influence peddlers or middlemen claiming to know others already willing to engage in criminal activity. Since these middlemen do not know they are dealing with the FBI, or that they are the subjects of investigation, it is difficult for us to monitor their activities, and, of course, they are not under our control. We must, therefore, carefully evaluate any information they provide to us as to the willingness of a third party to engage in a crime before we proceed further and assure that if such a third party does meet with us he is aware of the criminal nature of the meeting.

The recent unauthorized disclosures to the press on some of our undercover operations are deplorable. These leaks are unfair to the subjects of the investigation whether or not indictments are eventually returned. They are also detrimental to the mission of the FBI and the Department of Justice. Leaks force the premature abandoning of investigations; they tend to undermine strong cases. They may also be dangerous to those conducting investigations.

The FBI and the Department are vigorously investigating these leaks to determine the parties responsible. If, among the many government employees who had access to this sensitive information, we find that any of our employees is involved, he can expect to be severally disciplined at the least.

In summary, we must use the undercover technique with discretion and care. Whether it be the undercover technique or another technique, in every investigative venture there are potential risks. As I have indicated, we have developed policies and procedures designed to minimize these risks. This is not to claim investigative perfection. But whenever mistakes, miscalculations or misunderstandings do occur, you may be sure that the lessons learned will be incorporated in our future planning of operations.

Our experience tells us that the use of the undercover investigative technique is vital in combating the two areas of crime that impact most seriously on society—organized crime and white-collar crime. I am confident that the principles I have discussed today, which we follow, will allow us to continue to meet these crime problems in a manner consistent with the expectations of the American public

TESTIMONY OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, AND PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. WEBSTER. Thank you, Mr. Chairman.

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We consider the project's goals, the worthiness of its objectives, its costs, whether the tactics proposed might involve entrapment, or present some other legal problems, and the general propriety of proposed project tactics.

Many projects are rejected either by field or FBI headquarters managers. Those that survive are submitted to an Undercover Activity Review Committee at headquarters. This committee, comprised of representatives of our Criminal Investigative, Legal Counsel, Administrative, and Technical Services Divisions, and of three representatives of the Department of Justice, reconsiders the same issues before reaching a decision.

Many difficult questions come before this committee. One proposed operation presented a scenario in which the undercover agent would pose as a heavy or muscle. The committee considered the possibility that the agent in this role might be encouraged to commit violent acts. The risks were weighed; the committee believed that violence could be avoided by taking certain steps if the possibility of violence arose.

The committee approved the operation on the condition that the undercover agent be instructed not to participate in any violent acts, and that FBI headquarters be advised of any potentially violent situations.

In a second case, the field office proposed to use certain fraudulent documents as part of a proposed cover.

The committee determined, however, that the risk that undercover agents could lose control of the documents in that situation and that they might be used by someone who secured access to them to the detriment of an innocent third party was too great.

The field office was directed to develop a different approach. In recognition of this particular problem area, a policy has now been adopted requiring that the use of all such documents must be approved by headquarters.

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In addition to this approval review process, special care is taken to insure that our agents are sensitive to the limitations and requirements of undercover work. Before an operation is undertaken, FBI supervisors, the Special Agents in Charge in the field, and program managers at FBI headquarters carefully screen all undercover agents to be certain that they are suited for their particular missions.

We also provide special training for those selected, with emphasis on instruction in legal areas, including the issue of entrapment.

We take precautions to minimize potential problems. With adequate training, the agents involved are alert to sensitive issue areas. We want them to recognize when lines are about to be crossed, and to know that when in doubt, they must seek the advice of their supervisors.

Once the review committee approves a project, the Bureau monitors it, both at headquarters and in the field. When electronic surveillance or closed circuit videotapes are used, we can examine the propriety of our agents' conduct, and the quality of the investigation as it progresses.

And, of course, the results of the surveillance and the tapes provide an opportunity for the courts to evaluate the agents' actions, should they subsequently be challenged.

Perhaps it is also appropriate to note at this point that the proposed FBI Domestic Charter contemplates the promulgation of guildelines for undercover operations. We are currently working with the Department of Justice on these guidelines and very substantial progress has been made.

In the last few weeks, a number of concerns about undercover operations have been raised. When aimed at property crimes or crimes of violence associated with organized crime elements or terrorist groups, for example, few serious questions have been raised about the use of the undercover technique.

There has been almost unanimous approval in cases where it has been used to recover stolen property, in cases where it has been used to identify persons who have committed known crimes or to prevent the commission of planned criminal activities.

In fact, Congress itself has recognized the value of this technique by expressly providing for exemptions from certain statutory requirements through a certification process.

In cases involving consensual crime, however, particularly when public officials are involved, we recognize the need for special precautions. The investigation of wrongdoing on the part of a public official is a particularly serious undertaking. Our people are sensitive to the fact that reputations of public officials are delicate and even the hint of an investigation can be harmful.

Sometimes a project may initially target one type of criminal activity only to lead us into another equally as serious. When that occurs, even if it involves Government corruption, the operation, after appropriate review and examination, expands its focus. If we were not to follow these leads, we could justifiable be open to criticism for not doing our job.

We start our undercover investigations focused on criminality, not against individuals or intitutions. By creating a setting in which those who are predisposed to criminal activity find it convenient to deal, we may develop new leads. The same basic criminal standard always applies.

Before allowing an investigation to expand, the Undercover Activity Review Committee must be satisfied that there is a sound basis for doing so. Therefore, it will again weigh all of the facts it would consider when presented with any new proposal.

We are also aware of the problems inherent in operations where our undercover agents are investigating subjects who are influence peddlers or middlemen claiming to know others already willing to engage in criminal activity.

Since these middlemen do not know they are dealing with the FBI, or that they are the subjects of investigation, it is difficult for us to monitor their activities and, of course, they are not under our control.

We must, therefore, carefully evaluate any information they provide to us as to the willingness of a third party to engage in a crime before we proceed further, and assure that if such a third party does meet with us, he is aware of the criminal nature of the meeting.

Mr. Chairman, the recent unauthorized disclosures to the press on some of our undercover operations are deplorable. These leaks are unfair to the subjects of the investigation, whether or not the indictments are eventually returned.

They are also detrimental to the mission of the FBI and the Department of Justice. Leaks force the premature abandoning of investigations; they tend to undermine strong cases. They may also be dangerous to those conducting the investigations.

The FBI and the Department are vigorously investigating these leaks to determine the persons responsible. If, among the many Government employees who had access to this sensitive information, we find that any of our employees is involved, he can expect to be severely disciplined, at the least.

In summary, we must use the undercover technique with discretion and care. Whether it be the undercover technique or another technique, in every investigative venture, there are potential risks.

As I have indicated, we have developed policies and procedures designed to minimize these risks. This is not to claim investigative perfection, but whenever mistakes or miscalculations or misunderstandings do occur, you may be sure that the lessons learned will be incorporated in our future planning of operations.

Our experience tells us that the use of the undercover investigative technique is vital in combating the other areas of crime that impact most seriously on society—organized crime and white-collar crime.

I am confident that the principles I have discussed today, which we follow, will allow us to continue to meet these crime problems in a manner consistent with the expectations of the American people.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Webster. Mr. Heymann?

Mr. HEYMANN. Mr. Chairman, members of the committee, I will summarize my testimony since it's been introduced in the record, and let me begin by telling you what the outline of it is.

I am first going to pick up just a little bit on Judge Webster's description of the importance and the unique advantages of undercover operations. Then I am going to summarize the law which is fairly clear. Then I am going to talk about three additional protections that we—that means Judge Webster and the Department of Justice—agree as a matter of policy we should have and do have.

Then I am going to talk about how undercover compares with other investigative techniques in terms of the intrusiveness and invasion of civil rights. And finally I am going to ask the question, is there anything special about investigations that go to political figures, either at the local, State, or Federal level.

It sounds like a lot, but I will try to be at least decently brief.

The undercover technique itself is a very old one. I asked my special assistant to tell me what's the oldest use of it that she could find, and she says it goes back at least to the "Odyssey" and the hero of the "Odyssey," appearing undercover to detect crimes in his household when he returns.

It was being used extensively toward the end of the last century. There are cases out there, mail fraud, pornography. It is not only old and familiar, but it is varied.

It takes such forms as a police officer posing as an old woman, vulnerable to mugging or more severe physical attacks in Central Park in New York; as agents infiltrating a drug-smuggling conspiracy, or merely buying drugs on the street of a major city; a modest business front such as a local tavern, susceptible to extortion or payoff requests by the police; a jewelry fencing operation and art fencing operation. It has varied forms. It is old; it is established. It is just another technique of the sort that searches, compelled testimony, interview, scientific detection, electronic surveillance are. It is just another technique. It is dramatic now because it has been raised in scale and the size of the undercover operation by recent activities.

It is not exclusively used by the FBI. Director Webster mentioned operations carried on with the Bureau of Alcohol, Tobacco and Firearms. The Department of Agriculture has done undercover operations of its own. DEA, of course, does them. Senator Moss in the Senate ran his own undercover operation 4 years ago, and went through New York's medicaid clinics disguised as a potential customer, deriving information.

From my point of view, they have three or four major advantages as an investigative technique:

One: They enable us to get, as Judge Webster's examples show, into well-organized and secret, ongoing criminal activities; criminal activities that keep going and have a life of their own.

Second of all: Undercover activities are accurate. They generally involve monitoring with either audio or audio and video equipment. They do not put us in the position of relying on the tips or testimony of what are often highly unreliable informants, con men, somebody else out there. We end up with reliable determinations of what happened.

I am going to argue extensively later that compared to other techniques, they are nonintrusive. They don't do what the fourth amendment allows us to do in terms of invading privacy, or what the fifth amendment allows us to do in compelling cooperation. They are nonintrusive.

Finally: They could have a very spectacular deterrent effect. We quote with pleasure, and maybe with too much regularity, Operation Lobster in the Boston area. In that operation we had a warehouse offering to buy hijacked goods, ran it for a number of months, and then arrested the hijackers. Hijacking has practically stopped in the New England area. It has a substantial deterrent effect.

People who would engage in that activity not only worry about the consequences of being caught in the very moment they are engaging in the activity; they have to worry about whether they are dealing with a Federal or State agent.

Many of these, incidentally, are run with the cooperation and in partnership with State and local law enforcement authorities. Operation Lobster is of that sort.

Let me move second to the law.

The law, of course, is familiar to the members of the committee. We are not free to induce a crime by one who is unwilling or not predisposed. We are free to give an opportunity to commit a crime to one who is willing and ready to take advantage of an opportunity.

The Supreme Court, in recent decisions—the *Russell* case, and the *Hampton* case—have affirmed that the Government, State or Federal, can legally go quite far in providing that opportunity.

The test ultimately is whether we have created a specific occasion of criminal activity or have created a whole new type of activity that would otherwise not have taken place.

In every case where the Government is operating as a decoy victim or participant undercover, in every case that the entrapment issue has ever been raised, the particular crime only takes place because the Government agent is buying drugs or he is in the park there to get mugged. In every case, the particular crime is caused by the Government; the issue, though, is whether the type of crime would have taken place without us.

The courts have not required that there be any threshold showing of probable cause or reason to believe that a specific crime has been or will be committed before we can engage in undercover or participate in consensual activities.

The courts have never required that a particular individual be shown to be involved before an operation can be commenced that brings him in.

The courts have not imposed rigid rules on investigative agencies with respect to their behavior in establishing and running an undercover operation.

The courts, in fact, have been quite lenient and open in recognizing that deceptions and stratagems are necessary for the investigation of particular types of crimes.

The Department has, as a matter of policy, adopted three requirements that the courts do not insist upon. I think—and I know Director Webster thinks—that these three requirements are essential. I think, and the Director thinks, that additional proposed requirements are not sensible or reasonable.

The first requirement, the first safeguard that we have imposed, is that we should only initiate an undercover operation, we should only use the undercover technique when we reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur.

Note how that relates to the entrapment defense. The particular type of activity we have to have some reason to believe is taking place out there. That's what plugs us in to the charter, I believe, Mr. Edwards.

