THE WHITE HOUSE

WASHINGTON

October 10, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Request for Executive Review of All Evidence in the Case of Senator Harrison Williams

Jeanette Williams, wife of convicted Abscam figure Senator Williams, has written the President requesting an "executive review" of all the evidence in her husband's case and an investigation of all who took part in the prosecution, including former President Carter and Abscam trial judge George Pratt (who, Mrs. Williams notes, was elevated to the Court of Appeals after her husband's conviction). She specifically does not request a pardon, since she maintains her husband was guilty of no crime.

We also have outstanding an earlier letter from Mrs. Williams to Mr. Baker, demanding that a Justice Department Office of Professional Responsibility report on Abscam be made public. You will recall that I submitted a draft reply for your signature, advising Mrs. Williams that such reports are internal Justice Department documents and are not available for public dissemination, but that the report in question contained nothing exculpatory. You sent the package back, noting that you could not make such a statement without reviewing the report. I sent back a revised reply, advising Mrs. Williams that according to the Justice Department the report contained nothing exculpatory. This too failed to fly; you sent it back with the suggestion that Justice reply to the letter.

At this point we should probably send both the letter to Baker and the letter to the President to Justice for reply. A memorandum to Dinkins accomplishing this is attached for your review and signature.

Attachment

THE WHITE HOUSE

WASHINGTON

October 10, 1984

MEMORANDUM FOR CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Request for Executive Review of All Evidence in the Case of Senator Harrison Williams

The attached letters from Jeanette Williams, wife of convicted Abscam defendant Harrison Williams, are referred to the Department of Justice for direct reply and whatever other action you consider appropriate. The White House has not responded to Mrs. Williams in any manner.

Many thanks.

FFF:JGR:aea 10/10/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

October 10, 1984

MEMORANDUM FOR CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Request for Executive Review of All Evidence in the Case of Senator Harrison Williams

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Many thanks.

FFF:JGR:aea 10/10/84
cc: FFFielding/JGRoberts/Subj/Chron

July 14, 1984

243314

Mr. James A. Baker III
2415 Foxhall Drive
Washington, D. C. 20007

Dear Mr. Baker,

I had the pleasure again of sitting next to Susan at the White House luncheon. I asked her if I could communicate with you in this manner and she kindly gave me your home address. I also respect your position and the President of the United States, which is why I am motivated to bring my personal matter to your attention. It is a grave and serious situation and has been for several years.

I also recognize that the buzz word "Abscam" might have affected your thoughts of it. Abscam was created, manufactured and choreographed by the Carter Administration. Having created it, there was a concerted effort to protect it at all costs, at all levels by blocking any of the evidence that would disclose it's illegal and immoral unconstitutional methods. There are scores of ways this could be illustrated. There is one aspect of abscam that most clearly illustrates the wrongful actions of governmental agents and that has been absolutely blocked from being publicaly disclosed. The prosecutorial force operating out of Newark, New Jersey; observing the actions, techniques and methods of the Brooklyn prosecutorial force, after trying to correct abuses unsuccessfully reported the abuses--illegal actions of the Brooklyn agents to superiors in Washington. The Brooklyn - Washington response to this was the filing of charges against the Newark prosecutors for attempting to obstruct the abscam operations.

One of the most highly placed Washington individuals, former Judge Renfrew directed the Office of Professional Responsibility to review and fix the penalty to be imposed on the Newark prosecutors. The Office of Professional Responsibility investigated all of this and from a Congressional statement included in the July 13th, 1983 Congressional Record by Congressman Lujan -- we learned that Newark was not only cleared, but applauded and Washington and Brooklyn agents and officials were chastised. The critical missing link is that report.

All efforts by Congress, by defendants and by the press to obtain this report have been to no avail. This missing vital report is still buried in the Attorney General's locked file.

I feel a grave disservice has been done personally to my husband, who is wrongfully imprisoned. It is a tragedy for our country that all of our first principles have been demolished by some evil operators operating from positions of awesome power. Bit by bit, for instance, two and a half years after my husband's trial, he has received pertinent documents and affidavits which reveal his innocence and governmental agents illegality.

The failure to disclose the findings of the Office of Professional Responsibility report has come to symbolize the total denial of the revelations of truth. The Carter Administration carries the burdens of this cover up. This Administration would serve the highest principles of your nation by permitting it be known to the public.

I hope it will be possible for you, Mr. Baker, to honor my heartfelt plea. With respect and best wishes for a good year to you and Susan.

Respectfully Yours,

Jeanette Williams

Jeanette Williams

Box 2
Bedminster, N.J.
07921

Jeanette S. Williams
Bedminster, N.J. 07921

September 10, 1984

President Ronald Reagan
The White House
Washington, D.C. 20500

Dear Mr. President:

As Chief Executive sworn to uphold the set of principles according to which our country is organized; our Constitution, I call your attention to a most serious offense - a violation of the Separation of Powers.

Your predecessor, in addition to other members of the executive branch of government, namely the Attorney General and the Director of the F.B.I. attacked the legislative branch of government, an act that imprisoned my beloved husband, a United States Senator, who never committed a crime, but was convicted by an "illusion" of criminal activity created by government agents.

As in all wrongs that go uncorrected, the consequences are menacing. The contagious effect of "ABSCAM" as its adopted by every law enforcement agency in the country in their quest to incriminate elected officials leaves a very serious question in its wake. Are we now creating an institution for defamation and slander that is producing perpetrators, whose egomania could destroy public confidence in our ability to maintain a government of the people and for the people?

I cannot think of a more effective way of destroying a nation, than by removing it's most respected leaders in a disgraceful manner, and consequently undermining the confidence of it's people in the elective process. Do we now have an enemy within?

The methods used by government operatives and the criminals employed in operation ABSCAM and in similar Sting operations around the country, not only put decent men in peril, but may be, in fact, as much an enemy of the American people as any - ever confronted.

A fear now exists among many elected officials that prevents them from crying out against some of the visible wrongs of the bureaucracy. A fear that is well founded because my husband stands today, in Allenwood, as the most conspicuous example to all who doubt the awesome power of unscrupulous agents - innocence offers no protection to the elected target sighted for political destruction.

What prompted this letter, Mr. President is the outrage that you have shown recently, and rightly so, of the dilemma that surrounds Soviet prisoner Andre Sakarov is in that we in the United States are more aware of Mr.Sakharov's persecution than the Premier of the Soviet Union? Wasn't Sakharov prosecuted during Brezhnev's tenure as Premier? What do you know about my husband's involvement with ABSCAM? Aside from rumors and speculation. Do you think it would be right for Chernenko to re-open the Sakarov matter and to conduct a complete and through investigation to prove to the world once and for all either the guilt or innocence of Sakarov?

Would it now also be fair to grant a former United States Senator who served his country honestly and diligently for more than a score, and who also vigorously maintains his innocence from his jail cell the same treatment.

No one knows any better the true character and integrity of a man than the woman who shares his life. My husband is incapable of criminal activity. He is a gentleman who posesses a deep love and concern for his fellow man. The people of the United States have been deprived of an extremely sensitive representative, whose acts as a legislator made their lives a little richer.

Finally, Mr. President, it is not a pardon that I ask for my imprisoned husband, for a pardon is a forgiveness; a cancellation of a punishment incurred as a result of criminal activity; a kind of indulgence. My husband is not guilty of any crime, therefore he needs no forgiveness.

I seek an executive review of all evidence in my husband's case, including evidence that has been recently made available through the Freedom of Information Act. Secondly, an investigation of all who took part in my husband's persecution, not excluding former President Jimmy Carter and the trial Judge George C. Pratt who received an immediate promotion to the Circuit Court of Appeals following my husband's conviction.

Mr. President, you are a fair and decent man. On behalf of liberty and justice for all, I pray you will be the first to throw light upon the dark cloud of ABSCAM that will set my husband free, just as Sakharov demands the truth to be told, so does my husband.

Respectfully,

Jeanette S. Williams

Jeanette S. Williams

/bs

ID# 248193

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: SEPTEMBER 24, 1984

NAME OF CORRESPONDENT: MRS. JEANETTE S. WILLIAMS

SUBJECT: REQUESTS AN EXECUTIVE REVIEW OF ALL EVIDENCE IN THE CASE OF SENATOR HARRISON WILLIAMS

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FRED FIELDING	ORG	84/09/24			
REFERRAL NOTE: WAT 18		84/09/26		S	84/10/06
REFERRAL NOTE:					
REFERRAL NOTE:					
REFERRAL NOTE:					
REFERRAL NOTE:					

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: ____ ____ ____

MI MAIL USER CODES: (A)_____ (B)_____ (C)_____

*ACTION CODES:	*DISPOSITION CODES:	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF OUTGOING
*F-FURNISH FACT SHEET	*S-SUSPENDED	
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT. 2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

THE WHITE HOUSE

WASHINGTON

September 11, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Missing Report With Regard to ABSCAM

You will recall that Mrs. Harrison Williams wrote Mr. Baker, urging that a Department of Justice Office of Professional Responsibility (OPR) report related to the Abscam investigation be released to the public. I prepared a draft response for your signature, advising Mrs. Williams that OPR reports are not available for public dissemination. The letter did, however, go on to note that you were authorized to inform her that the report contained nothing exculpatory about any Abscam defendant. You objected to such phrasing in light of the fact that you have not reviewed the report. The attached redraft notes that, according to the Justice Department, the report contains nothing exculpatory.

Attachment

THE WHITE HOUSE

WASHINGTON

July 27, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Missing Report With Regard to ABSCAM

Mrs. Harrison Williams has written Mr. Baker, to urge that a report of the Justice Department Office of Professional Responsibility (OPR) arising out of the Abscam investigations be made public. In the early stages of the Abscam investigation, two Federal prosecutors operating out of the Newark Strike Force wrote a memorandum to Justice Department headquarters, pointing out the problems involved in relying on Mel Weinberg as a leading character in the "sting" operation. The Criminal Division overreacted with an unjustified personal attack on the two prosecutors, suggesting that they be fired. This precipitated a bitter internal dispute that was referred to OPR. OPR issued a one and one-half page report concluding that the two prosecutors were totally blameless and had acted properly in raising sincere concerns, while the Criminal Division had acted improperly in personally attacking the two. All of this took place during the Carter Administration; Associate Attorney General Rudy Giuliani later apologized to the two prosecutors.