If we open a storefront fencing operation, we do so based on some kind of reasonable indication that theft and the sale of stolen property

is taking place in the area, and could be effectively detected and prosecuted through the use of the technique.

When a courageous FBI agent named Walter Orrell was sent on a detail to the Bronx in 1976 to pose as the operator of a new garbage collection business, and to seek out customers, it was done based on an urgent suspicion that extortionate practices were occurring in the refuse collection business.

Sure enough, someone came soon and threatened to beat him up, threatened to throw him out the window. That's the first requirement; that we have a reasonable basis for believing that type of activity is going on, the type of activity the undercover investigation is designed to get at.

We do not impose any rigid requirement that we know the particular individuals involved in the pattern of criminal conduct before we begin use of the undercover technique. This goes to the questions Mr. Seiberling was asking in advance.

Sometimes we can know the individuals who are likely to be involved and check out whether they are involved or not. On other occasions, it plainly makes no sense if we set up a warehouse in Boston to buy hijacked goods, we shouldn't have to know in advance who will come into it and who won't come into it. That shouldn't be necessary, and isn't necessary.

What substitutes, if you think about it hard, for probable cause in that type of situation, what substitutes for knowing who's likely to be sucked into an undercover operation is the fact that the operation is self-selective. People don't come to our warehouse in Boston unless they have selected themselves to take part in that hijacking/fencing scheme.

That requires, however, a second step, which is a second safeguard, and it brings up questions that the chairman has raised.

I am not saying that we have always done each of these things perfectly. I am saying that I think we know what the right direction here is to go.

The second safeguard requirement is that we have to be very clear about what the nature of the illegal transaction is, that we are inviting people to participate in. If people are going to self-select, and if the self-selection is going to be a substitute for knowing anything about them they ought to know what they are self-selecting themselves for.

If it's going to be a corrupt transaction, they ought to know that. If it's going to be a mugging in Central Park, they ought to know that.

One example of self-selection is an investigation we conducted in Pontiac, Mich. several years ago where an undercover agent posed as an individual interested in starting a numbers operation. He soon was approached be a local union official who said that police protection would be required for the operation, and who thereafter brought several interested police officers to see the undercover agent.

Of course, we had no basis for investigating the police before that. Until that approach, we had not focused the investigation on official corruption, or suspected that particular police officials were corrupt.

Still, it was proper when through other contacts they were brought to us.

The third major safeguard—the first is that we know there is some activity out there. The second is that we make our own activities

unequivocal in terms of what we expect the person who might get sucked into the operation to do.

The third is that we make, we model the transaction, the undercover operation, whether it be a mugging in the park or a drug deal or a corruption sting or a hijacking sting, as much as possible after reality, to the best of our ability. That we don't offer inducements or promises or attractiveness that the real world doesn't offer.

That, of course, makes sense, because the crooks won't believe us if we don't model our transactions after reality; but it is also a guarantee of fairness, because it means that anybody who is brought in, is brought in with the same type of temptation that we know is floating out there.

We know that because we will not start an operation unless we have reason to believe that a particular type of activity is going on out there. Then we unequivocally model our activity, our temptations, on the real world.

From there on, it is a combination of self-selection and what we learn about individuals.

Let me move to the last two points very quickly.

INVESTIGATION

I personally believe that the undercover technique compares very favorably in terms of the mandate of this committee with other investigative techniques. In terms of civil liberties and constitutional rights, I think the undercover technique compares favorably not only with electronic surveillance, but with searches, with compelled grand jury testimony, with plea bargaining for evidence, with any of the number of regular investigative techniques we use in the law enforcement business.

Compare, for example, a situation in which an individual voluntarily drives a truckload of stolen goods to a fence at a videotape undercover warehouse—that's how we arranged it in Operation Lobster—with any of the following law enforcement methods:

A search under a judicial warrant of a home or business which is carried out against the will of the owners. Searching the house of people we think are hijackers. Much more intrusive; reaches the family, reaches people who have nothing to do with the crime. Not true when the man drives into our warehouse.

Grand jury or trial testimony compelled against friends and associates, or even relatives, bringing in the best friend of someone we think is a hijacker and requiring that person to testify—girlfriend, boyfriend.

We have a rule that we self-impose that we won't go for immediate family members because it's too harsh. It's legal, but we don't do it. But, friends, yes; girlfriends, boyfriends, yes.

No compulsion, no pressure, no tearing people apart by loyalty, and no putting someone in a position where they have to testify at risk of having their legs broken, for having testified.

Instead, a truckdriver driving a load of goods into a warehouse where his only complaint is that he was deceived into thinking it was a crooked operation, and it's really us.

A grand jury subpena for voluminous documents, physical evidence, or books and records; again compelling people, disrupting their lives.

We have to do it. We do do it. Investigations penetrate secrecy; not necessary when a truckdriver drives into our warehouse.

Court-authorized electronic interceptions of private conversations, intrusions of the sort that we don't have to do with undercover operations.

My point is very simple. I think in terms of civil rights and civil liberties, as well as in terms of effectiveness, undercover is a very desirable form of operation.

I haven't even mentioned the fact that it's nice if you only convict the guilty and don't convict the innocent. A criminal investigation undercover increases the already high probabilities that that is what will result.

Let me close just by saying a word about this, about a question that may lie somewhere in the background. Is there anything different when the investigation goes to public corruption, when it goes into bribery of electrical inspectors, which we have done in Chicago? Or bribery of a State legislator, which was done in Baltimore? Or it goes to a corrupt policeman in Pontiac, Mich? Or to Federal officials, such as an INS official? Or to Members of Congress?

Well, the answer is yes, there is something different, and the answer is no, in the long run, we shouldn't treat them very differently.

It would, of course, be intolerable if investigations were motivated by partisan or political considerations. It would simply be extremely destructive, the most destructive thing you could have of democracy in the country.

That means that every investigation that goes into the political area, State, local, Federal, has to be guaranteed not to be targeting any individual on the basis of his or her voting stance, political party, anything else.

What we do target on, what we can target on, is either prior information, which was true in the Baltimore State legislator case, or self-selection, which was true in the case of the Pontiac, Mich. police officer. Never in terms of whom we want, because we don't want anybody.

As a matter of fact, there is a sense—and I want to mention it, in which Judge Webster and I would sit and breathe a sigh of relief in an investigation when we failed to get somebody. We don't want anybody. We just want to be sure that we don't duck or step back.

At the same time, while we have to be careful that we are not distorting the political process, picking on people for political reasons or engaging in undercover operations that might result in a legislative act, in the changed behavior of a local city council or the State legislature or the Federal Congress, we have to continue to take extremely seriously the problem of public corruption.

It is a high priority with us. There are two reasons for it:

One is the same respect for institutions that we threaten when we bring one of these investigations, when they result in cases, will be far more seriously threatened if all of us didn't make a major effort to make dangerous, unpopular, unwise, any form of public corruption at any level.

The second is many forms of illegal transactions can't take place without at least local or State of Federal administrative public corruption. If we want to stop them, we have to be interested in stopping the corruption, too.

Now, the thing that makes political cases most difficult to conduct, the reason why we have to treat them a little bit differently, is the reputation of elected politicians and maybe of appointed, too, are their lives. It's my life, my reputation; and it's your life, your reputations.

But in any investigation, those reputations are on the line. The reason why we can't deny undercover whenever it goes to a question of public corruption is twofold:

One: That reputations of political figures, elected or appointed, are on the line, whether we use undercover or not. They are on the line whenever we start receiving information from crooks who are often wrong and sometimes right.

The other reason is because there is practically no other way to investigate charges of bribery and bribery is a uniquely political crime. We could not investigate systematic bribery among electrical inspectors in Chicago without going out there and offering bribes.

The reason is quite simple: Bribery takes place in a one-on-one situation, and it generally takes place between a somewhat disreputable briber and a somewhat reputable official, executive or legislative, local, State, or Federal.

We have to be a participant in the transaction, having heard that such transactions were going on, having made our participation as like those transactions as possible, and as unequivocal as possible, if we are going to investigate public corruption.

Thank you for giving me so much time, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Heymann.

We will be operating in the question-and-answer period strictly according to the 5-minute rule.

The Chair recognizes the gentleman from New Jersey, Chairman Rodino.

Chairman RODINO. Thank you very much, Mr. Chairman.

Mr. Webster and Mr. Heymann, I want to commend you for your statements, and I believe that you have given us the kind of information which is going to be useful.

However, I do not believe that in this one hearing we are going to be able to dispose of some of the questions that at least I have, and I'm sure many other members have, which cause us the concerns that I think were very eloquently expressed by Mr. Seiberling.

I might start off by saying that all of us applaud your efforts in attempting to get at white-collar crime, which I think all too frequently has been ignored and has been, I think, one of the greater burdens we have had on society. I think it has gone undetected probably because it hasn't been addressed as it should have been. We applaud your efforts in that area and in the public corruption area particularly because of the indifference of the public to public officials, and the mistrust, and the climate after Watergate. All of us are aware and applaud your efforts in that direction.

Again, though, what does bother me is that there would be carefully crafted guidelines in these areas in order to prevent intrusions into civil liberties. Those of us may differ as to what those civil liberties are, and we may recite Supreme Court cases on how there is latitude, but I think we've got to be very careful here. I think that is fundamental to our democracy.

And, Director, in your statement, and again when you were being interviewed on television by Mr. Carl Rowan, in answer to his statement that he thought that what troubles people is they don't know whether you're going out luring people, you said:

> I don't believe we are luring people. We are creating a setting in which those who are predisposed to criminal activity find it convenient.

Now, you have set out, and Mr. Heymann has set out, some of the requirements in some of the undercover operations. But who decides this predisposition? Is this predisposition not a state of mind? Is this predisposition not something that someone is going to make a determination about? And based on what?

Now you have stated that there are certain requirements, but it still seems to me that we originally talked about criminal conduct and criminal activity, and all I have heard through the arguments has been that there is reasonable grounds to believe that there is this criminal activity. We know that in some of the Sting operations, the crimes are already committed.

Yet in some of the cases that were reported in the newspapers recently involving public officials, there hadn't been any criminal activity. It seems to me that the setting was such as though we were finding out whether some could be lured who might be predisposed.

Now it's pretty difficult for me to accept that, because somebody is making a determination as to what the attitude or what the willingness of a person might be who has never been involved in any corrupt activity. You are relying totally on purveyors or informers who themselves are subject to great question as to whether or not they are reliable.

Now who makes that determination about the predisposition? And can you tell me whether your guidelines are going to be able to deal with this with such care and specificity that you won't be involving innocent people. You are going to be responsible for the leaks, too, because you set the whole thing in motion, and unfortunately damaged reputations of the very people whom you do not want to damage.

In any event, I'd like to know, Mr. Webster, just how you answer that.

Mr. WEBSTER. Chairman Rodino, I have already in my statement expressed my disapproval and my dismay at the leaks. It has not yet been determined who is responsible for them, but certainly there is no institutional responsibility for those leaks in terms of purposeful leaking, and I hope very much that we arrive at an early date at a resolution of that question.

I think it is significant that with the number of long-term investigations that we have underway in our undercover capacity, this is the only instance of a wholesale leaking.

We will try to improve that. We will do the very best we can, but other investigations result in leaks. There isn't anything endemic about undercover operations being leak prone, except that they, like other investigations, frequently extend over a substantial period of time.

Chairman RODINO. But, Director, those leaks show, at least from what I have been able to read, that in some of the undercover operations, the so-called predisposition either did not exist, or what you based it on, I don't know.

Mr. WEBSTER. Well, you're asking me, and I know we all have agreed, and I have heard the public statements of Congressmen, and you have read mine, we should not be talking about the specifics of the Abscan investigation. That is going through the grand jury process at the present time.

What is in the papers may or may not be correct, or may or may not be complete. I can tell you that it is not complete.

To simply explore the fact situations of certain individuals who were not indicted, without an overall examination of the entire grand jury process and trial process, and the evidence that comes out in the trial, to me would be an abrogation of your oversight responsibilities, and I know you are not going to do that.

Chairman RODINO. Well, I'm not going to do that. I'm not referring to those cases. I'm referring to some cases that were leaked that you yourself, the Department, has stated that these people were not the target or subject of any investigation.

Mr. WEBSTER. In any type of investigation that involves leaks, whether it's undercover or overt, we are going to be interviewing, reviewing files of individuals, and many of those leads will prove to be of no value, or an absence of criminality. But all of them are based upon allegations, and we have historically had the province of assessing the reliability of those allegations.

Now, in terms of predisposition, predisposition is a term that is applicable to the defense of entrapment. That is offered by someone who admits his guilt, but says he wouldn't have done it except for being overreached and persuaded against his will to do something.

Predisposition is not the criteria for the instigation of a criminal investigation. I said in my statement that we try to create a setting in which those who are predisposed will come, because we are not interested in having a whole bunch of people come in and be screened out.

As a matter of fact, I think it will show when this one investigation comes through how few indeed met that criteria. And, as Mr. Heymann pointed out, not only do we try to go on the basis of the information that we have where criminality is indicated or alleged, but also in the setting itself, we take extra precautions to be sure that anyone who manages to come into that situation not predisposed, is quickly made aware of the situation, so that he is in no doubt as to what he is doing.

And, in fact, the reports that Congressman Seiberling and you made reference to about the Senator, I think, when the facts are known you will have an indication of the procedures that we put in place. Because the effort was to be certain that no one was being trapped. There would be no way in which the defense of entrapment could be successfully raised and, in fact, again, I point out to you we are putting ourselves on those tapes, as well as the individuals under investigation, and those tapes are going to be before the court, and we know that if we misbehave, the record will be there in technicolor or black and white, at least, for all the court and the jury to observe.

Mr. EDWARDS. Your time has expired.

Chairman RODINO. Thank you.

Mr. EDWARDS. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Mr. Heymann, on page 24 of your statement, you said:

> * * * if we are satisfied of the individual's criminal intent, then we cannot and will not shirk our responsibility to continue the investigation and to prosecute, if warranted, regardless of how prominent or powerful the official may be.

Now you told us about the investigation of electrical inspectors in Chicago. Tell me again why you didn't investigate and prosecute Dr. Peter Bourne in the White House.

Mr. HEYMANN. I'm wondering for a minute, Mr. Hyde, whether it's appropriate for me to say anything about that or not.

Mr. HYDE. Well, excuse me. Mr. Rodino is objecting to the question, and Mr. Edwards is agreeing to the objection, and I don't want to embarrass anybody, so I will withdraw the question.

Mr. HEYMANN. There is a simple answer, and the simple answer, to the best of my knowledge, is that no one is prosecuted for similar behavior, and that ought to apply to political figures, too.

Incidentally, it's a principle that isn't always easy for one in my position to maintain. It's easy, as you gentlemen, I think, sense nowadays for someone in my position to say let's go ahead and prosecute a political figure. Administrative, executive or legislative, State or Federal.

It's hard to say let's not prosecute a political figure who may or may not have technically violated the law in a situation where no one else would be prosecuted. That's the category that I believe the Bourne matter is in.

Mr. HYDE. Well, if that's so, that's fine. If that wasn't a violation——

Mr. HEYMANN. It's not a matter of saying it's not a violation. Whether it was or not, it's a matter of saying there are situations where no one else would be prosecuted, and I believe in those situations, even if a political figure has violated the law, he or she should not be prosecuted where no one else would be, simply because they are political figures.

Mr. HYDE. Well, you can understand the sensitivity a Republican could have to a situation like that, having endured the mudbath of Watergate.

Let me ask you another question: Now the media has reported that the Justice Department considers two of the Abscam cases weak. Are you checking to see who made that evaluation and how that leaked?

In other words, if two were weak, then six are strong; is that part of your investigation?

Mr. HEYMANN. The answer to that is no, Mr. Hyde. There are some leaks that seem to me to just simply belong to "silly season," and we have entered silly season. I only feel extremely badly about leaks when they bear on the reputation of particular individuals. When they are simply silly season leaks, I am not worried about them.

Mr. HYDE. I am a great believer in undercover operations, and I would respectfully suggest a sting operation to catch your leakage.

Mr. HEYMANN. It was indeed suggested to me seriously as part of the leak investigation.

Mr. HYDE. There was a fascinating letter in the Wall Street Journal of February 14 by a professor at a theological seminary. He quoted the

Old Testament. He quoted Leviticus, chapter 19, verse 14: "Do not put a stumblingblock before the blind."

And he said this means don't offer a Nazarite, who is prohibited from drinking wine, a glass of wine.

Now those in Congress and public officials have taken an oath freely to be the equivalent of teetotalers when it comes to corrupt money. You don't see anything unjust in tolerating circumstances where a public official is offered corrupt money, do you?

Mr. HEYMANN. I regard the situation, Mr. Hyde, of offering a public official corrupt money with no predicate out there at all, no reason for it, no operation suggesting it to us from the outside world, as right on the line. It is plainly legal, it seems to me.

It seems to me not unfair by the standards of things that we do daily in the criminal business to expect an electrical inspector, a city councilman, a major, a Governor, a Congressman, or an assistant attorney general, to turn down what is plainly a bribe. It is not something that we have to be terribly concerned that people should accept by mistake.

On the other hand, I believe that there should be either a reasonable system of self-selection or some basis for going forward. We are not in the business of testing morality.

Mr. HYDE. I understand that.

May I ask you this, without compromising the present investigation: Can you tell us how the particular Congressmen who were involved were selected? Or were they self-selected?

Mr. HEYMANN. Well, the only thing I can say is what I have said before, and I am sure the Director has said before, and that is to the best of our knowledge, no one in the Federal Government or working for the Federal Government picked any of the individuals.

Mr. HYDE. Is the proposed charter that we are dealing with broad enough to cover an Abscam operation such as we are dealing with?

Mr. HEYMANN. The proposed charter broadly authorizes undercover operations subject to guidelines promulgated by the Attorney General, and it is my view that there is no, and should be no, special category of undercover operations that go to public integrity questions.

Therefore, my answer would be yes.

Mr. HYDE. Thank you. My time is up.

Mr. EDWARDS. The gentleman from Wisconsin, Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I, too, would like to commend the Director of the FBI and Assistant Attorney General Heymann from the Criminal Division for many of the operations which have been successful in bringing people to justice.

That the Director of the FBI, Judge Webster, is being honored tonight by the recording industry probably is largely because of Modsoun, the operation which stopped record piracy.

I take it, however, that these are relatively new operations, that at least while there is a historical use of undercover agents, that one can point to, the amount of resources dedicated to the more recent operations are a new kind. What we know about in terms of experience is relatively little.

I take it by suggesting, Judge Webster, that you were forced to discontinue 15 operations because you didn't have the resources, it is not criticism of Congress, since I think you came and asked for $3

million, and were not in fact denied resources in order to pursue those operations; were you?

Mr. WEBSTER. No, that's absolutely correct. That was not intended as a complaint, but simply to indicate that the reason for the increased request for the 1981 budget——

Mr. KASTENMEIER. To gain some perspective, I think the year before, it was $1 million, and then $3 million in the present year, and $4.8 million.

Mr. WEBSTER. I think we've had $3 million for actually 3 years, 1978, 1979, 1980, $1 million first, and then three $3, and then $4.8 is requested this year.

Mr. KASTENMEIER. Which I believe suggests a linear upward curve regarding these operations and what is intended, and therefore I think it is important for us to look at them.

In terms of the notoriety and sensationalism that comes out of these operations, and the possible inability to prevent or manage the leaks, I think obviously you have a problem. Evidently the press in the country is going to look for these stories in the future with even greater intensity and interest. Therefore, I wonder whether you have the ability to maintain the secrecy required to protect your operations and to protect those innocently involved.

Mr. WEBSTER. I certainly hope that we do, because they are too important to give up for that reason alone. It is very important to us that the integrity of these investigations be maintained throughout, and including the period of grand jury investigations and trial.

Of course, once there is a grand jury investigation, it is very difficult for those matters to remain unobserved by an alert press and media.

Very often in today's investigative journalism, though, which has come to the fore in the post-Watergate era, we find that investigative journalists are working the same territory that we are working, so that it comes as no great surprise to us to find that they are there and aware of some of the things that we are doing.

We had early reports in the Abscam case in October of last year, or in the fall, from a newspaper who is not mentioned in the current list of those who had the stories at the time we were conducting our overt interviews.

It will be a problem for us, and we are addressing it seriously, but, again, I don't believe this is endemic to undercover operations other than a premature exposure of one can endanger some of our agents.

Mr. KASTENMEIER. Well, actually, while apparently the Attorney General was looking for the source of the leak, someone in a high place, either in the Bureau or in the Justice Department, had to also make a decision to manage that leak by further briefings and official leaking. If we are to look at the most recent operation, all the information could not have all come from the original leak. It had to have been that someone made a judgment at the top to make an arrangement with the press whereby they are briefed, in return for which they were to suppress, presumably, the breaking of a case. Isn't that it?

Mr. WEBSTER. I have no knowledge of that. It is my personal view that the one leak in the New York Times was so complete that there must have been access to Government documents which would not have necessitated any further briefing or clarification.

I might say that on January 30, which predated the weekend in which we brought this operation down, we advised our field offices

that there appeared to be some press awareness of what we were doing, and urged them to intensify their efforts to keep the thing under control. On Sunday, when the New York Times article came through, and the Washington Post article was available to me at my home, I contacted the Attorney General. We discussed the situation, and Monday morning, the Attorney General issued his statement ordering an investigation.

I sent that statement to the field. I also sent a personal statement on holding tight. The following week I sent still another communication to the field, and I have publicly stated my views of the impact of this type of leaking.

We don't know that it was us or some other group or agency or employees. It is a problem. It is a problem that involves questions of ethical restraints by the press, not legislation and not regulation, but decisions——

Mr. KASTENMEIER. Judge Webster, then you are saying that perhaps the Justice Department at a high level made a determination, surely somebody did, to fully inform the press, so that a premature leak wouldn't take place. Is that not the case?

Mr. WEBSTER. Are you talking about before the interviews took place on February 2?

Mr. KASTENMEIER. Yes.

Mr. WEBSTER. I am not aware of that. I have participated with the highest officials in the Department of Justice in the closing down of the operation, the covert phase of the operation, and I am not aware of that. It certainly did not take place within the Bureau.

Mr. HEYMANN. I agree with what Judge Webster said, Mr. Kastenmeier. It's worth pointing out that the Attorney General, Judge Webster, and I, plus a number of other people are by now under oath, having promised to take polygraph tests as to all we know about any of those leaks.

I was told that I was free to take the polygraph test or not, but I was to know that Judge Webster had already agreed to take one. I think it's called coercion.

Mr. EDWARDS. The gentleman from Ohio, Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. Heymann, you pointed out at some length the success of many undercover operations, including fencing and other operations of that sort. But I think if we're going to understand the issue that we are dealing with here, we've got to understand this difference between those types of operations and the one that we are talking about right now.

It seems to me the difference between undercover fencing operations, for example, where the individuals come in to fence the stolen goods, and this operation, or the operations that we are involved in, are considerable.

In the fencing operation, the person who brings in the goods has already been involved in a crime or crimes, that of receiving stolen goods. He is also self-selected by coming in on his own.

Now if you are going to analogize that to what has happened here, if the FBI or its middlemen went to an individual who had not stolen or received stolen goods, and attempted to put some stolen goods into his hand, and let him know that they were stolen, and then told him

where to go to fence them, directed him to the undercover fencing operation, that would not be self-selection in the same sense. That would be FBI-selection of that individual, and indeed it would be the FBI attempting to corrupt that individual by, first of all, getting him to knowingly accept stolen goods, and second, to come and fence them.

Now that's the analogy to this situation, and it's quite different, I think, from the ones that you describe. Am I correct in that?

Mr. HEYMANN. I don't think so, Mr. Seiberling.