The OPR report has never been released; as a rule such reports are considered internal Justice documents not subject to disclosure. Senator Hatch asked for a copy of this report and was turned down; we obviously cannot provide Mrs. Williams what we have denied to Senator Hatch. According to Roger Clegg, however, OPR has no objection to stating publicly that there is nothing whatsoever in the report that is exculpatory with respect to any Abscam defendant.

? I can't say, this is a review the report — why not have DOJ make statement?

A draft reply to Mrs. Williams is attached, for your signature. I think the reply should come from you rather than Mr. Baker, since it concerns Justice Department matters properly coordinated by our office. A reply from you might also ease any personal discomfort Mr. Baker may have in dealing with someone with whom his wife appears to have some sort of personal acquaintance.

7/30

Attachment

THE WHITE HOUSE

WASHINGTON

September 11, 1984

Dear Mrs. Williams:

Mr. Baker has asked me to respond to your letter of July 14, 1984. In that letter you requested that a report of the Department of Justice Office of Professional Responsibility be made public. The report in question concerned certain Federal prosecutors and the response of units within the Department of Justice to particular actions taken by those prosecutors.

I must advise you that such Office of Professional Responsibility reports are internal Department of Justice documents and are not available for public dissemination. According to the Department of Justice, however, the report in question contains nothing whatsoever that could be considered exculpatory with respect to any of the Abscam defendants. I am sorry that we cannot be more responsive to your request.

Sincerely,

Fred F. Fielding
Counsel to the President

Mrs. Jeannette Williams
Box 2
Bedminster, NJ 07921

FFF:JGR:aea 9/11/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

September 11, 1984

MEMORANDUM FOR JAMES A. BAKER, III
ASSISTANT TO THE PRESIDENT
CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Missing Report With Regard to ABSCAM

Attached for your information is a copy of my reply on your behalf to Mrs. Harrison Williams, who wrote requesting that an internal Department of Justice document be made public.

Attachment

FFF:JGR:aea 9/11/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

July 27, 1984

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FFF:JGR:aea 7/27/84
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WASHINGTON

July 27, 1984

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Sincerely,

Fred F. Fielding
Counsel to the President

Mrs. Jeannette Williams
Box 2
Bedminster, NJ 07921

FFF:JGR:aea 7/27/84
bcc: FFFielding/JGRoberts/Subj/Chron

ID # 243344 CU

JL003

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

FR — let's review & then decide who should respond — Three senators 7/24

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) ___/___/___

Name of Correspondent: Jeanette Williams

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: [illegible] report with regard to ABSCAM

____

____

____

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHolland		ORIGINATOR	84/07/24			/ /
Referral Note:						
CUAT18		A	84/07/25			/ /
Referral Note:						
			/ /			/ /
Referral Note:						
			/ /			/ /
Referral Note:						
			/ /			/ /
Referral Note:						

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: Harrison Williams
Jul 23 84 Kathy Camalier memo to FFF

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

THE WHITE HOUSE
WASHINGTON

7/23/84

Fred:

Jim Baker asked that your office prepare a response to the attached correspondence from Senator Harrison Williams' wife, Jeanette. Would it be more appropriate if your office responded or could you prepare a draft for JAB's signature?

Please advise. Thanks.

Kathy Camalier
x6797

Department of Justice

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

TO

A PUBLIC FORUM

SPONSORED BY

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

7:00 P.M.
WEDNESDAY, JUNE 23, 1982
NEW YORK CITY

This evening I would like to outline my views on a law enforcement issue of substantial importance and current interest -- the use of undercover operations to investigate especially secretive crimes, including public corruption. Although undercover operations have evoked greater public attention recently, they have for years been a staple of law enforcement efforts against the most pernicious of crimes. The judicious use of undercover techniques has often been the only way to detect and deter the secretive activity that characterizes certain kinds of very serious crime, like public corruption. In fact, the federal effort against public corruption is older even than the FBI.

Seventy-three years ago, there was no Federal Bureau of Investigation. Although some investigations of federal crimes were undertaken by the Secret Service, they were few in number, lacked coordination, and were restricted in scope. In 1909 President Teddy Roosevelt -- and his Attorney General Charles Bonaparte -- determined that something had to be done to make federal law enforcement more effective. Congress, however, expressed reservations about expanding the use of the Secret Service or other federal agents -- especially if that could result in investigations of members of Congress. In typical fashion, Teddy Roosevelt -- who had previously served as the President of this city's Board of Police Commissioners -- responded directly to that concern, in words that bear a full repeating today:

> "It is not too much to say that [the restriction on the use of Secret Service agents] has been of benefit only to the criminal classes... The chief argument

> ... was that the Congressmen did not themselves wish to be investigated by Secret Service men. Very little of such investigation has been done in the past; but it is true that the work of the Secret Service agents was partly responsible for the indictment and conviction of a Senator and a Congressman for land frauds in Oregon. I do not believe that it is in the public interest to protect criminals in any branch of the public service, and exactly as we have again and again ... prosecuted and convicted such criminals who were in the executive branch ..., so ... we should give ample means to prosecute them if found in the legislative branch. But if this is not considered desirable a special exception could be made in the law prohibiting the use of the Secret Service force in investigating members of Congress...."

Congress subsequently did approve a heightened federal effort that in 1910 was designated the Bureau of Investigation -- and in 1935, the FBI. It is worthy of note that Congress chose not to exempt itself from the scrutiny of federal law enforcement.

In the nearly three quarters of a century since the creation of the Bureau of Investigation, federal law enforcement has compiled an impressive record of effective investigations and enforcement. It is only during the last decade -- and especially

the last six years -- however, that federal resources have been concertedly and effectively employed to fight the most secretive of crimes like public corruption. The key to that effort has largely been the refinement of undercover techniques.

To assess the need for undercover techniques, we must first gauge the magnitude of the evil we seek to combat. Drug-trafficking, organized crime, white-collar crime, and public corruption are all serious threats to our society. They occur beneath the surface of society and employ every imaginable device to remain hidden from public view. There usually is little incentive for the victims of these crimes to report their occurrence. Only active, undercover law enforcement can penetrate that veil of secrecy.

In recent years, the Department of Justice has dramatically altered its enforcement program and its priorities to seek out this type of crime. Late in 1975, the Attorney General's Committee on White Collar Crime was established. The Committee recommended an increased and improved effort -- including a less reactive approach to ferret out violations. In January 1976, the Department organized a new Public Integrity Section in its Criminal Division. In early 1977, many of the recommendations of the White Collar Crime Committee were implemented. In 1978 the FBI set up its Criminal Undercover Operations Review Committee, and specific written Guidelines on Undercover Operations were issued by the Justice Department just eighteen months ago.

Much of this process was a response to growing public concern -- and the public concern was fully expressed in the United States Congress. In the mid-1970s the Subcommittee on

Civil and Constitutional Rights of the House Judiciary Committee itself began to urge an enhanced effort against more sophisticated kinds of crime. Harvard's James Q. Wilson -- in an article reprinted in 1981 as part of that Subcommittee's record -- makes the following observations about a 1977 staff report of the House Subcommittee:

> "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."

The Federal Bureau of Investigation bore the brunt of such criticism over the last five or ten years. Some said that the largest and most sophisticated law enforcement agency in the world was unable or perhaps unwilling to conduct the kind of sensitive undercover investigations necessary to root out drug-trafficking, organized crime, white-collar crime, and public corruption. Moreover, cynics noted that such investigations were unappealing to the Bureau because they did not produce striking increases in the numbers of crimes "solved." It was a dirty, lengthy, and risky business they said, not the stuff for which higher appropriations are voted.

Through a bipartisan effort over the past three Administrations, however, any inability or unwillingness to conduct undercover investigations has been steadily and decidedly

eliminated. Under Attorney General Edward Levi and Deputy Attorney General Harold Tyler, and later under Attorneys General Griffin Bell and Benjamin Civiletti -- and under FBI Directors Clarence Kelly and William Webster -- the FBI has demonstrated its willingness and its ability to conduct the necessary kinds of undercover investigations. The strides have been monumental. For example, following a lengthy undercover investigation, the FBI just yesterday apprehended the leaders of what appears to be a large and sophisticated Japanese commercial espionage ring attempting to pirate American computer technology. In the last two fiscal years, using less than one percent of its total budget, the FBI's undercover operations have netted illicit funds and property of over $109 million. In just those two recent years, arrests arising from FBI undercover operations alone have totaled more than 2700 -- and resulted in nearly 1100 convictions.

The message is clear. Every corrupt public official, drug-trafficker, or organized crime figure should recognize that he is not beyond the reach of law.

In the course of our increased efforts against these kinds of carefully concealed crime and corruption, the Department of Justice quickly learned what must now be regarded as a fundamental tenet. An enforcement program can never succeed without the effective use of undercover investigations.

By their very nature, these are clandestine crimes. Payment of a bribe is not a public event. Neither the person who pays nor the person who takes a bribe heralds that fact from the roof tops. The person who pays, even if regarded as a victim, typically makes no report to the authorities.

In most cases, there is only one way for law enforcement to apprehend such criminals and to deter such crimes. It must interject its agents into the midst of corrupt transactions. It must feign the role of corrupt participant. In short, it must go undercover. If it does not, we as a society, as taxpayers, as persons with respect for law, can do nothing but tolerate this particularly pernicious and costly form of crime. And, to go further, our undercover techniques -- although they must be judicious and they must be controlled -- must also be innovative. Otherwise, we must settle for apprehending only those at the lower levels of corruption. Our techniques must be as sophisticated as those we want to catch.

Of course, undercover operations present certain dangers. The techniques are sensitive and by definition involve subterfuge. There is a potential for mischief, for undue invasion of privacy, for illegal activity committed by law enforcement agents themselves. Although exceedingly unlikely, every potential injustice must be considered and minimized. For that reason, the Department of Justice and the FBI have built controls into the system.

Undercover operations must be approved by a separate Review Committee made up of FBI specialists, members of the FBI's Division of Legal Counsel, and Department of Justice officials. The Committee reviews the propriety and legality of every operation involving any "sensitive issue" before it is begun. It reviews the continuation of every operation beyond six months -- and monitors most investigations with even greater frequency.

All undercover operations are now conducted under written guidelines that reflect the experience and insights gained

by the FBI and Department of Justice. These guidelines incorporate numerous safeguards beyond those necessary to comply with the law. No invitation to engage in an illegal activity may be offered unless:

-- the corrupt nature of the activity is reasonably clear to the target;
-- there are reasonable indications the operation will reveal illegal activity; and
-- the character of the illegal transaction justifies the inducements offered.

In addition, the authorization of the FBI Director is necessary before any inducement may be offered to someone absent a reasonable indication that the person already has engaged or is engaging in the illegal activity being investigated. The Guidelines, which also cover the other kinds of activities necessary in undercover operations, are themselves reviewed against those lessons learned from on-going investigations.

Although these Guidelines had not formally been issued when the Abscam investigations were begun, the legality of the practices employed have been substantially demonstrated in the courts. It is most worthwhile to reflect upon the results of those investigations -- and of the videotape record they presented in court. Twenty-two individuals were indicted -- including six members of Congress, one U.S. Senator, one state senator, three city councilmen, one state official, and one federal employee. In eight separate cases, jury verdicts resulted in the conviction of eighteen persons -- while one defendant pleaded guilty. One person is still awaiting trial -- and two defendants died before

being tried. Out of twenty-two persons indicted, no individual was acquitted. To date, 96 jurors have found for the government, and no juror has exonerated any of the defendants. Although several cases are now on appeal, none of the eight defendants that raised the issue of entrapment has been successful on appeal. Only three of the eighteen defendants that raised due process questions have had any success on that issue even at the district court level. And the only two appellate courts that have thus far ruled on these verdicts have ruled in the government's behalf.

When it comes to undercover investigations, no one would claim that there could not be any mistakes. The subjects of such investigations -- and the corrupt influence peddlers with whom our agents must credibly deal -- are neither Boy Scouts nor regular attendees in Sunday School. The work is difficult, and the risks to federal agents are outweighed only by the seriousness of the crimes being investigated. Human frailties inevitably affect any government agency, and the pressures of undercover work multiply the stress. We have, however, learned from our experience. And we can learn further and improve upon practices and policies.

Before concluding, however, I want to emphasize one further point. Our investigations of public corruption have increased dramatically over the years in response to public and congressional desires. During 1981, as the result of federal prosecutions, over seven hundred public officials were convicted of corrupt activities -- only a few of whom were involved in Abscam. Since 1970 federal indictments have been returned against over 5000 federal, state, and local officials -- plus other individuals involved with them in corrupt activities. Nearly 80

percent of those indictments were returned in just the last six years. All of those figures indicate the seriousness with which the Department of Justice attacks public corruption.

In a democracy, it is essential for the public to have confidence in the integrity of influential and powerful institutions -- especially governmental institutions. And it is the effectiveness of federal law enforcement in uncovering public corruption that reassures the public in their belief in the high integrity of the overwhelming majority of their government officials. Nothing would do more to undermine public confidence than for federal law enforcement to be denied the means necessary to detect, prosecute, and deter crimes committed by the powerful.

In the case of the Abscam investigations -- and all federal undercover operations -- there is much that should be studied and improvements certainly can be made. Already, the Undercover Review Committee has been improved and Undercover Guidelines have been formally issued.

Clearly, Congress should itself review the propriety of federal law enforcement efforts -- just as it should seek to improve the effectiveness of those efforts. This Administration welcomes -- and will join in -- such an effort by the Congress. There cannot, however, be different rules of law enforcement for the governed and for those who govern. Although law enforcement techniques can always be improved -- both to protect those under suspicion and to protect the public -- they must not be emasculated, especially in a context that suggests special treatment for the powerful. Although the Abscam investigations were not undertaken or completed during this Administration, we are committed to the

use of effective law enforcement techniques of the kind Abscam employed. We will work to make them more effective and to ensure that they -- like all law enforcement procedures -- are fairly employed. We will also resist any effort to weaken effective federal law enforcement efforts aimed at detecting and deterring drug, organized , or white-collar crime -- including public corruption.

A foreign writer once observed that his homeland "fell because there was corruption without indignation." After surveying the federal effort against public corruption, I for one want to express my indignation -- not at the techniques or aims of law enforcement, but at the corruption uncovered. Let everyone who seeks to improve the efforts of law enforcement in these areas keep in mind that the American public itself is also indignant about the kind of criminal activity uncovered and videotaped during Abscam. The most important lesson is not that federal law enforcement techniques can be improved, but that public corruption clearly exists and must be effectively uncovered, prosecuted, and deterred.

During 1981, the first year of this new Administration, there were more federal indictments and convictions of corrupt officials at all levels than in any previous year. Those efforts -- and the undercover techniques they frequently require -- will continue. We will pursue public corruption by every necessary and legal means -- wherever the trail may lead. Weakening legitimate undercover investigations would be tantamount to granting some of the most virulent types of criminals a license to steal. That is something this Administration will not do.

Mr. Chairman, I want to compliment you on the outstanding manner in which you have conducted these most difficult hearings to date. As usual, your diligence in bringing before this subcommittee a witness with valuable testimony has not waivered.

I am certain members of this committee agree that no one should be held above the laws of our land. I also hope we agree with Director Webster, who has previously testified, that law enforcement officials must act with scrupulous fairness, apolitically, and cautiously in carrying out their investigations. When this principle is violated, the dangers to a democracy such as ours are very grave.

Unfortunately, with respect to the undercover operations on which this subcommittee has heard testimony, some of these prerequisites apparently have been lacking. Previous witnesses have provided us with documented evidence which clearly shows that certain of the undercover operatives might well have been not under control.

We have also received evidence of possible unprofessional and unethical conduct. The President's new Executive order on domestic spying will of course compound the difficulties of coordination and supervision which may presently exist. And a new policy of Government secrecy would make it difficult, if not impossible, for individuals and for the public to learn when abuses have taken place.

All of this greatly disturbs me and many other people because of its susceptibility to political abuse and because it has a potential for once again undermining public confidence in law enforcement agencies.

Today we will hear what I anticipate to be very enlightening testimony from FBI Director William Webster. I am sure he is as eager to speak to us as we are to hear from him. I welcome him and look forward to this hearing with great gusto.

Thank you.

Mr. EDWARDS. Thank you, Mr. Washington.

We also welcome Mr. Hughes, a member of the Judiciary Committee who will sit with us today.

Mr. Hughes, do you have a statement?

Mr. HUGHES. No, Mr. Chairman, I do not.

Mr. EDWARDS. Judge Webster, you may proceed.

TESTIMONY OF HON. WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WEBSTER. Thank you, Mr. Chairman.

I am pleased to appear before you today to discuss the FBI's undercover activities.

I appeared before this subcommittee 2 years ago and testified on the importance of undercover investigations in effective law enforcement. Many issues which could not be fully discussed at that time have become a matter of public record in subsequent trials. Likewise, a number of new matters have been reported in the press that, for the same reason, can only be discussed with deference to pending litigation. Insofar as I can be properly responsive to your questions today, I intend to do so.

As in all endeavors, we have experienced some significant successes and we have suffered some setbacks in specific investigations. The overall results seem to me to be very positive.

An undercover activity, especially one of long-term duration, is more demanding than simple theater. There is no fixed script; indeed, our participating antagonists are not even aware of the plot. Considerable dexterity, ingenuity, and often courage are required to deal with unexpected twists and turns in the road as the investigation progresses.

Agents are required to conform to legal and operational limitations and requirements and still maintain the credibility of the approved scenario. We do not always succeed. Sometimes the subject becomes suspicious. Sometimes innocent third parties become involved in the activity, and sometimes a cooperating witness or informant does not or will not comply with our rules. These are some of the problems with which we must deal.

As I hope my testimony will demonstrate today, we are getting an increasingly better handle on the byproduct problems of undercover operations. Certainly the very small percentage of our resources devoted to undercover work has proven to be both cost-effective and an indispensable tool in certain kinds of cases.

The traditional approach to investigating crime is a direct one; our agents knock on doors, identify themselves, and ask questions. In some cases they may request documents or records, in others they may arrive on the scene of a crime and take fingerprints and collect other physical evidence. This approach is usually successful in bank robberies, embezzlements, kidnapings, and many other crimes, but certain criminal activity is not susceptible to these techniques.

One of the problems we face is the organized crime figure who directs the criminal activity of others but rarely exposes himself to other than his criminal confederates. Another problem we face is what I refer to as consensual crime. This includes cases where fences are accepting stolen property from thieves, situations where a broker knowingly assists narcotics dealers in laundering their profits, or the public servant who accepts a bribe. These criminal acts are rarely documented or witnessed by outsiders. In each case both parties to the transactions have a criminal interest in concealing the relationship. In each case, the general public is the unknowing victim.

To reach beyond the streets and to develop evidence that will lead to prosecutions of this kind of serious criminal activity, we can and we do employ sensitive techniques from our investigative arsenal. These techniques include the use of confidential informants, court-authorized electronic surveillance, undercover special agents, and combinations of these. Of course, there are risks inherent in their use. We recognize that at the outset. Because of these risks and the intrusive nature of these techniques, they must be carefully controlled and monitored, and we must be publicly accountable for their use.

Each of these techniques has its advantages and its disadvantages. Electronic surveillance involves less danger to our personnel, but it isn't as flexible as other techniques. If the subjects of our investigation have any idea that electronic surveillance is being used,

they simply move to other phones or other places, or they don't use their phones.

The traditional informant is still the most important tool in law enforcement although their reliability varies widely and they are often unwilling to testify. They usually provide us with specific information as a result of their station within the criminal community. They may even be able to tell us something about the plans and structure of a criminal organization, but they have limitations. Often they do not have the flexibility to move about within the structure. We have to overcome these limitations.