Mr. SEIBERLING. Well, please explain in what way that isn't a good analogy.

Mr. HEYMANN. Let me take it in the steps that I think you take it in, Mr. Seiberling.

First of all, there are obviously many perfectly proper Sting undercover operations where we have no basis for believing the individual has already committed a crime like stealing property. When a policeman goes out in Central Park, dressed like a little old lady and gets mugged, he may get mugged by a new mugger or an experienced mugger. I hope the city of New York will arrest and prosecute in either event.

The same is true even when you think about it in a hijacking sting type operation. It would be nice to pretend that the hijacked goods have already been hijacked at the time that we set up our sting operation, but we run the sting operation—we ran the one in Boston for about 18 months. The fact of the matter is, people are going out and hijacking goods, and then bringing them to us, knowing all the while——

Mr. SEIBERLING. May I ask you, are there any such operations where the FBI first put the stolen goods in the hands of the individual who came in later?

Mr. HEYMANN. No. No operation that I know of, including this one.

Mr. SEIBERLING. Yet that's what the FBI did in this case, apparently, in trying to get individuals to accept bribes.

Mr. HEYMANN. There is a major difference, Mr. Seiberling, and that is we have no agent going out and making contact, and I am going to drift off in the general, because I don't want to talk about the Abscam investigation. I know of no case where an agent has gone out and tried to persuade a political figure to take a bribe, which would be the equivalent of trying to persuade him to take stolen goods.

Having said that, I am a little bit worried about it, because there is a reported case, affirmed without any difficulty by the courts, something called *United States* v. *Santoni*, where an agent did offer a State legislator money, having reason to believe that the State legislator had previously solicited money.

The situation that I think—the reason that I think you are picturing a situation, Mr. Seiberling, that doesn't correspond to what we have in mind is that we have Federal agents going out and contacting individuals and not connected in any way with the Federal Government, and with their friends and associates who deal for them, and who are themselves not connected in any way with the Federal Government, conduct these operations.

If we are talking about—if we have an organized crime operation, where a big organized crime figure is in the business of demanding

kickbacks, and if everybody knows that, and if he has friends and associates who go out, who radiate out from him and ask for kickbacks which eventually go to him, our contact with those friends and associates is not forcing kickbacks on the organized crime figure.

It is only if the agent goes there and does a lot of fancy talking, somebody will be responsible for it, if they go and do a lot of fancy talking and inducing. Then you've got a situation like the one you described where stolen goods are put into somebody's hands.

We don't have a situation where we have any agents doing a lot of fancy talking and convincing.

Mr. SEIBERLING. My time has expired.

Mr. EDWARDS. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

I'd like to explore the concept of middlemen. These are these very mysterious characters, and the head of the FBI himself says:

"The middlemen, of course, are not under our control." Yet he has total control of this total operation. Well, who are these middlemen? Are they informants? Are they paid?

The Director also says that the middlemen, of course, do not know that they are dealing with the FBI. Well, where do these middlemen come from, and how accurate is their information?

Mr. WEBSTER. Congressman Drinan, I may have slipped into using the word middleman just as——

Mr. DRINAN. It's crucial in your testimony.

Mr. WEBSTER. Yes. I've used it. I'll stand by it.

Mr. DRINAN. It's very vague, and it makes me alarmed about the whole program, when you shifted the focus from informants to middlemen. Who are these middlemen?

Mr. WEBSTER. I'll be glad to answer that. I'd say the use of the middlemen may create, as it has with you, a different perception than we have of what this person is.

Very simply, the middleman is a subject of investigation, a target of prosecution. In the Abscam case, we started in stolen artwork. That investigation has already yielded over $1 million in actual recoveries. It took us through a chain, the same people who were bringing us thieves became involved in bringing us influence, people who were willing to sell their office.

Now, whether it's a city or State—and we did, we followed it through. Corruption at the municipal level, and then at the State level, and then finally the same people who were the subject of our investigation.

Mr. DRINAN. These are the middlemen?

Mr. WEBSTER. The middlemen.

Mr. DRINAN. Why are they the middlemen? Between whom are they?

Mr. WEBSTER. They are the influence peddlers, those who make it their business to deal with Congressmen willing to sell their office.

Mr. DRINAN. These are the crooks that you are after originally, and now the whole thing has gotten away from art, and into politicians, so you have taken the middlemen, who are allegedly crooks, known crooks, and you accept their information about Congressmen. Is that what you are saying?

Mr. WEBSTER. I'm saying that in the criminal world many of our informants have been living criminal lives, but that does not take away the reliability of their information.

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It is only by getting close to these that we can reach beyond the streets and get out to the place where the influence and the other illegality is taking place.

Mr. DRINAN. Well, do the middlemen graduate into informers? I'm still confused about the middlemen.

Mr. WEBSTER. No, no. They do not graduate into informants. We occasionally have informants who lead us to middlemen, but the middleman—let's just call him the subject of investigation.

Mr. DRINAN. All right, he's the suspect, and all of a sudden now, he's the one that's leading you away from art theft into alleged political corruption, and you rely upon them, when you say they are not under your control at all?

Mr. WEBSTER. He doesn't know that he's dealing with the FBI or law enforcement agency. He believes he's dealing with somebody he either can ripoff or can take money from in a criminal sense.

Mr. DRINAN. And who decides now on the predisposition, the question earlier that Mr. Rodino asked, that really wasn't answered? The middleman comes to one of your informants or agent, and says, "I think this public official has a predisposition." Someone at the Department of Justice or the FBI has to sit in judgment and say, "Yeah, we believe this middleman and we're going to move on this."

Now by what norm is that made?

Mr. WEBSTER. He doesn't ordinarily say somebody has a predisposition. He's probably a little more candid about that. He's apt to represent to us that he is in his pocket or he is in his stable, or that he is known to have done this for some period of time, or he can be had.

There are a variety of ways that these things are expressed in criminal terminology by one criminal dealing with someone that he thinks is equally unsavory. So that we have the information. Then within the time constraints that we have, we can run our own check and see whether there is any reason to believe it's reliable or not reliable. And we do this.

We don't go out in the neighborhood and ask, "What's the general reputation of that person?" But we see whether there is any basis for it.

In the particular case, you in part demonstrate your reliability by producing, and these people produced, and they produced under circumstances that a court can adjudicate in the future, and I don't think we should talk about that.

We try within the guidelines that we have and in the point of time in which someone, some new person, is coming into the conspiracy or coming into the plan or the deal, to make sure before we cause him to commit an act which he would not otherwise commit, such as the acceptance of a bribe, to understand in the clearest of terms what is happening, and to make them elicit the promises in exchange for the office and the influence of the office, before any money passes.

Mr. DRINAN. Well, Mr. Webster, that's not a very satisfactory conclusion, but before my time is up, Prof. Gary Marx of MIT has written a very thoughtful article that the Members have here, where he gives evidence that undercover operations actually increase crime.

He has statistics here where there is a stimulant for theft from the sting operation, and where in one instance the DEA paid up to $400 over the ongoing price per ounce of cocaine, and that apparently increased the traffic in cocaine.

Would you like to make any observation on the evidence—and I think it's growing evidence—that actually the undercover operation stimulates crime in certain areas?

Mr. WEBSTER. I'm not privy to that article, or the facts that are set forth in it. Mr. Heymann earlier mentioned that we try not to create a setting which is unreal to the alleged criminal or person about to commit a criminal act.

Now, that's one benchmark of protection that we can take. As I look at the undercover operations conducted by the Bureau, I see no basis for saying that these operations contribute to crime.

In the Lobster case, for instance, Operation Lobster in Boston, where we had such enormous hijacking of trucks and operations up in your part of the world, Congressman Drinan, that when we brought the Operation Lobster down, there wasn't another hijacking for what was it, 6 months?

Mr. HEYMANN. It's been about 6 months.

Mr. WEBSTER. It had a very deterring effect on crime.

Mr. HEYMANN. Could I say a word in response to you, Congressman Drinan? On your last question, I would suppose that for a period of time, and we could actually check it; it's rare, but we could probably check this—I would suppose that for a period of time there were fractionally more hijackings in Boston because we were buying goods and they didn't have to take them to New York, and then a very substantial reduction to nothing thereafter.

The total effect would be a substantial reduction in hijacking.

On your question to Judge Webster on who finds predisposition, I think the answer is that though we will try to check before an offer is made to anyone, there is no requirement that we find predisposition in advance of making an offer in any undercover operation. Now we are not talking about political as opposed to something else, and the reason for that is because the only harm that the recipient of the offer is exposed to is the harm of being made an illicit offer.

Now I don't mean to say that's nothing, because it has serious consequences. You don't know how you would react, you don't know whether you would call the police or not. It is difficult, but the harm is not a harm like having your house searched or your phone listened to, or being called to give testimony.

The only harm is that someone makes you an illicit offer, and for that reason, the courts have never required us to find in advance predisposition. And although, as Judge Webster said, we ought to try and we will try, there are situations in which we can't—I think you people would agree we should not—if we are running an undercover liquor operation in Iowa and a crook of unknown reliability, of unreliability, comes up to us and says, "There is a police captain here who wants to sell you protection." I think that we ought to say, "Bring in the police captain."

Now, that doesn't mean to do anything except that if a crook says to us, a crook totally unreliable says, "A police captain wants to sell protection, he regularly sells protection to bars here," I think we ought to say, "Bring him in."

But we ought to make sure then that the transaction is unequivocally clear, and if he tries to sell protection, arrest him.

Mr. EDWARDS. Your time has expired.

The gentleman from Missouri, Mr. Volkmer?

Mr. VOLKMER. Thank you, Mr. Chairman. I'd like to get back to that subject that the gentleman from Wisconsin and I discussed, and I think it is very important to us to make a decision on it eventually, and I believe you mentioned, Director Webster, that without the $4.8 million for fiscal 1981, you would not be able to continue some of your operations, and they had to be prematurely terminated.

Now I am not going to ask you specifically as to any specific operations, but what I want to know is, is the increase meant to continue only on existing operations, or also to start up new operations as well?

Mr. WEBSTER. We have a number of proposals for new operations that have gone through or have been going through the Undercover Activity Review Committee process. The operations are not static, they do close down, and new ones are started as we go along.

The 15 I mentioned were those that we terminated in order to stay within, as best we could, our financial constraints, and we did exceed the $3 million by—I think it's $310,000.

Mr. VOLKMER. Well, this has been approved by the Budget Office; is that correct?

Mr. WEBSTER. By our Budget Office?

Mr. VOLKMER. They have approved this $4.8 million?

Mr. WEBSTER. $4.8 million?

Mr. VOLKMER. Yes.

Mr. WEBSTER. Yes; I understand it's approved, all the way up through OMB.

Mr. VOLKMER. So there are a lot of people who agree with us, as I do, that there is a positive use of these funds in combating crime in this country, and I just want to tell you right now that I am in support of the full amount.

The other thing I'd like to ask about is in the charter, you mentioned also that during the process of effecting the guidelines in this area, do you have a timeframe which you feel you will be able to have a final draft on those guidelines?

Mr. WEBSTER. We are coming right along. I would have been happy—I know Mr. Heymann would have been happy—if we could have said to you we already have them. We have been working on a document——

Mr. VOLKMER. Well, we're still working on the charter, so there is no big hurry to get the guidelines.

Mr. WEBSTER. Well, the reason we are in a hurry is because I have been trying to bring the Bureau within the charter in every respect, and when these guidelines are ready, the Attorney General is going to promulgate them, with or without a charter.

We are very pleased with them. We've got about four or five minor areas that didn't take something into account, or did take something into account the wrong way, and we are working it out.

I am very optimistic about it. I am very pleased with the progress.

Mr. VOLKMER. Will I be able to receive a copy of those guidelines?

Mr. WEBSTER. You are saying when we are finished?

Mr. VOLKMER. When you are completed.

Mr. WEBSTER. Yes. I don't think there is anything confidential in these guidelines, any techniques.

Mr. HEYMANN. I think there is no problem there, Mr. Volkmer.