The use of the special agent in an undercover capacity answers some of these problems and presents some additional advantages to us. He or she is more disciplined and more reliable. After all, they are our special agents, trained to know and respect the law. They can be trusted with large sums of money which today's operations often require because we are dealing with and against those who have access to large sums of money. And they're more likely to recognize and acquire evidence concerning a major crime figure.

The bottom line for the undercover agent is discipline and staying power. As a special agent of the FBI, he receives a basic course of legal instruction, periodic refresher courses, and additional guidance in legal matters specifically connected with his undercover assignment. His operation is planned in advance, and his work is continually monitored. Therefore, the key to an undercover operation is to maximize the use of the agent personnel.

While statistics tell only part of our story, they are illuminating. In combined fiscal years 1980 and 1981, undercover operations led to actual recoveries worth over $109 million. Arrests arising from such operations in those fiscal years totaled 2,723, with 1,064 convictions. Our funding for undercover operations during this period was about $7.5 million, less than 1 percent of our total budget.

I do want to advise you that we have identified 10 undercover operations that have resulted in the filing of 30 civil actions involving the FBI and/or its employees. To date, nine of these civil actions have been resolved, and the remainder are currently pending in court.

I know the subcommittee is familiar with the operation which we call Frontload. I am informed that it is the only FBI undercover case to date which has resulted in payments being made to satisfy civil liability to others. Frontload was one of our first undercover efforts, approved and implemented well before the creation of our undercover review committee. I can assure you that the lessons of each lawsuit have not been lost.

A brief look at recent undercover cases illustrates the kinds of crime that confront us and how effective investigations can be. I will discuss three.

An investigation entitled "Greenthumb" was directed by our Washington field office against fences of stolen precious metals and their associates who cloaked their illegal activities with legitimate second-hand businesses. Two undercover agents were able to inject themselves into the distribution system. As a direct result of their observations, we were able to engage in court-authorized surveillance of telephone and other conversations.

On April 28, 1981, simultaneous raids were carried out in the greater Washington area by FBI agents and officers of the Metropolitan Police Department. A total of 22 individuals were arrested and charged in Federal and local complaints. Stolen property valued at approximately $2 million was seized.

A public viewing of the property was conducted during a 3-day period in June 1981, and approximately 1,400 citizens participated. Over 30 percent were able to identify property which had been stolen from them. To date, 35 persons have been convicted of Federal and local charges; 13 additional subjects have been charged.

In another undercover operation entitled "Bancoshares," our undercover agents posed as brokers willing to launder illicit drug money through a fictitious corporation. Transactions which grew to over $1 million per day were video taped. The primary services offered by the undercover corporation were the conversion of small bills to large bills, the conversion of U.S. currency to cashiers' checks, the maintenance of large quantities of U.S. currency in bank accounts of the undercover corporations, and the depositing of clients' U.S. currency in Miami area banks to protect them from being identified as the source of funds.

Upon termination of the covert stage of this investigation in August 1981, 61 arrest warrants were issued, and 31 subjects were arrested. Property and cash recovered, seized, and/or frozen as a result of this operation included numerous airplanes and vehicles, large quantities of cocaine, a 4,600-acre ranch with an estimated value in excess of $4 million, three residences, and $18 million in cash.

In another undercover case known as "Corcom," our Oklahoma City office has conducted a joint investigation with IRS, aimed at county commissioners in Oklahoma who allegedly have been demanding kickbacks from material and equipment vendors for years and years. To determine if this was so, in December 1979 we created our own business to sell road- and bridge-building materials. As a result of the efforts of undercover agents, almost 100 individuals have been convicted or have entered guilty pleas, approximately 180 more have signed agreements to plead guilty, and another 100 are under investigation.

While numerous other cases could be cited, Mr. Chairman, in investigations ranging from simple sting operations to those involving terrorist organizations, these three examples suggest the range and utility of the undercover technique. Let me turn now to the procedures by which undercover proposals are developed, approved, and managed.

Generally, undercover projects originate in our field offices and are designed to investigate a particular crime problem or groups of individuals suspected of participating in illegal activity. Prior to the submission of an undercover proposal to FBI Headquarters [FBIHQ], the proposal must be approved at the field office level by the field supervisor, the principal legal advisor, the special agent in charge, and the concurrence of strike force attorney's or U.S. attorney's office in that region. The approval must include comments and observations regarding the legal and ethical considerations involved in the proposal.

In addition, the project's goals, the worthiness of its objectives, its cost, and whether the tactics proposed might involve entrapment, due process violations, or create a unreasonable potential for economic loss to either individuals or the general community must be addressed in a proposal.

Many projects are rejected in the field or by FBIHQ supervisors after their initial review. Those that meet the basic requirements and which appear to offer potential to accomplish the objectives are submitted to the Criminal Undercover Operations Review Committee.

The Committee includes FBI headquarters officials from the disciplines involved, including representatives from the Legal Counsel Division and representatives from the Department of Justice who consider any legal issues. It was established by me in the fall of 1978 to provide an ongoing institutionalized method of evaluating proposals, recognizing potential pitfalls, and giving guidance on such matters as avoiding injury to third parties.

This committee has become my main advisory board in the approval process for undercover operations. The committee thoroughly reviews the fields submission and attempts to look at the project from other angles, including the general propriety of its approach. After this review, many proposals are sent back to the drawing board.

If the committee makes the determination that the legal and ethical considerations as well as operational aspects warrant approval of an undercover proposal, the committee will make such a recommendation to the Assistant Director of the Criminal Investigative Division or, when particularly sensitive circumstances are involved, to me.

No operation is approved for more than 6 months, and many are approved with the stipulation that an interim progress report be made to the committee. Undercover operations requiring a time period of more than 6 months must be represented to the committee for subsequent approval.

In addition, special agent supervisors at headquarters provide continuing supervision of those operations which are approved. Since the implementation of the committee problems which could arise during the course of an undercover operation have been more readily recognized, and the possibility of harm to other third parties as a result of an undercover operation has been greatly minimized.

We recognize that undercover work places unusual stress upon agents and their families. We carefully choose our undercover agents from a pool of volunteers. We have instituted a training program, including undercover seminars at Quantico, which deal with many aspects of undercover operations. These seminars are designed to train undercover agents, the handling agents, and the undercover agents' supervisors.

As an example, recent seminars have presented such diverse topics as legal matters, handling of informants, stress factors, money laundering, narcotics investigations, psychological aspects of undercover work, and female undercover roles. In addition, our principal legal advisors have been given seminars at Quantico which address the developments in such legal issues and policy

matters as: Entrapment, due process, Federal jurisdiction, creation of undercover companies, false identification, and numerous additional topics.

The Attorney General's guidelines on FBI undercover operations were not issued until February 1, 1981; however, they were designed to set forth practices that had developed out of our previous experiences. These guidelines provide that in addition to complying with 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 activity, and

(c) The nature of any inducement is justifiable in view of the character of the illegal transactions in which the individual is invited to engage.

The guidelines recognize that inducements may be offered to an individual even though there is no reasonable indication that the particular individual has engaged in or is engaging in illegal activity that is properly under investigation. However, the guidelines provide that no such undercover operation shall be approved without the authorization of the Director.

Other circumstances which can be approved by the committee would include situations where there is 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 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 contemplated illegal activity.

All long-term undercover projects must be closely coordinated with U.S. attorney's or strike force offices. As I indicated earlier, the committee must be assured that the U.S. attorney is fully advised of the proposed operation and that he or she concurs with the proposal, its objectives and the legality of the operation.

Once an operation is approved by FBIHQ, the contact with the U.S. attorney's office or strike force office is intensified. For example, Abscam was reviewed on a daily basis by the strike force in the eastern district of New York. Strike force attorneys personally monitored on closed circuit television many of the transactions as they were taking place. One purpose for this on-line monitoring was to guard against conduct amounting to entrapment. The attorneys could pick up a telephone and call into the meeting room. The undercover agent would answer as receiving a business call and obtain instructions necessary to insure that all legal requirements were being followed.

It should also be emphasized that this investigation was closely monitored by the Department of Justice in Washington. Many investigative steps were taken at the recommendation of Department of Justice attorneys. Strike force and U.S. attorneys were not only in close touch with our undercover agents and their supervisors, but also with Department of Justice officials as the investigation progressed. Department of Justice officials viewed the more signifi-

cant tapes, provided legal guidance and exercised the ultimate prosecutive discretion as to each Congressman considered for prosecution.

Before turning to the specifics of the Abscam investigations, it might be helpful to make some important distinctions that go to much of the confusion and uncertainty about those and other cases.

First, an undercover operation that is designed to identify criminal practices normally requires the assistance of one or more cooperating witnesses. These individuals have a wide range of backgrounds and motives for cooperating. They may be victims of a practice of payoffs and kickbacks who want to be relieved of this burden. Our labor racketeering cases have often developed in this way. They may be in serious trouble with the law and are looking for a way to soften the blow. In such cases, their expertise in the fraud techniques of the area under investigation and their familiarity with the criminal actors are of vital importance to the success of the operation.

Their credibility as a witness in a trial may be of uncertain value in view of their background, but their credibility in dealing with criminal contacts provides our agents with access and credibility which might take years, if ever, to develop. The cooperating witness knows, of course, that he is dealing with the FBI, and that the FBI expects him to conform his conduct to FBI requirements. Melvin Weinberg was the cooperating witness in the Abscam cases.

In contrast to the cooperating witnesses in Abscam, the corrupt influence peddlers did not know they were dealing with the FBI, but rather thought they were dealing with individuals like themselves who were interested in achieving results by purchasing influence. The influence peddler often fronts for a corrupt public official and is sometimes called a bag man. In Abscam they were themselves the subjects of our investigations. In what they thought was a confidential setting, they spoke of their political contacts and the political corruption that could be utilized in the services of the Arab shiek.

In all that followed, these influence peddlers were not Government informants, cooperating witnesses, or Government operatives. They were, as the courts have found, engaged in crime, and those who have been tried have been convicted. I think it is important that these distinctions be kept firmly in mind.

I now want to focus on a brief chronology of Abscam as reflected in the evidence adduced in various trials. The idea for Abscam arose in the Hauppauge office of the FBI on Long Island, N.Y., in early 1978. Agents there began working with a convicted swindler, Melvin Weinberg. The scope of the operation was limited at the outset to property crimes, including the recovery of stolen or forged securities or artwork. The operation was simple and similar to one which Weinberg had run illegally prior to being convicted.

Upon conviction, Weinberg agreed to cooperate with the Government in the hope of receiving a lenient sentence. He and agents of the FBI posed as American representatives of wealthy Arab businessmen interested in making shrewd investments, regardless of their legality. Abdul Enterprises, Ltd., from which the name Abscam was derived, was established in an office on Long Island, and the word was spread in the network of con men that easy money was available for shady transactions.

In the early stages of the investigation, there was nothing unusual about the undercover operation except perhaps the somewhat elaborate cover story. Through the summer of 1978 there was no political orientation to the operation which was aimed at the recovery of stolen and forged property.

Things began to change slowly in the fall of 1978. One of the groups which had sold Abdul Enterprises phony certificates of deposit raised a new prospect. They offered to serve as a broker between the mayor of Camden, Angelo Errichetti, and the fictitious Arabs who had indicated some interest in investments, including the newly legalized gambling casinos in Atlantic City, N.J. These individuals described in detail the corrupt relationship that they had with this politician and the influence he claimed he could command in the State. Errichetti was described as a corrupt politician who could obtain an Atlantic City casino license in return for a bribe.

Meetings were held between Errichetti and the Abscam operatives. Errichetti boasted that with his assistance the operatives could obtain a gambling license; however, without his assistance, it would be impossible to obtain the needed licenses. Errichetti indicated that a cash payment would be necessary in order to obtain his assistance.

When Errichetti indicated that he would accept a bribe, the New York office of the FBI, with the concurrence of the strike force, furnished FBIHQ with the details. They also requested the authority to make a $25,000 cash payment to Errichetti. The request followed the FBIHQ chain of command and was presented to the undercover review committee, where it was approved. At this time, the decision was made that all bribes would be documented on video and audiotape. This procedure was followed throughout Abscam.

On January 20, 1979, a $25,000 payment was made to Errichetti.

Meetings between the operatives and Errichetti continued, and arrangements were made for a payment of a $100,000 bribe to Kenneth MacDonald, vice chairman, New Jersey Casino Control Commission. With the concurrence of the strike force, our New York office requested and received FBIHQ authority to make this payment.

A meeting was set up with Errichetti and MacDonald. On March 31, 1979, Errichetti was furnished with a bribe payment of $100,000 in the presence of Kenneth MacDonald. At this time, Errichetti demonstrated through words and actions that he was MacDonald's intermediary.

Errichetti was also directly responsible for developing another case, this one involving Senator Harrison A. Williams. As early as January 10, 1979, Errichetti had mentioned Senator Williams and his associates. It was determined on January 11, 1979, that Senator Williams and his associates were looking for financing for a mining venture in Virginia. Subsequent investigation and meetings with Senator Williams and his associates determined that Senator Williams had a hidden interest in the mining venture. On June 28, 1979, Senator Williams met with our operatives and offered to use his influence and position to benefit the mining venture.

In the spring of 1979, Errichetti, still believing the Abscam operatives to be agents of wealthy and unscrupulous Arab sheiks, provided them a written list of names of those who he claimed were corrupt Federal and State politicians. It is important to note that Errichetti first brought up these names, not the operatives. This became a pattern which followed throughout the operation. Errichetti claimed he could put the operatives in touch with these allegedly corrupt politicians should the need arise. An opportunity soon presented itself.

In late July 1979, aboard a yacht in Florida, a meeting was held with Errichetti and others to discuss a proposed casino transaction. Also present at the meeting were individuals whom Errichetti had identified to the FBI operatives as being instrumental in the casino deal. These included Louis Johanson, a Philadelphia city councilman, and his law partner, Howard Criden. During the cruise, FBI undercover Agent Anthony Amoroso, posing as the Arabs' right-hand man Tony DeVito, remarked that the sheiks might have to flee their country and seek asylum in the United States. He said that the sheiks did not want to face a situation like that which had recently confronted Anastasio Somoza, the deposed Nicaraguan leader who had been expelled from this country shortly after his arrival. Errichetti, with the assistance of Criden, began to identify U.S. Congressmen who, in return for cash, would take actions to guarantee asylum for the fictitious sheiks.

On March 30, 1979, Errichetti had supplied the name of Congressman Myers as a corrupt politician. Errichetti, in a series of telephone conversations with Abscam operatives in July and August 1979, claimed——

Mr. HYDE. Judge Webster, would you mind giving Mr. Myers' first name? We have another.

Mr. WEBSTER. Ozzie Myers. Thank you. Congressman Ozzie Myers.

Mr. HYDE. We have another one still serving with distinction.

Mr. WEBSTER. I appreciate your drawing that to my attention.

Errichetti in a series of telephone conversations with Abscam operatives in July 1979, claimed to have commitments from Congressmen Ozzie Myers and Lederer to meet with the sheiks' representatives in order to provide immigration assistance. He subsequently advised the operatives that the support of each Congressman would cost $100,000. After consulting with FBIHQ, the operatives were able to reduce the demand to $50,000 each. Payments of $50,000 were subsequently made to both Congressman Ozzie Myers and Congressman Lederer.

Howard Criden, with the assistance of Joseph Silvestri, introduced our agents to Congressman Thompson. Silvestri was involved in the construction industry in New Jersey and had strong political ties. On October 9, 1979, our agents made a $50,000 payment to Congressman Thompson. During the meeting Thompson himself assumed the role of a corrupt influence peddler and suggested that he had a close friend who was a Congressman from New York who could assist us. We later learned that he was referring to Congressman John Murphy.

Acting upon the suggestion of Congressman Thompson, Howard Criden made arrangements for Congressman John Murphy to meet with the undercover operatives, and on October 20, 1979, he was paid $50,000 in exchange for the commitments he made to assist in the immigration problem.

During October 1978, in a recorded telephone conversation with Weinberg, John Stowe, a South Carolina businessman, advised that he knew a Congressman who was as big a crook as he was—Stowe—and who would assist in transactions involving forged certificates of deposit. In November 1979, recalling Stowe's representations, he was recontacted by the Abscam operatives.

Stowe was asked if he was still dealing with the Congressman that he had previously mentioned. Stowe identified the Congressman as John Jenrette, and indicated that he still had contact with him. Our operatives then asked if Congressman Jenrette would be interested in assisting the sheik in his immigration problems in return for cash. Stowe indicated that Jenrette would be interested, and that he would set up a meeting.

In December 1979, our operatives had several meetings with Stowe and Jenrette, at which time Jenrette offered to assist us for $50,000. After two meetings and several phone calls with Stowe and Congressman Jenrette, Stowe accepted a $50,000 bribe on behalf of Congressman Jenrette. Congressman Jenrette confirmed this payment in a telephone conversation which was recorded. Several days later, Congressman Jenrette reconfirmed his receipt of the money in a video taped face-to-face meeting with our operatives.

During this period, William Rosenberg, a corrupt influence peddler and con man from New York, who had been responsible for introducing us to Mayor Errichetti, introduced us to Stanley Weisz, Eugene Cuizio, and Congressman Richard Kelly. Congressman Kelly, in exchange for his offer of assistance in connection with the immigration problem, was paid a bribe of $25,000 in January 1980.

In January 1980, Howard Criden led our operatives to George Schwartz, Philadelphia city council president; Harry P. Jannotti, Philadelphia city councilman, and Louis Johanson, Philadelphia city councilman. As you will recall, Johanson had attended the July 1979, meeting held in Florida. It was now represented to our operatives that these individuals could assist in obtaining permits which would be necessary for construction work that the Arabs wanted to finance in Philadelphia. Johanson was paid $25,000 on January 21, 1980; Schwartz was paid $30,000 on January 23, 1980; and Jannotti was paid $10,000 on January 24, 1980.

The corrupt influence peddlers talked at length about their political connections and in the course of their discussions many additional names were mentioned. Some of these turned out to be mere puffery.

While we could not eliminate the possibility that completely innocent officials might come to an undercover meeting at the behest of a corrupt influence peddler, we sought to reduce the likelihood in the following way:

First, the shiek's representative firmly and repeatedly instructed the influence peddlers not to bring public officials who did not understand the purpose of the meeting and unless they were prepared to make their promises of assistance and receive payment personally. This was couched in language consistent with the scenario.

While the corrupt influence peddler had a vested interest in not offending the shiek or exposing his corrupt operation by violating this requirement, we nonetheless put in place a second or backup requirement. The undercover agents were instructed that no money should pass until after the criminal representations had been made. The online monitoring by strike force attorneys provided an additional safeguard.

The facts that I have presented received searching scrutiny in pretrial motions, in the trials themselves, and in extensive posttrial hearings. The judicial process has thus far determined that those charged and tried significantly violated the public trust. Of equal importance, the techniques employed by the Department of Justice have thus far withstood legal attack in the courts on review.

The responsibility does not stop there. Our undercover investigations are regularly reviewed in the helpful light of hindsight. Problem areas are eliminated and better ways to achieve worthy goals are developed. I, therefore, approach these hearings with the hope that they will be helpful to your oversight function and to the FBI in the discharge of its significant law enforcement responsibilities.

In that spirit, I am now prepared to answer your questions, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Judge Webster.

Pursuant to House rules, we will be operating under the 5-minute rule.

Judge Webster, on page 4 of your report, the second paragraph, you point out how carefully the agents in these undercover activities were monitored, that the operations were planned in advance, and that all work was continually monitored. Back in February of 1980, you said on TV, "The Abscam operation is probably the most carefully monitored, the most carefully controlled, the most carefully scrutinized investigation in the history of the FBI."

In a trial where Special Agent Anthony Amoroso, the supervising FBI agent in charge of Mel Weinberg—I believe his undercover name was Tony DeVito—was testifying under oath, of course; he was asked the question by defense counsel, Mr. Robinson:

Are there any written regulations or guidelines at all in the FBI there to give agents cover guidelines to pursue an investigation?