Mr. VOLKMER. Thank you very much. I yield back the balance of my time.

Mr. WEBSTER. I think you are going to have a chance to look at these in your oversight responsibility.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. I thank the chairman for yielding. Very briefly, for a few seconds, I want to address a comment to Mr. Heymann. Despite my first question, I want the record crystal clear that I have total confidence in the competence and the willingness of the Justice Department to fully and fairly prosecute public corruption cases. Your actions in the *Diggs* case, in the *Eilberg* case, in the *Flood* case, indicate to me that you will prosecute all of these things without fear or favor.

I genuinely am curious about the one case I mentioned earlier, but I didn't want to leave the wrong implication. I have total confidence in the Justice Department.

Mr. HEYMANN. Thank you, Mr. Hyde.

Mr. EDWARDS. The testimony of both the witnesses was very positive.

From your testimony, Judge Webster and Mr. Heymann, one would think that all of these operations had worked out beautifully, and so why don't you tell us a little bit about an operation or two that has been a disaster?

For instance, Front Load in New York, how much is that going to cost the taxpayers?

Mr. WEBSTER. I think it's a little bit premature to make assessments about Front Load. That was an operation that predated the Undercover Activity Review Committee. There are circumstances about that case that lead me to feel that we don't have too much apologizing to do for it.

It was an insurance case undercover program designed to discover fraud in the insurance field. It has a legitimate objective. We encountered an errant informant, not an undercover agent, but an informant, who went off on his own under circumstances that will be reviewed in the course of litigation, I am sure. If we have not already briefed the committee, we can certainly do so.

I understand that the first phase of litigation resulted in favor to the Government. I am quite optimistic that there will not be a major expense to the Government.

It was unfortunate. It was a good program. It was flawed, and I believe that under our policy, one that I mentioned in my statement this morning, that what went wrong there would not have occurred.

Now, Mr. Chairman, I don't want to represent, and I said we don't have perfection in the investigation—I don't want to represent that we aren't going to make some mistakes. It's a little like the loan business; if we don't make some mistakes, we are really not in business. But the important thing is that we minimize those mistakes, that you be satisfied as our oversight committee with the procedures that we have in place, and that you be satisfied that when we do make mistakes, we do something to see that those mistakes don't recur.

Mr. EDWARDS. Well, I believe that the gentleman from Massachusetts put his finger on the problem I don't think we have resolved yet, and that is the problem of these free-floating purveyors, middlemen, or whatever they might be, often of dubious reputation, sometimes hoodlums who, while not working for the FBI, are certainly

working with the FBI, because they are the ones who bring out the leads. They are the ones who finger people. How do you control them? What devices do you have for auditing their activities? In our private conversations, we made it very clear, the chairman and I, that a number of innocent people have been damaged very severely by these operators, by these middlemen.

Tell us what you are going to do in the future about controlling their activities so that other Americans aren't severely damaged.

Mr. WEBSTER. I guess I would have to put aside the issue of the damage, because that assessment is not in, and I don't want to appear to be agreeing to it, but I do recognize that influence peddlers, those who sometimes really have the capability and sometimes were con men, do a great deal of damage.

They are already doing a great deal of damage, and they are the people who cause or induce public officials to sell their office and breach their public trust, and they are the principal menace in corroboration and collaboration with these who are willing to go along with their act.

We are interested in them as subjects of investigation, and we intend, when we investigate them, to develop evidence for their prosecution, and we do, and we will.

To the extent that they make representations, you might be interested to know that the executive branch is not immune from the same types of representations by middlemen as to the amount of influence they peddle, and we investigate the executive branch just as vigorously as we do legislators whom these people represent are in their stable.

I don't think it's incumbent on us in an undercover operation to demand some type of specific proof of prior illegal activity by those that these people say they have in their stable. I don't see that at all. That would be inconsistent with the scenario of undercover. They don't know that they are dealing with the FBI. They are not under our control, nor do they think they are under our control.

What we do try to do is identify the con men who are misleading us in the attempt to rip off whatever cover our undercover agent is functioning under, and to deal out those operatives, if they are not in fact engaging in illegal activity.

In the Abscam case, again without trying to get into facts, there were influence peddlers—and there was a chain of them, one led to another, there were others who introduced them. They were told consistently not to bring anyone to the undercover agent, unless that person was prepared up front to make promises which would in a legal sense violate their trust.

We don't express it, obviously, to the middlemen in that sense, but unless they were prepared to make these statements and assurances up front, and to take the money personally, so that there could be no opportunity for the middlemen, or at least minimized opportunity for the middlemen to mislead the public official as to the purpose of that visit.

Now, in at least one, and maybe two, cases, that's exactly what happened. But step two, which we instituted to control the operation, was that in our handling of the situation, it was made clear to the individuals that it was a criminal activity, or at least an activity which that person could not in good conscience participate in, and he walked out, and that's exactly what we intended.

So we had two things in place there:

One, don't bring us anybody who isn't prepared to be up front with us; and two, if he comes, then it was our purpose and plan to make sure before any money was passed to that person, that he understood the criminal nature of the situation and that whole process was monitored by U.S. attorneys watching the process and in a position to cut it off if at any time our agent exceeded the bounds we had set for them.

Mr. EDWARDS. Well, we will continue to have a dialogue on this subject of these middlemen. They are of great concern to the subcommittee.

Mr. WEBSTER. Of course, they are.

Mr. EDWARDS. And I am personally not satisfied that some of them at least are not out of control and have been triggered by the FBI to go on capers of their own, with the result that innocent people are injured.

My time is up, and I yield to the gentleman from New Jersey.

Chairman RODINO. Thank you very much for yielding.

Director, I am intrigued by the last satement you made concerning the so-called middlemen or purveyors. It seems to me that if you review the statement you made, and I seem to recall it very clearly, you talk about the middlemen bringing in someone who they say is prepared to engage in criminal conduct, to accept money.

Now I think you ought to reflect on the cases that you have had before you. If you place that kind of reliance on the statement of the middleman or the purveyor whose conduct in the past has been questioned, and whom you say is already under investigation himself, it seems to me that you are going to a great extent to continue this kind of an operation. You continue to wonder about whether or not there might be a leak and an innocent person has been implicated, when that person is not at all involved.

It seems to me that you have responsible people in the FBI, your agents, who I think are responsible enough and expert enough in undercover activities to be able to review what that informant has or has not said about such-and-such a person may be in his pocket, or words to that effect, as you have said. Do you engage in this kind of further review so that the informant who has made this kind of statement to you, so that what he has had to say is really carefully weighed? Can you recite that in the cases that you have conducted, this is what you have actually done?

Mr. WEBSTER. If I understand the chairman's question, I can certainly say yes, at various levels, the reliability in the sense of whether the statement made has a basis sufficient that we would have an obligation to investigate further is assessed.

Now we have for cross-checking available to us within certain time constraints—depending on how fast the situation is breaking—we do the best we can. We up the level of approval consistent with the individuals involved, and the sensitivities involved.

For example, in a number of these instances in Abscam, by both I and the Assistant Attorney General, we were aware of and approved the proposals based on the information furnished to us. Those of us who live in a world of decency, at least among our friends and associates, sometimes find it hard to assume that anyone who engages in crime can tell the truth. But when he is telling the information to someone who he thinks is in league with him, that is sometimes the way by

which we get our very best information consistently, in all types; not just public corruption cases.

But in other instances, we have some of the most important ones now that are going through the process, organized crime figures dealing with our undercover agents, and telling us things that are true and turn out to be true.

So there has to be some investigative judgment call. What Mr. Heymann pointed out, and what I pointed out, is the nature of the controls that we have on entrapping innocent people. I can't guarantee that in an Operation Lobster, or even a sting operation, some innocent person isn't going to walk in the door thinking that this is for him or have some misapprehension about it.

I gave you the ground rules that we apply to try to minimize that. We haven't the interest or the facilities to keep screening out people banging on the door, because we haven't taken the precaution to keep them away. We can't obviously inform the influence peddler that we are the FBI and we don't want him to bring any innocent people—I don't mean to be facetious about that, but we have to carry out the cover, and the two ground rules are don't bring us anybody that isn't going to be up front with us, and then we take the second ground rule, which is to be sure that that's the case.

Chairman RODINO. That's why I would like to be convinced that under your guidelines you are able to say that you now have reasonable grounds to believe, based on the fact that you have actually scrutinized data, not only what the purveyor has said, but what other information you may have—I would like to be convinced that it isn't just the purveyor and some rumors—that the FBI doesn't go forward and then engage in this kind of operation, which when ultimately disclosed and leaked, damages the reputation of innocent persons.

Mr. WEBSTER. No one would like to convince you more than I, Mr. Chairman. In the course of these proceedings, I do want to emphasize that in investigations particularly where we are trying to reach beyond the streets and go out and reach the areas that all of you have been telling us to go in, that we are not sitting as a grand jury. We don't have to have probable cause, but we do have to have a reasonable suspicion and move on it.

I know you don't ask for any more than that, but I hope we will be able convince you.

Chairman RODINO. That's all I'm asking for, and if you can convince me that that's the way you have been conducting these operations, I would like to applaud you.

But I would also like to state that if you have undertaken to go beyond that, that you have ackpowledged there is a mistake, because I think that's the only way we are going to be able to proceed, where mistakes are made and acknowledged, and that this thing can be a kind of mutual cooperation, where we understand that you are engaged in doing that which is done responsibly.

Mr. WEBSTER. I heartily concur, Mr. Chairman.

Chairman RODINO. Beyond that, I'd like to ask one further question, Director, regarding Operation Front Load. The chairman asked you about the amount of money that might be involved in the event of damage suits being successfully waged against you.

Was it not at some time stated by your department—and I can't say who by—that there was some thinking that it might cost the Government some $5 million?

Mr. WEBSTER. I'm unaware of any such statement. I am informed that one of the five suits have been dismissed. We are very confident about those lawsuits. There are a lot of numbers, you know. It only costs $25 to file a lawsuit, and you can allege as many million dollars as you want, but we have thus far in our assessment of the damages been accurate to date.

I will be glad to brief the chairman on that.

Chairman RODINO. Well, thank you very much.

Mr. EDWARDS. Because of the shortage of the time, we are going to operate under a brand new rule, a 2-minute rule.

Mr. Hyde.

Mr. HYDE. Well, that brings up an analogy. Judge Webster, I think we have all seen football games on television, and wished that the field judge or the referee could have the benefit of the television replay, which we the spectators do, so he could see exactly what happened, not what he thought happened on the field, under the emotional stress of the game.

Isn't it true that in criminal cases, many times you have to rely on informants of dubious reputation, criminals, coconspirators, whose credibility is easily attacked by defense counsel? Oftentimes you have to grant immunity to someone who is involved in the very crime in order to get evidence sufficient to prosecute.

This gives the defense attorney the opportunity to wax poetical about the purchased testimony. All of these obstacles are obviated, are they not, by having the videotape of the transactions, so questions of identity, of what exactly was said in the surrounding circumstances are there for the judge and for the jury? Isn't that true?

Mr. WEBSTER. I believe that's correct, yes.

Mr. HYDE. Many times in political corruption cases, where the crime is consensual and the activity is consensual, undercover techniques are about the only method available to you, are they not?

Mr. WEBSTER. Well, bribery, gambling, prostitution, and other consensual crimes are very much like adultery, rarely performed in the public streets, and we have to take an undercover approach.

Mr. HYDE. I'm told that Secretary Stimson some years ago said, "Gentlemen don't read other gentlemen's mail." Do you think that if that were mandated in the FBI Charter that we could cope with public or official corruption today?

Mr. WEBSTER. That was in a different time. We now carefully prescribe the circumstances, which are rare indeed, in which mail can be opened. In the foreign counterintelligence field, those Marquis of Queensbury rules really will not permit the type of success that we have.

What I would rather focus on are the due process issues, to be sure that the rule of law does apply, and if the law permits us to use deception as a means to get at someone so buffered and so insulated that he would not otherwise be found out, that we should be allowed to do so, subject to oversight, subject to guidelines, and subject to our internal procedures.