Answer by FBI Agent Amoroso:

Not in an undercover operation, no.

And then the questions continue:

We've talked about the guidelines and that there were no written guidelines, no written—no recordings.
Did you make written reports on a day-to-day basis of what was happening with you and Weinberg?
Answer. No.
Question. Did you make them on a week-to-week, month-to-month basis?
Answer. No, never made any reports. The tapes were what we were using.

Later,

Question. Weren't you told as part of your script, your role as an undercover officer, Tony DeVito, to get the man to talk about taking the money and get one?
Answer. I was not given any script or I was not told what to say.
It was all what I felt.
Question. You were given no guidelines at all as to what was expected of you?
Answer. No.

Later on, again:

Question. You kept no notes at all?
Answer. No, not concerning that. Tape recordings is what was utilized.

Another question:

You know of no rule, regulations, memo or anything else written or oral which would require that you keep some type of notes or memoranda.
Answer. No.

Then later on:

You left it with Mr. Weinberg and for the most part Mr. Weinberg was unsupervised in these calls, was he not, in the spring of 1979?
Answer. Correct.
Question. And his whereabouts, isn't that statement correct that Mr. Weinberg's whereabouts from June 1979 to and through January of 1980 you have no written documentation.

And so forth. I believe you are acquainted with these facts.

This FBI agent testified that over 50 percent of the time Weinberg was not supervised at all. Would you care to comment on that?

Mr. WEBSTER. Yes, I would be glad to.

You mentioned a few things and I am not sure, Mr. Chairman, which ones you want me to address first.

Mr. EDWARDS. It is the supervision of Mel Weinberg?

Mr. WEBSTER. Yes.

First, as to Mr. Amoroso, I was aware of that statement when it was called to your attention, and you made a point of it and I made inquiry of Mr. Amoroso. The question related to guidelines on entrapment. There were no written guidelines on entrapment until December 1980.

So his statement was made in response to the question. An agent with 18 years experience has had numerous seminars, specific seminars and training and online instruction from principal legal advisors in the field; 16 hours is given to every special agent in the field as well as the training that we have at Quantico.

I think that in terms of supervision, one has to recall the daily contact that Amoroso and John Good, who was his supervisor, had with Thomas Puccio, the chief of the strike force in the eastern district of New York and others, departmental attorneys with whom they were working. They were getting constant advice, touching base, cluing in with each other on what was proper and appropriate and setting the next stages.

So far as accounting for Mr. Weinberg, I did not make a note of the dates and I cannot tell you out of my own knowledge what was happening at that particular time. But this is over several months, and it is my understanding in talking to our agents that before any meetings took place, Mr. Weinberg was in the company of our undercover operatives for as much as 48 hours before they took place.

I think it is not too helpful to talk in terms of only 50 percent of the time. I think 50 percent of the time to keep track of somebody who is—who is a relatively free agent, is a substantial amount of keeping track of.

The issues have to do with what Weinberg did or did not do, it seems to me, when he was under supervision or when he was not under supervision. And it is my impression that all of those issues

were searchingly examined in the due process hearings and to date no fault has been found by the courts with that degree of monitoring.

Mr. EDWARDS. Well, in the same hearing, the same trial, Mr. Amoroso said Mr. Weinberg was, as I have said before "* * * at liberty to operate in a manner he saw fit." But naturally, I accept your response and thank you for it.

But doesn't those statements by the supervising agent for Mel Weinberg call into question what you said, that "the Abscam operation is probably the most carefully monitored, the most carefully controlled, most carefully scrutinized?"

Amoroso testified that over 50 percent of the time he did not know what Weinberg was doing and there were no notes kept on what Weinberg was doing and he really did not know what he was doing.

Mr. WEBSTER. That had to do with his relationship with Weinberg. If you would care to be specific, as I said before, the courts looked at what Weinberg did or did not do and what evidence was involved. I do know that it was our policy that when Weinberg—that Weinberg was not to meet separately with public officials. He did it on one occasion, for which we remonstrated with him, with the manner in which he handled it.

That was very early in the investigation, Mr. Chairman, I think that was in the spring of 1979, before any of the other cases came on. And we made a point of trying to stay in close touch with him when he was dealing with any of the public officials. Now we could not keep him from accepting telephone calls in any place where he might receive them, but those that came into Abdul Enterprises were largely taped. I think we had over 1,000 tapes of recorded conversations.

We did not have—he was as you know, he had his own home and we could not sequester him and I do not think that the case indicates that any damage was done by his activity during periods when he was not under lock-step with us.

Mr. EDWARDS. Thank you, Judge Webster.

Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Judge Webster, I would like to take you in a different direction entirely. Some of the fish that you landed were very important Members of Congress, Two were committee chairmen, and one was a Senator.

I am interested in knowing why the process stopped. Did you do so on your own or were you directed by the Justice Department or others to cease and desist the Abscam operation?

Mr. WEBSTER. Congressman Hyde, we were never directed to cease or desist. The decision to conclude the operation was made primarily by me and by Assistant Attorney General Philip Heymann, at a time when, after consulting with strike force attorneys and our own executives at FBI headquarters, we had determined that we had run our leads.

There is always the possibility of keeping an ongoing investigation open. It has some risks that had to be balanced. One of those was the risk of imminent disclosure of the covert part of the operation by the press. At least one newspaper and one television network had gotten wind of what was going on and were getting very close to us and very close to writing about it. So that had to be taken into account.

As a matter of fact, I authorized the extension of the Abscam investigation for an additional 10 days after we had originally planned to close it, in order that the strike force attorney, the U.S. attorney rather, in Philadelphia and FBI agents there might have an opportunity to follow some leads into the Philadelphia City council. So it really ran 10 days longer than we had expected.

Mr. HYDE. Was there a fear expressed that you were being too successful, that you were getting too many political figures and that enough is enough; was that fear ever expressed in your conferences with Mr. Heymann?

Mr. WEBSTER. No; not by Mr. Heymann and——

Mr. HYDE. By you?

Mr. WEBSTER. By me?

I have always been of the view, and I apply this not just to public corruption but corruption in supporting industries and so forth, that you follow your leads, you do not turn away from something that you hear about and you resolve it quickly, but you do not try to keep going on and on and on. The point gets made. The deterrent effect gets made at some reasonable point.

That point, it seemed to me, is when our leads that we had were resolved and we were running the risk that the corrupt influence peddlers were going beyond their string of associates and beginning to bring in people who were not——

Mr. HYDE. Not good prospects?

Mr. WEBSTER. Not good prospects.

Mr. HYDE. For the enterprise?

Mr. WEBSTER. Exactly.

Mr. HYDE. There was no political pressure brought on you, and there was no discussion then I take it between you and the Justice Department about this—the repercussions? As I take it, there were 12 Congressmen approached and only 5 refused and 7 took the bait?

Mr. WEBSTER. I am not sure of those figures. I think two came and went away, one accepted money under ambivalent circumstances, ambiguous circumstances; a few were named who did not come and the rest came and took the money.

Mr. HYDE. Now, I did not hear you mention Joseph Meltzer and I am very interested in Mr. Meltzer and his operations. What was his relationship with the entire Abscam operation?

Mr. WEBSTER. Meltzer did not have a direct relationship with the Abscam operation. He was involved as a cooperating witness in another case which we called Palmscam. It was intended to look into a number of corruption-type activities in southern Florida. And it was an operation that was open for about 2 months in the summer of 1978.

During that time he was to set up an office as a sort of a real estate place from which he could approach some rezoning matters and other things. And he had a lead that a person responsible for rezoning was interested in taking money for that type of activity. And he needed some credibility.

A decision was made which in the benefit of 20-20 hindsight I think we could have done better, a decision was made to provide him with a letter from Abdul Enterprises on Abdul Enterprises stationery, which I believe has been made a part of the record, and certainly if it hasn't it can be; it was in the courts that talked about two deals that Abdul was interested in.

It was not a letter of reference, it was not a letter of credit, it was simply saying we are interested in those two deals and would like to explore this further with you, words to that effect.

That letter was apparently utilized by Meltzer after the Palmscam investigation had closed on the west coast with another letter that was apparently forged by Meltzer or someone working with Meltzer for which we had no participation of any kind, to use as bait for what we call an advance fee scheme.

[The letter referred to follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., May 19, 1982.

Attention: Michael Tucevich.

CATHERINE LEROY,
Counsel, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MS. LEROY: I am returning the transcript of the testimony for William H. Webster, Director, Federal Bureau of Investigation, before the Subcommittee on Civil and Constitutional Rights, on April 29, 1982, concerning FBI Undercover Operations. Also enclosed for the record is a copy of a letter dated July 7, 1978, addressed to H & J Realty, c/o Joseph Meltzer, and signed John McCloud. Reference to this letter occurs on page 38 of the corrected transcript.

Further information regarding (1) complaints to the FBI of Joseph Meltzer's advance fee scheme, page 54; (2) the tracing of gifts which were allegedly provided to Mel Weinberg, page 56; and (3) an approach to Congressman James Howard by a corrupt influence peddler, page 86, will be provided to the Subcommittee as soon as possible.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

Enclosure.

ABDUL ENTERPRISES, LTD.,
New York, N.Y., July 17, 1978.

H. & J. Realty,
care Joseph Meltzer,
P.O. Box 413, Delray Beach, Fla.

DEAR MR. MELTZER: Regarding our conversation of June 23, 1978, I am considering the purchase of the 160 acre Longmeadow Development owned by Allison Mortgage of Los Angeles, California. I believe the price you mentioned was $1,900,000. Additionally, the adjacent parcel of land owned by John Rochman which is for sale for $250,000 also looks interesting. Further, the purchase of Lighthouse Foods in Miami for $500,000 appears to be a good business venture which could be mutually profitable.

I feel confident, Mr. Meltzer, that you will be able to handle the legal problems concerning the use of the land in the appropriate way.

As soon as you assure me that the property can be used for the purposes I specified, we can proceed quickly in making arrangements for final closing.

Sincerely,

JOHN M. MCCLOUD,
Chairman of the Board.

Mr. WEBSTER. An advance fee scheme is when a con man offers to do something for someone who is either naive or greedy and wants something that he would not be able to get from conventional financing sources such as a big loan or a reasonable interest

rate, and he asks for a payment in advance as good faith. It does not make much sense to you or me as to why someone would do that unless they were very anxious to get some money and very hopefully knew what he was talking about; sort of like a financial pigeon drop confidence scheme.

We have quite a few of those in the country, just an enormous amount, victimized American citizens who are in need of money or looking for money under those circumstances.

So he engaged apparently in a series of advance fee schemes and activities, working with other associates. We were not aware of his activities until after many of these people that have appeared before you had actually paid their money to Meltzer.

Meltzer was not a part of Abscam. But he apparently, by being a good con man, knew that Abscam was our operation—Abdul Enterprise was our operation and knew enough about it, apparently, to observe or get the idea about Arabs. He was also dealing with a figure—and this was part of the purpose of Palmscam—he was dealing with a figure in New York associated with organized crime with whom we in turn were dealing out of the Abscam—Abdul Enterprise operation. It appears from what we have been able to learn that he picked up some of the information about the Arabs and their money and that scenario in talking not just with us but with a person under our scrutiny. That is where he comes in.

Now there have been a lot of lawsuits filed recently, they are in the court and I am sure you can appreciate that I can only respond to your questions in a rather limited way because the Government is entitled to its day in court. A great deal of money damages have been claimed. The actual amounts that Meltzer took from these various victims was relatively small by our standards, certainly not by theirs. But we are talking in $5,000, $10,000 increments.

Undoubtedly some of those people were—I can't say because I do not know, but there is a good indication that some of these people came in off the street, were not involved in any illegal activity of their own. Whether that is the responsibility of the FBI, whether it is the responsibility of the Department of Justice, or the Government remains to be seen. They have a remedy in court and if it proves that the FBI was the—or the Government was the cause of their loss, I would hope and expect that they would be made whole.

Mr. HYDE. Judge, I do not want to prejudice any litigation that is pending because there is a lot at stake. It just appeared to me, from the testimony of a great number of these people, that they were not greedy, they needed financing for some enterprise, legitimate enterprise and that Meltzer was credentialed by the FBI in the sense that these people checked with the FBI, and of course the FBI is no Dunn & Bradstreet but it is funny, as soon as they would talk to the FBI about Meltzer, Meltzer knew about it almost immediately and would remonstrate with these people about why were they going to the FBI?

Also, the Chase Manhattan Bank credentialed Meltzer's operation. It called the Chase Manhattan, Oh, yes, the shiek has a lot of money on deposit here.

I just am interested to know if the FBI stood by with knowledge that he was scamming a lot of people, Meltzer, and out of a fear of

blowing his cover let these people go down the drain, as some of them did.

We have had some weeping at those tables, and justifiably so. Is it your view that going into that in detail might compromise that litigation?

Mr. WEBSTER. I think so, Congressman Hyde. And besides, what I am saying is information that has come to me by my own questions and searching questions to find out where we were. I was not aware of Mr. Meltzer until the spring of 1980. He was not considered part of our Abscam activity and I do not believe that those around were—talking to me were generally aware of the Meltzer problem.

I can say a few generalizations and I say them only because—on the basis of what I know or I have been told and believe.

First is with regard to the Chase Manhattan Bank, that was a credibility cover for Abscam. Our arrangements were made with Mr. Elzay of that bank, that if persons called he would acknowledge that there was a substantial amount of money on deposit in the Chase Manhattan Bank under Abdul Enterprises, that is all; that is all he would say. He kept a log. And it is my understanding that the log reveals no such inquiries by any of the people who testified here. That will all come out in the courts.

With respect to contact to the FBI, when in May and June 1979 two people called the San Diego office to complain and then to go in, an investigation was promptly opened on Meltzer. Meltzer was not recognized as a former FBI informant. He had been closed as an informant several months—I do not have the exact date, several months—before that. He was not recognized. That is a question, whether we should have recognized Meltzer as an informant in the San Diego office.

I am not trying to buy off on that question, but he was not recognized.

When we finally did recognize Meltzer and began to talk to our own people, then his former handler in Florida contacted him to find out what he was doing and why these calls were coming in, the purpose being to get him to behave himself.

Meltzer apparently, and I am only getting it as you have explained it to me, apparently used that information then to imply that he had some kind of FBI credibility.

Mr. HYDE. One of the witnesses, Richard Stratton, said and I quote, "It was really amazing that almost every time someone contacted anyone to get some information on Mr. Meltzer, Mr. Meltzer seemed to know about it a short time later."

Well, I do not want to pursue this beyond my time but just to suggest—I just have some questions as to whether the FBI knew what Meltzer was up to and what its obligation was to these innocent parties who were being victimized.

Certainly when you call the Chase Manhattan Bank and they say, "Oh, yes, there is this money on deposit," and when you call the FBI, within minutes or hours, you get a call from Meltzer asking what are you going to the FBI for, it raises some questions.

Mr. WEBSTER. Of course it does, Congressman Hyde.

As I said earlier, I think Mr. Elzay's record reflects that he received no such calls. As far as the FBI's obligation, I am aware of one individual, late in the investigation, when we were in fact aware of Meltzer, who called, I believe from Denver—and I have his name, it is Harlow—who called the FBI and, as a result of his conversation, he did not invest. All these other people who called had already lost their money. This was not a question of keeping them from losing their money, they had already lost it.

It will be the testimony of the one agent at Abdul who received a call that he told the one person who called, and I do not remember, I do not recall whether he left a name or not, to call the FBI if he had some question about it.

Mr. HYDE. We had a Joel Chasen who wanted to buy a soccer team, who was led to believe that he could. He contacted, he said, the Bureau in New York and Washington. He testified he was told that Meltzer was fine, everybody was good as gold. He said he contacted the Bureau in August 1979 and was not recontacted until December, at which time he was told to be quiet and not tell anyone anything.

Mr. WEBSTER. Those are disturbing reports. But as you know and I know, those are allegations that will be developed in the courtroom. The FBI keeps fairly meticulous logs and presumably this person had a record of a long-distance call that he can establish if he has one. So I would rather avoid the issue of the facts of the case other than to assure you in response to a reasonable question that in this case it is my view that the FBI did not let people go down the drain in order to protect Meltzer or in order to protect Abscam. There may be other types of situations in the future, there have been terrorism-type cases in the past, there have been all kinds of questions where that hard philosophical issue comes up.

Should Winston Churchill have let Coventry be bombed at the risk of giving up the code? I do not think that is the issue in the Abscam-Meltzer case. I do not think that happened.

Mr. HYDE. I thank you.

Mr. EDWARDS. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I want to congratulate you for having these hearings. I think the interest with which this hearing has been received is evidence that the policy questions and the interest generally in the subject have not been exhausted.

I was very interested in the line of questioning just pursued by the gentleman from Illinois. I attended those hearings and heard the same complaints of innocent victims of some of these operations.

Judge Webster, in your testimony you said the guidelines recognize that inducements may be offered to an individual even though there is no reasonable indication that the particular individual has engaged or is engaging in an illegal activity that is properly under investigation.

What is the public interest in offering such inducements under those circumstances?

Mr. WEBSTER. I think that the public interest probably is identified in the two circuit court opinions that have dealt with the need for prediction in the second circuit, fairly recent opinions that reviewed the law in this area. I think the public interest is this: I

referred, if you will recall, in my statement to consensual crimes, where you do not have clear evidence that someone is engaging in prostitution, is engaging in gambling, is engaging in narcotics, or is engaging in bribery. Those have a willing participant on each side of the transaction. You have no witnesses, as a rule, to that type of situation.

What you have is a smell. You have people who talk about it and talk around it and the tendency in our investigations is to focus upon this kind of activity, rather than upon particular individuals and create a setting in which these allegations, or smell if you want to call it, either are true or not true.

That was largely true in Oklahoma where so many people had been receiving kickbacks for every contract, virtually, let by county commissioners in the majority of the counties in Oklahoma.

No clear evidence as such, but a clear kind of smell. We focused on that, established a business in which we, with other businessmen, learned more about these practices, participated in those practices, and did it. We did not have, to start off with, particular candidates. That is true to some extent in the successful investigation of the dock, longshoremen, the smell of kickbacks.

We have to get a handle on knowing how they take place. That involves getting close to corrupt individuals. That often involves the cooperating witness who is, in a sense, our great blessing and our great risk, because he can misbehave and sometimes does. But he brings us close to the people we have been hearing about in these smells.

Now these people began to talk about their contacts. And that becomes even more remote. But if we say that we must have a predication, a prior bite by the dog, we wipe out the decoy in the park, we wipe out a whole range of sting operations, a whole range of undercover things.

Now, as I understand it, Congress in its own legislation took pains to be sure that it was not excluding itself from investigations relative to bribery under this law that I described in the second and third circuits.

The Supreme Court has held that Congress could exclude itself by imposing special requirements. It has not done so.

So the public interest, it seems to me, is to establish whether these things in fact are taking place.

But also, as I think your question suggests the answer to the problem, it does suggest that a higher level of responsibility is required before such activity be authorized.

Mr. KASTENMEIER. I would think so. I wonder whether we do not need something more than a smell. I say that because you have indicated yourself, some of the cooperating witnesses were engaged in puffery.

Mr. WEBSTER. That is right.

Mr. KASTENMEIER. And I wonder whether your technique with reference to verifying the targets offered by these cooperating witnesses is adequate to avoid the puffery; whether you do not require some additional level of verification as to whether the individual really has been engaged in some various activities in the past.

Mr. WEBSTER. I think that is a fair question, but it is a very difficult one to answer. If we nose around, check in somebody's neighborhood, ask about their reputation in the community, if we do these other things, we often raise more of a problem for the individual than to do what we did in this case, which was to establish a scenario in which only those who come are likely—now I did not say beyond any doubt, but are likely, are likely to come if the rules are followed, only those that are likely to come who have an interest in doing this kind of thing.

And as I mentioned in the statement, and I have said publicly a number of times, we built into our approach a way of selecting out those who might have come by error, and by making the criminal nature of it very apparent from the beginning. I realize there are criticisms directed against that that have some merit. But I believe the end goals of resolving the issues and protecting them are worthwhile.