Mr. HYDE. I yield.

Mr. EDWARDS. Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

The reason I think these hearings are so important is because these techniques for which an increased amount of money is sought, is relatively recent, and it seems by embarking upon them, we need to know in terms of public policy what we are upon.

Mr. WEBSTER. Absolutely.

Mr. KASTENMEIER. As far as Congress being subject to this, there is a difference, of course. Partly that suggested by the gentleman from Ohio. Also the fact that while a number of Members in the last 20 years or so in the House and Senate have been prosecuted for crimes effectively, this is the first time that a Federal investigation has proceeded through the back door involving a large number of Members of Congress. Not even in conspiracy, that is not in relation one to the other, and while, as Mr. Heymann says, he asked rhetorically, is there anything special about public officials, the answer being no, except we really do have to treat them differently, he says. I think correctly, because we have the problem of not necessarily whether this is or is not an abuse in the Abscam case, but in the future might this be an abuse in the hands of another Justice Department, where these decisions have to be made.

I, for example, Mr. Heymann, know that you do have a procedure which I wonder whether is actually followed in each case here. That is to say the U.S. attorney's manual mandates in every sensitive case, a sensitive case involving a public figure, cleared at the top level, the information to be sent to the Attorney General, to your office, and to the deputy, and presumably there is a program for clearance in each case.

Was it actually followed, however, in the Abscam case?

Mr. HEYMANN. I think the answer, Mr. Kastenmeier, is that is was not formally followed, and the reason for that is that although the sensitive case reports, which is what we call those, only are made in five or six or seven copies, I don't think that we would send around in the Department five, six, or seven copies of any undercover investigation.

The Attorney General was aware of the Abscam investigation, but plainly the center of responsibility on the lawyers' side of the Department of Justice was at my level. He was certainly aware of it.

The other people who receive these sensitive case reports are the Associate Attorney General, who handles the civil side. I assume he was not aware of it. The Deputy Attorney General, my immediate boss, he was aware of it.

Mr. KASTENMEIER. Well, I asked that question because it was my information that it was assiduously followed in this case.

Mr. HEYMANN. It is not intended to be a protection in the handling of sensitive cases, Mr. Kastenmeier. If it were, it would raise all the questions that Mr. Hyde commended us earlier for avoiding. Then you would way whenever you ahve a political case, it goes shooting right up to the political levels of the Department to be analyzed and passed on there. The function of the sensitive case report is to make sure that the people who are doing appointments, for example—and, this has come up in one of these cases, not Abscam, but in Brilab, according to the newspapers—that the people who are doing appointments of judges and U.S. attorneys know if there is an ongoing investigation in the FBI and the Criminal Division. It is not to be a review for the propriety of the investigative steps or anything like. that.

Mr. EDWARDS. Mr. Seiberling?

Mr. SEIBERLING. Thank you.

I hope that we will have a subsequent hearing, and perhaps several sessions, so that we could really explore in depth the nature of the guidelines the FBI has followed or has not followed, in view of the fact that this subcommittee has before it the proposed FBI Charter and must come to some kind of conclusion. I think perhaps it is fortunate that these questions have arisen before we have approved a particular legislative recommendation.

I note that in your interview with Mr. Rowan, Judge Webster, you said this, and this is one of the questions I think we are going to have to get into much more when we have further hearings. Leaving out the parenthetical parts, you said:

> When we have information from a corrupt intermediary who is under investigation, that he has Mr. So-and-So who will help in the illegal project, we have an obligation to follow through that lead, and in the Abscam investigation I can tell you that we followed every lead when we closed it down. There was nothing left in the barrel except what we call scam representations by intermediaries.

I guess the word who has to be in there—

> Who want to produce people whose names were being bandied around, but who had absolutely nothing to do with it, and could not be produced by the intermediaries.

Now, in fact, about half, just taking the Congressmen and basing it on what we have read in the newspaper, about half of the Congressmen and Senators who were contacted by intermediaries turned out not to be leads. They were false leads, they were not correct. They turned down any improper blandishment.

But I think we are going to have to know in very much more detail to what extent this statement of a corrupt intermediary, which is your phrase, is deemed a sufficient basis for an attempt to entice a particular person into committing a corrupt act, and we are going to have to know to what extent you require corroboration and so forth.

I think this applies whether the person is a public official or not. The only difference is that a public official is constantly being approached by people who want help from him, and legitimately so. And what's more, he has his reputation, which is everything. If his reputation is beclouded, he is dead politically, and that's, of course, true of a lot of people who are not public officials. Their reputation is allimportant. So I do think that we have got to know what checks there are on the use of corrupt intermediaries, which is your phrase, to make sure that they do not put a cloud over the reputation of a person who is not in fact going to be predisposed, as you have said.

I have used up my time, I see, but perhaps the chairman will let you respond.

Mr. WEBSTER. We'll be happy to explore that, and Mr. Heymann wants to add a postscript to what I say, but I, too, believe, and I believe that most Members of Congress and most public officials believe with me, that those people are out there, they are hovering around the offices of public trust, and that we do a service when our leads from other sources take us in this direction and we follow it.

I want you to be satisfied with the guidelines that are in place, but I think we both have a common interest in seeing what we can do to get those people away from our institutions.

Mr. SEIBERLING. Well, as we have seen, honest officials do have sensitivity, and when they smell a rat, they are inclined to say, "This is the end, I won't have anything more to do with it." It does bother me, and I think it bothers all of us, that the Government itself would be putting public officials in a position where they have to demonstrate under circumstances where they are not even aware that they are being tricked, they are not even aware that there is some kind of investigation going on, they have to affirmatively demonstrate their bonafides, and I think that raises some questions about the ability of our system to function that are very, very profound, and need to be carefully handled.

This isn't a simple thing. I sympathize with your problem, and I want to see every corrupt instance brought to light and squelched, but at the same time the mass of people and the mass of politicians, I think are honest, and the problem of finding how to find out the crooks and still not prejudice the honest ones is a very difficult one, and we need to pursue it more.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

There has emerged from this conference the shadowy world of middlemen. They are the new characters in Abscam now, and they are corrupt intermediaries, and I have a lot of trouble with their motivation. We learned the ground rule. You say to the middleman, "Don't bring in anybody unless he is prepared to take money," and in 50 percent of the cases, the middlemen are wrong.

Were the middlemen told that they were going to appear on television, that they are going to be a feature in the trials that are forthcoming? It seems to me that you owe a lot to these middlemen.

Furthermore, did they get compensation? Did they get promises of immunity for prosecution? What is their motivation, when you say, "Go out there and get somebody who will come in and commit a crime on television"? Who are these middlemen?

Mr. WEBSTER. I have to take issue with just about everything you said. [Laughter.]

They are subjects of investigation. We did not ask them to go out and bring us in people. We set a situation in which the undercover agent represented that he was interested in buying favors. As far as knowing that they are going to be on television, of course, they don't know they are on television. That is the part of the investigative technique that we are using to build a case against them, and anyone who conspires with them to violate the law.

Mr. DRINAN. Well, sir, will they be immune from prosecution? Suppose now that the name of this corrupt intermediary comes out in the instance of a Congressman who is vindicated, and his reputation has been damaged. Does he have a right to find out who this character was, the influence peddler, this faceless accuser, this corrupt intermediary? Does he have the right to find out who he is and why he brought him into the situation on W Street?

Mr. WEBSTER. That's a prosecutive discretion matter. I am looking for no immunity, but I will turn it over to Mr. Heymann.

Mr. HEYMANN. I think certainly anyone who fits all those adjectives ought to be prosecuted. [Laughter.]

Mr. DRINAN. Then how many are you going to prosecute?

Mr. HEYMANN. The answer, of course, Congressman Drinan, is these people are, as Judge Webster said, just as much subjects of investigation and likely targets of investigation as anyone else.

The fact of the matter is in any investigation, we make deals or arrangements among the possible defendants in order to strengthen our case with witnesses. We are likely in any investigation, political, nonpolitical, anything that involves a number of people, to prosecute some and not prosecute others.

Some of the people you are describing as middlemen—that was originally my term—will undoubtedly be prosecuted. Others will not. It's a standard arrangement.

I would like to take the opportunity to say one thing that goes to, in a very narrow and careful way, the question Chairman Rodino and Mr. Seiberling and maybe you, Father Drinan, have raised.

If we are running Operation Lobster and somebody comes to us and says that somebody is a hijacker and a crook and no good, unreliable in 1 million ways, and he says, believing that we are crooks and fences, says, "Should I tell John Jones about this? I think he is in the hijacking business."

Our answer, Mr. Seiberling, in particular, is that we ought to say yes, even though the person who said to us, "I think John Jones is in the hijacking business," wasn't certain, and is generally unreliable, but we ought to say to him, "Yeah, tell John Jones about this."

Sure, there is some risk that John Jones will go out and hijack a truck just because he knows about our fencing operation, but that is a very small risk, and that leads me to the following very narrow, but perhaps very important, point:

At the moment we say, "Yes, go out and tell John Jones about it," we don't have much basis for believing that John Jones is indeed a hijacker of trucks. At the moment—and this difference in time is very important—at the moment that John Jones arrives with a truck at the warehouse, we have a very good reason to believe he is a hijacker, and let me explain very precisely why. We have been put onto John Jones by somebody who wants to keep doing business with us, and who obviously has a relationship that he wants to maintain with John Jones.

If we are simply careful enough to say the transaction here is going to be absolutely plain, clear, and incontrovertible, we are going to pay money for a hijacked load of goods, this con man, this nameless informer, this man who has no basis for credibility otherwise,, suddenly has high stakes in not bringing in John Jones unless John Jones really is prepared to sell a truckload of goods for cash. He doesn't want to disrupt his relationship with us by bringing in somebody who isn't a hijacker or isn't selling the goods. He doesn't want to embarrass John Jones and disrupt his relationship with John Jones by bringing him into a place where we are going to say, "OK, now, we are going to take the goods, you get the cash." These are stolen goods.

By the time that man pushes the bell on our warehouse door, there is every reason to believe that John Jones is indeed a hijacker. At the time we said, "Sure, go ahead and make the offer to John Jones," the evidence may have been very thin.

Thank you.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Volkmer?

Mr. VOLKMER. Thank you, Mr. Chairman.

I'd like to continue a little bit and then go to something else I was going to start with, because this is one of the things I wanted to bring up.

I think there is a major misunderstanding by some members of the committee as to how the middleman, as he is called here, actually operates, and that misunderstanding seems to be that they view the middleman as an operative of the FBI which he definitely is not. If we look at it, let's say—correct me if I am wrong—as I understand it, a procedure, take the Lobster case or Abscam or anything else. What we have is a knowledge there is crime—criminal influence peddling or something going on, and then we can know people who are in the business. The FBI then sets up an operation, unknown to those people who are the middlemen as being FBI agents. Is that correct?

Mr. WEBSTER. That's correct.

Mr. VOLKMER. If they ever became known as FBI men, that blows the whole thing, of course.

Mr. WEBSTER. That's correct.

Mr. VOLKMER. It is necessary, then, in the operation, to keep them from becoming suspicious; right?

Mr. WEBSTER. That's correct.

Mr. VOLKMER. So if you started saying to them, "No, don't go see him, we don't want you to see him, because he might be all right," immediately the middleman is going to say, "What's going on here?" Is that correct?

Mr. WEBSTER. That's correct.

Mr. VOLKMER. So, you of necessity, have to tell him, "Well, that's a pretty good idea. Why don't you go ahead?" Because especially if he's already brought in others; correct?

Mr. WEBSTER. That's right.

Mr. VOLKMER. I think we have to understand that. That's a basic imperfection in the system, that's a necessary part of the system. Is that not correct?

Mr. WEBSTER. That's correct.

Mr. VOLKMER. Father Drinan of Massachusetts previously alluded to an article by Gary Marx of MIT. I have taken the time also to read it, and it does point out some imperfections in the system of using undercover, but also I think we must understand—it's interesting reading, by the way—and I don't think it's a profound case against undercover. That's my own viewpoint. It may be the opposite of the gentleman from Massachusetts.

I view the question using undercover or not using undercover on the basis that if we don't use it, there is going to be many, many major criminals, crimes, going undetected and unprosecuted; is that not correct?

Mr. WEBSTER. That's correct.

Mr. VOLKMER. So if we would shut it down, all these things that have been done in the past against crime would no longer be done?

Mr. WEBSTER. That's correct.

Mr. VOLKMER. Let me ask you this. Do you envision actually how you would be able to catch some thieves? Take the Lobster operation.

Do you think the FBI operators could walk into an existing fencing operation and be able to gather evidence against those who are selling to the fence?

Mr. WEBSTER. It would be most improbable.

Mr. VOLKMER. Walk in cold, you've got a suspicion, somebody has told you about it, you've got a reasonable ground to believe it.

I've just been handed a note that my time is up. The gentleman from Massachusetts, I timed him at 6 minutes and 15 seconds, I just concluded 2 minutes.

Thank you, Mr. Director. My time is up.

Mr. WEBSTER. I hope we won't go back to the days, Mr. Chairman, when our agents walked into bars and ordered glasses of milk. [Laughter.]

Mr. EDWARDS. Mr. Director, when I was an agent, that's all we ever drank. [Laughter.]

Mr. Rodino?

Chairman RODINO. I just want to say thank you, but I will be looking forward to scrutinizing those guidelines, your work rules, and I'd like to leave this statement with you in parting.

Mr. Heymann, I think you ought to consider this, because you have been referring all along to Operation Lobster, and some other sting operations. I can't, for the life of me, reconcile the kind of operation where crime already has been committed as against these other operations which were conducted where public officials were involved, where representations were made by middlemen or purveyors, with the kinds of inducements that we have read about, which would suggest that possibly a Member of Congress could be of help to the district because of what someone might be able to invest in that particular district.

I don't understand how you could analogize one with the other, because in one case, crimes have been committed or a crime has been committed, or an overt act has been done, where the person who is then prepared to commit the crime would have to say that he was accepting stolen goods or hijacking.

That, to me, is a lot different, and that seems to really be the crux of what bothers me of how you proceed with one and proceed with the other which should have, I think, even at the beginning, given you lots of pause as to the consequences. It's entirely a different kind of case. It's entirely a different kind of setting, and one that is fraught with so much peril, that I am wondering whether or not it is being given that careful scrutiny, and that's what I am hoping that we are going to be able to resolve as we go on. As I suggested to the chairman—I think it was well stated by the gentleman from Ohio, Mr. Seiberling—at some time in the future, some of these things may have to be aired in executive session.

Mr. EDWARDS. This will conclude today's hearing. As the chairman of the full Judiciary Committee suggests, we will continue the subject at a future date. We still have a number of questions to ask about undercover operations, and as we pointed out earlier, undercover operations are included in the charter that the subcommittee presently has under consideration.

We thank both Judge Webster and Mr. Heymann for their appearance here today.

Mr. WEBSTER. Thank you, Mr. Chairman.

[Whereupon, at 12:30 p.m., the hearing was adjourned.]

APPENDIX 3

The changing FBI — The road to Abscam

JAMES Q. WILSON

It is inconceivable that J. Edgar Hoover would ever have investigated members of Congress to gather evidence for possible prosecution. Hoover's FBI learned a great deal about congressmen, and may have gone out of its way to collect more information than it needed, but all this would have been locked discreetly away, or possibly leaked, most privately, to a President or attorney general whose taste for gossip Hoover wished to gratify or whose personal loyalty he wished to assure. The Bureau's shrewd cultivation of congressional and White House opinion, effective for decades, was in time denounced as evidence that the FBI was "out of control," immune from effective oversight.

Today, of course, the Bureau is again being criticized, albeit circumspectly, by various congressmen who complain of the manner (and possibly also the fact) of its investigation of possible legislative bribery. Congressmen wonder whether the FBI is launched on a "vendetta" against its erstwhile allies turned critics. Once again there are angry mutterings that the Bureau is "out of control," this time because it is using its most powerful technique—undercover operations—to discover whether congressmen are corrupt.

It would be tempting to ascribe the changes in the Bureau's relations with Congress to nothing more than personal pique amplified

into organizational vengeance. After years of congressional adulation of Hoover and the FBI, the mood suddenly turned nasty with revelations of how far the Bureau was prepared to go in using its investigative powers to maintain political support. The list of Bureau excesses is long, familiar, and dismaying; the wrath visited upon it by several congressional committees combined a proper outrage at abuse of power with a hint of romance gone sour. For the FBI now to turn on those who had turned on it would be precisely the sort of thing one might suppose a Hoover-style agency might relish.

This is not what has happened. No doubt there are some FBI agents who are enjoying the sight of congressmen scurrying for cover, but that was not the motive for "Operation Abscam." The Bureau has in fact changed, and changed precisely in accordance with the oft-expressed preferences of Congress itself. Congressional and other critics complained that the Bureau in the 1960's was not only violating the rights of citizens, it was wasting its resources and energies on trivial cases and meaningless statistical accomplishments. Beginning with Director Clarence Kelley, the Bureau pledged that it would end the abuses and redirect its energies to more important matters. This is exactly what has happened.

This rather straightforward explanation is hard for official Washington to accept, and understandably so. Bureaucracies are not supposed to change, they are only supposed to claim to have changed. It tests the credulity of a trained congressional cynic to be told that a large, complex, rule-bound organization such as the FBI would or could execute an about-face.

But the FBI is not just any bureaucracy, and never has been. Next to the Marine Corps, it is probably the most centrally controlled organization in the federal government. Its agents do not have civil service or union protection, its disciplinary procedures can be swift and draconian, and despite recent efforts to decentralize some decision making, the director himself, or one of his immediate subordinates, personally approves an astonishingly large proportion of all the administrative decisions made in the Bureau. Not long ago, a decision to install sanitary-napkin dispensers in women's lavoratories in Bureau headquarters could not be made until Director William Webster endorsed the recommendation. FBI agents have complained for decades about the heavy-handed supervision they received from headquarters; though that has begun to change, the visit of an inspection team to an FBI field office continues to instill apprehension bordering on terror in the hearts of

the local staff. The inspectors sometimes concentrate on the minutiae at the expense of the important, but whatever its defects, nit-picking insures that field offices will conform to explicit headquarters directives pertaining to observable behavior.

But even for the Bureau, the change in investigative strategy that culminated in Operation Abscam was no easy matter. For one thing, much of what the Bureau does is not easily observable and thus not easily controlled by inspection teams and headquarters directives. Law enforcement occurs on the street in low-visibility situations that test the judgment and skill of agents but do not lend themselves to formal review. Many laws the FBI enforces—particularly those pertaining to consensual crimes such as bribery—place heavy reliance on the skill and energy of agents and field supervisers who must find ways of discovering that a crime may have been committed before they can even begin the process of gathering evidence that might lead to a prosecution. Relations between an agent and an informant often lie at the heart of the investigative effort, but these are subtle, complex, and largely unobservable. Finally, what the Bureau chooses to emphasize is not for it alone to decide. The policies of the local United States Attorney, who though nominally an employee of the Justice Department is in reality often quite autonomous, determine what federal cases will be accepted for prosecution and thus what kinds of offenses the local FBI office will emphasize.

Changing the Bureau

Given these difficulties, the effort to change the investigative priorities of the Bureau was a protracted, controversial, and difficult struggle. Several things had to happen: New policies had to be stated, unconventional investigative techniques had to be authorized, organizational changes had to be made, and new incentives had to be found.

As is always the case, stating the new policies was the easiest thing to do. Attorney General Edward Levi and Director Kelley pledged that the Bureau would reduce its interest in domestic security cases, especially of the sort that led to such abuses as COINTELPRO, and in the investigation of certain routine crimes (such as auto theft or small thefts from interstate shipments) that had for years generated the impressive statistics that Hoover was fond of reciting. The domestic security cases were constitutionally and politically vulnerable; the criminal cases that produced evi-

dence of big workloads but few significant convictions were unpopular among the street agents. The man Kelley brought in to close down virtually all the domestic security investigations was, ironically, Neil Welch, then in charge of the Bureau's Philadelphia office and later to be in charge of the New York office and of Operation Abscam. In a matter of months, thousands of security cases were simply terminated; hundreds of security informants were let go; domestic security squads in various field offices were disbanded and their agents assigned to other tasks. New attorney-general guidelines clarified and narrowed the circumstances under which such cases could be opened in the future. The number of FBI informants in organizations thought to constitute a security risk became so small that it was kept secret in order, presumably, to avoid encouraging potential subversives with the knowledge that they were, in effect, free to organize without fear of Bureau surveillance.

Kelley also announced a "quality case program" authorizing each office to close out pending investigative matters that had little prosecutive potential and to develop priorities that would direct its resources toward important cases. Almost overnight, official Bureau caseloads dropped precipitously, as field offices stopped pretending that they were investigating (and in some cases, actually stopped investigating) hundreds of cases—of auto thefts, bank robberies, and thefts from interstate commerce and from government buildings—where the office had no leads, the amounts stolen were small, or it was believed (rightly or wrongly) that local police departments could handle the matter.*

Headquarters made clear what it regarded as the "priority" cases that the field should emphasize: white-collar crime, organized crime, and foreign counterintelligence. But saying that these were the priorities, and getting them to *be* the priorities, were two different things. Permitting field offices to stop reporting on high-volume, low-value cases did not automatically insure that the resources thereby saved would be devoted to, say, white-collar crime. For that to occur, some important organizational changes had to be made.

The most important of these was to reorganize the field-office squads. Traditionally, a field office grouped its agent personnel into squads based on the volume of reported criminal offenses—there would be a bank robbery squad, an interstate theft squad,

* A fuller account of these changes can be found in James Q. Wilson, *The Investigators*, [illegible] Basic Books, 1978).

an auto theft squad, and so on. These squads reacted to the incoming flow of reported crimes by assigning an agent to each case. What we now call white-collar crime was typically the province of a single unit—the "accounting squad"—composed, often, of agents with training as accountants, who would handle bank complaints of fraud and embezzlement. Occasionally, more complex cases involving fraud would be developed; many offices had individual agents skilled at detecting and investigating elaborate political, labor, or business conspiracies. But attention to such matters was not routinized because the internal structure of a typical field office was organized around the need to respond to the reports of crimes submitted by victims. Elaborate conspiracies often produced no victims aware of their victimization or enriched the participants in ways that gave no one an incentive to call the FBI. Taxpayers generally suffer when bribes are offered and taken, and innocent investors may be victimized by land frauds, but either the citizen is unaware he is a victim or the "victim" was in fact part of the conspiracy, drawn in by greed and larcenous intent.

Again Neil Welch enters the scene. The Philadelphia office was one of the first to redesign its structure so that most of its squads had the task, not of responding to victim complaints, but of identifying ("targeting") individuals, groups, and organizations for intensive scrutiny on the grounds that they were suspected of being involved in organized crime, major conspiracies, labor racketeering, or political corruption. Though almost every FBI field office would from time to time make cases against corrupt politicians or businessmen, the cases made in Philadelphia were spectacular for their number and scope. Judges, state legislators, labor leaders, businessmen, police officers, and government officials were indicted and convicted. The more indictments that were handed down, the more nervous accomplices, frightened associates, or knowledgeable reporters would come forward to volunteer more information that spurred further investigations.

During the period when Welch and the Philadelphia office were making headlines (roughly, 1975 to 1977), the rest of the Bureau was watching and waiting. Experienced FBI officials knew that under the Hoover regime, the only safe rule was "never do anything for the first time." Taking the initiative could result in rapid promotions but it could also lead to immediate disgrace; innovation was risky. What if the allies of the powerful people being indicted (one was Speaker of the Pennsylvania House of Representatives) complained? Hoover had usually rebuffed such com-

plaints, but you could never be certain. More important, how would Bureau headquarters react to the fact that the *number* of cases being handled in Philadelphia had dropped owing to the reassignment of agents from the regular high-volume squads to the new "target" squads? In the past, resources—money, manpower—were given to field offices that had high and rising caseloads, not to ones with declining statistics.

Kelley's response was clear—he increased the number of agents assigned to Philadelphia and gave Welch even more important responsibilities (it was at this time that Welch was brought to headquarters to oversee the winding down of the domestic security program). There were still many issues to resolve and many apprehensive supervisors to reassure, but the momentum was growing: More and more field offices began to reorganize to give structural effect to the priority-case program, and thus to an aggressive stance regarding white-collar crime.

Emphasizing priority offenses

The incentives to comply with the emphasis on priority offenses came from within and without the Bureau. Inside, the management information system was revised so that investigations and convictions were now classified by quality as well as number. The criminal offenses for which the FBI had investigative responsibility were grouped into high- and low-priority categories, and individual offenses within these categories were further classified by the degree of seriousness of the behavior under investigation (for example, thefts were classified by the amount stolen). It is far from clear that the statistics generated were used in any systematic way by Bureau headquarters—in the FBI as in many government agencies, such data are often perceived as a "numbers game" to be played and then forgotten—but at the very least these statistics reinforced the message repeated over and over again in the statements of the director, first Kelley and then William H. Webster: Go after white-collar and organized crime.

Outside the Bureau, key congressmen were pressing hard in the same direction. Nowhere was this pressure greater than in the chambers of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, chaired by Congressman Don Edwards of California—who had once been, briefly, a member of the FBI. This Subcommittee had become one of the centers of congressional attacks on the Bureau. Kelley and Webster spent

hours answering questions put by its members, who included in addition to Chairman Edwards, Elizabeth Holtzman of New York and Robert Drinan of Massachusetts. The attack on the FBI's performance began with criticism of the domestic security programs, but came to include criticisms of the Bureau's weaknesses in the area of white-collar crime. This latter concern reflected, in part, the Subcommittee members' genuine conviction that white-collar offenses were serious matters. But it also reflected the Subcommittee members' suspicion that the FBI was "soft" on "establishment" crimes while being excessively preoccupied with subversion, and thus inclined merely to go through the motions when investigating the former and to put its heart and resources into inquiries regarding the latter. Thus, getting the Bureau to emphasize white-collar crimes was not only good in itself, it was a way, the Subcommittee seemed to think, of keeping it out of domestic security work.

In 1977, staff members of the Subcommittee toured various FBI field offices and spoke as well to several U.S. Attorneys. Their report sharply criticized the FBI for continuing to devote manpower to street crimes such as bank robberies and hijacking—all of which, in the opinion of the staff, could better be handled by the local police. In some cases, the staff claimed, the FBI's idea of white-collar crime was welfare cheating and other examples of individual, and presumably small-scale, frauds against the government. The staff lamented the "reluctance on the part of FBI personnel, particularly at the supervisory level, to get involved in more complex investigations that may require significant allocation of manpower for long periods of time." And the report criticized the field offices for not mounting more undercover operations.

Whatever shortcomings the FBI may have, indifference to congressional opinion has never been one of them. The pressure inside the Bureau to develop major white-collar-crime cases mounted. The Bureau had always thoroughly investigated reported violations of federal law whatever the color of the collar worn by the suspects. Businessmen, politicians, and labor leaders had been sent to prison as a result of FBI inquiries. But most of these cases arose out of a complaint to the Bureau by a victim, followed by FBI interviews of suspects and an analysis of documents. Sometimes wiretaps were employed. The number, scope, and success of such investigations depended crucially on the skill and patience of the agents working a case. One legendary FBI agent in Boston was personally responsible for making several major corruption cases as a result of

his tenacity, his ability to win the confidence of reluctant witnesses and accomplices, and his knowledge of complex financial transactions. But finding or producing large numbers of such agents is difficult at best. Far easier would be the development of investigative techniques that could generate reliable evidence in large amounts without having to depend solely on an agent's ability to "flip" a suspect, who then would have to testify in court against his former collaborators.

Undercover operations

One such method was the undercover operation. Narcotics agents in the Drug Enforcement Administration and in local police departments had always relied extensively on undercover agents buying illegal drugs in order to produce evidence. Traditionally, however, the FBI had shied away from these methods. Hoover had resisted any techniques that risked compromising an agent by placing him in situations where he could be exposed to adverse publicity or tempted to accept bribes. Hoover knew that public confidence in FBI agents was the Bureau's principal investigative resource and that confidence should not be jeopardized by having agents appear as anything other than well-groomed, "young executive" individuals with an impeccable reputation for integrity. From time to time, an agent would pose as a purchaser of stolen goods, but these were usually short-lived operations with limited objectives. For most purposes, the FBI relied on informants—persons with knowledge of or connections in the underworld—to provide leads that could then, by conventional investigative techniques, be converted into evidence admissible in court in ways that did not compromise the informant.

The FBI's reliance on informants rather than undercover agents had, of course, its own costs. An informant was not easily controlled, his motives often made him want to use the FBI for personal gain or revenge against rivals, and either he would not testify in court at all or his testimony would be vulnerable to attacks from defense attorneys. Moreover, it is one thing to find informants among bank robbers, jewel thieves, and gamblers with organized crime connections; it is something else again to find informants among high-level politicians, business executives, and labor leaders. An undercover operation came to be seen as a valuable supplement to the informant system: Though created with the aid of an informant, it could be staffed by FBI agents posing as thieves, fences, or businessmen,

carefully monitored by recording equipment, used to develop hard physical evidence (such as photographs of cash payoffs), and operated so as to draw in high-level suspects whose world was not easily penetrated by conventional informants.

In 1974 the Law Enforcement Assistance Administration (LEAA) began supplying money to make possible the now-famous "Sting" operations in which stolen property would be purchased from thieves who thought they were selling to criminal fences. LEAA insisted initially that a Sting be a joint federal-local operation, and so the FBI became partners in these early ventures, thereby acquiring substantial experience in how to mount and execute an undercover effort in ways that avoided claims of entrapment. In 1977, the FBI participated in 34 Sting operations. Soon, however, the requirement of federal participation was relaxed and the Sting became almost entirely a state and local venture (albeit often with LEAA money). After all, most of the persons caught in a Sting were thieves who had violated state, but not federal, law.

The experience gained and the success enjoyed by the FBI in the Stings were now put in service of undercover operations directed at the priority crimes—especially white-collar crimes and racketeering. During fiscal year 1978, the Bureau conducted 132 undercover operations, 36 of which were aimed at white-collar crime. They produced impressive (and noncontroversial) results, and led to the indictment of persons operating illegal financial schemes, trying to defraud the government, engaging in union extortion, and participating in political corruption.

Each of these operations was authorized and supervised by FBI headquarters and by the local United States Attorney or by Justice Department attorneys (or both). Among the issues that were reviewed was the need to avoid entrapment. In general, the courts have allowed undercover operations—such as an agent offering to buy illegal narcotics—as a permissible investigative technique. In *Hampton v. United States*, the Supreme Court held in 1976 that the sale to government agents of heroin supplied to the defendant by a government informant did not constitute entrapment. In an earlier case, Justice Potter Stewart tried to formulate a general rule distinguishing a proper from an improper undercover operation: "Government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so." It is noteworthy that this formulation appeared in a dissenting opinion in which Stewart involved entra ment· thus it

probably represents the opinion of many justices who take a reasonably strict view of what constitutes entrapment. As such, it affords ample opportunity for undercover operations, especially those, such as Abscam, in which lawyers can monitor agent activity on almost a continuous basis.

Congress was fully aware that the FBI was expanding its use of undercover operations. The House Appropriations Committee, as well as others, were told about these developments—without, of course, particular cases then in progress being identified. Moreover, Congress by law had to give permission for the Bureau to do certain things necessary for an undercover operation. These prerequisites to FBI undercover operations involve the right to lease buildings or to enter into contracts in ways that do not divulge the fact that the contracting party or the lessee are government agents, and that permit advance payment of funds. Indeed, one statute prohibits a government agency from leasing a building in Washington, D.C., without a specific appropriation for that purpose having first been made by Congress. If that law had been in force, the FBI would not have been able to lease the Washington house in which Operation Abscam was conducted. At the request of the FBI, however, Congress exempted the Bureau from compliance with statutes that might have impeded such operations. The proposed FBI Charter, now before Congress, would specifically authorize undercover operations and would grant a continuing exemption, whenever necessary, from the statutes governing contracts and leases.

Though the FBI learned a great deal about undercover operations by its early participation in Stings, Operation Abscam is not, strictly speaking, a Sting at all. In a Sting, a store is opened and the agents declare their willingness to buy merchandise from one and all. Much of what they buy involves perfectly legitimate sales; some of what they buy is stolen, and when that is established, the ground is laid for an arrest. Operation Abscam followed a quite different route. It resulted from the normal exploitation of an informant who had been useful in locating stolen art works. The informant apparently indicated that he could put agents in touch with politicians who were for sale; the agents accepted, and set up Abscam by having an agent pose as a wealthy Arab interested in buying political favors to assist his (mythical) business enterprises. Several important congressmen, or their representatives, were brought to the house used for Abscam and their negotiations with the agents recorded. The operation is no different in design from those used in many other cases that earned praise for the Bureau.

What is different is that in this case congressmen were apparently involved and the operation was leaked to the press before indictments were issued.

Congress, law enforcement, and the Constitution

For congressmen to be in trouble with the law is nothing new. During the 95th Congress alone, 13 members or former members of the House of Representatives were indicted or convicted on criminal charges. Most if not all of these cases resulted from the use of conventional investigative methods—typically, a tip to a law enforcement officer or reporter by a person involved in the offense (bribery, payroll padding, taking kickbacks) who then testified against the official. Law enforcement in such cases is ordinarily reactive and thus crucially dependent on the existence and volubility of a disaffected employee, businessman, or accomplice. Operation Abscam was "proactive"—it created an opportunity for persons to commit a crime who were (presumably) ready and willing to do so.

Congress has never complained when such methods were used against others; quite the contrary, it has explicitly or implicitly urged—and authorized—their use against others. There is no small element of hypocrisy in the complaints of some congressmen that they did not mean a vigorous investigation of white-collar crime to include *them*.

But it is not all hypocrisy. It is worth discussing how such investigations should be conducted and under what pattern of accountability. An unscrupulous President with a complaisant FBI director could use undercover operations to discredit political enemies, including congressmen from a rival party. Hoover was a highly political FBI director, but he saw, rightly, that his power would be greater if he avoided investigations of Congress than if he undertook them. Clarence Kelley and William H. Webster have been sternly nonpartisan directors who would never consider allowing the Bureau's powers to be put in service of some rancid political purpose. But new times bring new men, and in the future we may again see partisan efforts to use the Bureau. What safeguards can be installed to prevent schemes to embarrass political enemies by leaked stories is worth some discussion.

But there is a dilemma here: the more extensive the pattern of accountability and control, the greater the probability of a leak. The only sure way to minimize leaks is to minimize the number of

persons who know something worth leaking. In the case of Operation Abscam, scores of persons knew what was going on—in part because such extensive efforts were made to insure that it was a lawful and effective investigation. In addition to the dozens of FBI agents and their supervisors, there were lawyers in the Justice Department and U.S. Attorneys in New York, Newark, Philadelphia, and Washington, D.C., together with their staffs, all of whom were well informed. Any one of them could have leaked. Indeed, given their partisan sponsorship and what is often their background in political activism, U.S. Attorneys are especially likely to be sources of leaks—more so, I should surmise, than FBI agents. If, in order to prevent abuses of the Bureau's investigative powers, we increase the number of supervisors—to include, for example, members of the House or Senate ethics committees—we also increase the chances of leaks (to say nothing of other ways by which such investigations could be compromised).

In the meantime, the debate will not be helped by complaints that the Bureau has launched a "vendetta" against Congress or that it is "out of control." It is nothing of the kind. It is an organization that is following out the logic of changes and procedures adopted to meet the explicit demands of Congress.

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