You know, Congress passed the, what I call the Special Prosecutors Act, in which we are mandated to investigate any kind of smell, any kind of allegation, whether unsubstantiated or not, about a given list of officials close to the President of the United States, and we do, on a regular basis.

Mr. KASTENMEIER. That is an interesting question.

My time has expired, Mr. Chairman, but I appreciate it.

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

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Let me state at the outset that I believe that one of the first responsibilities of the FBI is to root out and prosecute public corruption, so that the public will have confidence that its Government is operating in an honest and ethical manner.

As you may recall, during the last Congress I had the honor, and I use that term advisedly, of serving on the Ethics Committee. So I had more of an intimate overview of FBI activities, in terms of the allegations against some of our colleagues, than members of this subcommittee did.

My main concern, as is the chairman of the subcommittee's, is over the control that the FBI had over Mr. Weinberg. I recall that during my reading of the rather lengthy transcripts of the trials of some of the former Congressmen who were indicted and convicted in Abscam that there was testimony which came out to the effect that Mr. Weinberg did not file income tax returns for the period that he was on the FBI payroll. I would hope that he would subsequently have to face the music on that.

But I am more concerned about the story that was nationally syndicated by the Gannett News Service on April 20, 1982, to the effect that Mr. Weinberg may very well have used phony certificates of deposit to set up his own private scam over and above what the FBI was doing relative to Abscam. And my question is, Are you sure that Weinberg did not forge certificates of deposit for his own use, separate and apart from Abscam rather than using the forged CD's within the Abscam context?

Mr. WEBSTER. So far as I am able to determine from the questions I have asked and the assurance that I have been given and the documents that I have been shown, that was not the case. The certificates of deposit were used as a part of the scenario in actually three different States, trying to develop credibility with crimi-

nals by showing a willingness of the Abdul Enterprises Co. to engage in criminal conduct and to be looking for shady deals.

The first phase of that involved three individuals, one of whose names was Bell, I cannot quickly recall the other two. And Weinberg was successful in obtaining $200 million in face value of certificates of deposit from that group. It was an elaborate scenario, using these to get money out of the Arab money by collateral and other means.

The second group involved, as I recall, Mr. Rosenberg—I could be mistaken about that, but I think I am correct—and in that situation we have satisfied ourselves that Mr. Weinberg did not supply the forms as was alleged in some of the postconviction cases to those who produced the bogus certificates of deposit.

In the third instance, involving Mr. Errichetti, Mr. Weinberg did in fact supply the forms for the bogus certificates of deposit. This was known to the undercover agent and to the supervisor John Good. So this was not a scam on us. We knew it and we approved it.

Mr. SENSENBRENNER. Thank you very much.

I have no further questions Mr. Chairman.

Mr. EDWARDS. The gentlewoman from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman. And thank you for being here this morning.

I guess my feeling is, No. 1, I agree with the gentleman from Wisconsin and the chairman that certainly we want the FBI not to be engaged in trying to weed out public corruption wherever it is, all we have to make Government work is trust. So the other piece of that, though, that concerns me the most is, again, the same thing, the supervising of the Mel Weinbergs of the world.

I am very perplexed about the victims because obviously many came from my region and really felt they have been terribly wronged by the FBI. Now I understand your parameters of the questions that you do not want to answer because of the court cases.

But one of the things you stated in answer to Congressman Hyde's question was that when inquiries were made by individuals the FBI started looking into this; is that correct?

Mr. WEBSTER. When the FBI itself was contacted.

Mrs. SCHROEDER. And that would have been?

Mr. WEBSTER. As I recall, I can refer to my notes, but as I recall that was in May and June, the end of May and the first of June 1979.

Mrs. SCHROEDER. Now the thing that disturbs me about that is, I recall many of the witnesses talking about this still going on in the fall of 1979.

Mr. WEBSTER. I believe the record will show that Special Agent Davis, who was assigned that responsibility, went out and interviewed all of the known victims. The case was given to the U.S. attorney, I believe it was San Diego—I think that is right—in December I think, 1979, and he did not reach a prosecutive decision on it for 2 or 3 months. It was not ready to go to the grand jury as far as he was concerned.

Mrs. SCHROEDER. I see. So nothing really happened to stop Meltzer in that interim? Was there any way—my frustration, I guess, was there any way to sense out right away what Meltzer was doing, that he was using the FBI to rip off citizens?

Mr. WEBSTER. I think during that investigation by Davis it was apparent that that is what Meltzer was doing.

Mrs. SCHROEDER. But why did it take so long, unless I have the dates wrong; it seems to me that is an incredible period of time to figure that out.

Mr. WEBSTER. I do not know how many people after 1979 lost money. I have to say that I do not have my facts clear on that. All that came up here I am told had lost their money before that time, before any calls were made.

Mrs. SCHROEDER. My recollection was there were some in the fall. Didn't we have testimony to that?

Mr. HYDE. October 1979.

Mrs. SCHROEDER. October 1979. So that seems to be——

Mr. WEBSTER. Did they make a complaint, do you know?

Mrs. SCHROEDER. Yes.

Mr. WEBSTER. Would we have a way of knowing about them?

Mrs. SCHROEDER. Well, they said they made a complaint. I would appreciate very, very much if you could sort that out, because I think every one of us here was——

Mr. WEBSTER. Sure.

Mrs. SCHROEDER [continuing]. Was very distressed about how Meltzer was able to use the FBI, Chase Manhattan, and fuse all this up to do his own little personal moonlighting scam on innocent people.

Mr. WEBSTER. I have to tell you that I am not happy with any time a witness who has been a cooperating witness goes off the reservation.

Mrs. SCHROEDER. I think that is one of the things we would really like to look at, because while we get upset about public misuse of funds, that is also a misuse of the public services, I think, when somebody uses the FBI that way.

The other allegation I would like to look at that has worried me a lot, I am sure you are aware of many allegations that Mel Weinberg solicited and accepted gifts from some of the targets of the Abscam investigation.

Are you aware of those allegations?

Mr. WEBSTER. I am aware of those allegations. I am also aware of the testimony given under oath in the trial proceedings in New York and that Judge Pratt found no basis for giving credence to those allegations. Now that is about where we are on it.

I would like to know the answers beyond the swearing match that took place; if there is any other evidence, we want it. We have made a very sincere effort to secure that evidence in Florida and if there is any way of making it clear, why we will do so.

Mrs. SCHROEDER. I guess my problem is I am also aware that Marie Weinberg, the deceased wife, has a sworn affidavit on file in the Federal court saying that these gifts did in fact occur and that ABC News reported they had traced the serial number on some of these items, and yet the FBI has been unable to trace it.

I am a little worried that maybe we should contract out to ABC News.

Mr. WEBSTER. Well, we welcome all the help we can get. If they have any information we would be very glad to receive it from them.

Mrs. SCHROEDER. Are you aware that they claim they traced the serial numbers on this?

Mr. WEBSTER. No, I am not.

Mrs. SCHROEDER. Are you aware of Mrs. Weinberg's sworn affidavit?

Mr. WEBSTER. I am aware of the affidavit. I am also aware that it was submitted and reviewed in New York by the district judge and found not to have any relevance to the cases that were tried.

Mrs. SCHROEDER. And are you aware of Joey DeLorenzo's testimony before the grand jury that ABC News then picked it up and traced it?

Mr. WEBSTER. You have to help me on that one, I am not——

Mrs. SCHROEDER. I guess I am saying that the supervision issue does disturb me a whole lot because again the innocent victims come from my district and I think that is a great tragedy. I really worry when I read allegations about Mel Weinberg having solicited gifts, his wife says: "Yes, that is right, he did"; ABC tracing him through all of this, and the FBI can't find it.

Mr. WEBSTER. Well, you catch me being unable to respond to something that has been given to us. We are interested in this.

Mrs. SCHROEDER. My time has just expired.

Mr. WEBSTER. Well, let me say, Congresswoman Schroeder, that I really do not believe that that particular activity reflects upon the guilt or innocence of those involved. You have a right to wonder whether or not that is proper management.

Mrs. SCHROEDER. And that is exactly what I am targeting the question to. I am not saying it has anything to do with the guilt or innocence of those involved. I am strictly going to proper management of the (*a*) Meltzer area and (*b*) Weinberg.

Mr. WEBSTER. We do know that he had three very expensive watches that were turned in to us, we do know of other matters that were reported to us. We do know that he has sworn that he did not receive them. An effort to keep crooks honest during the time they are with us is a major undertaking.

Mrs. SCHROEDER. When you say that you admit how difficult it is, that is why I think you ought to be terribly interested.

Mr. WEBSTER. I do indeed, I do indeed admit—I do not admit it, I advance it as one of the problems that we do have. But if we do not have a cooperating witness, we do not have an entre. So we must try to manage him. We can't lock him up 24 hours a day.

Mrs. SCHROEDER. You are admitting they are not Boy Scouts and I would think the FBI would be 20 times more vigilant in what happens when you release the person from the operation or what have you to make sure.

Mr. WEBSTER. We must, I agree, we must be vigilant.

Mrs. SCHROEDER. Yes.

Mr. WEBSTER. That is essential and it is one of the conclusions that any objective analysis of undercover work would bring us to. That is our greatest challenge, is to be sure that improper things do not happen.

I do not want to judge this one because thus far Mr. Weinberg's position has been sustained in the courts. But I do think it is important that we take certain steps, as we have, as we learn from mistakes and also from careful analysis, from some of those cases that predated our undercover review committee where we could identify these problems. We make a special effort now to keep the cooperating witness away from backstops, that is corporations or individuals who provide cover for us, to deal, so that they do not pick up indicia of authority or other types of equipment that they could use in some other scam purpose.

They know that if we find them we will prosecute them. Mr. Meltzer has been prosecuted and convicted of the things he did in San Diego.

Mrs. SCHROEDER. But a whole lot of people were hurt very badly by that, that were innocent, from what we have heard.

Mr. WEBSTER. Yes.

Mrs. SCHROEDER. I am just saying that we are all in agreement and I just feel that there should be much more vigilance on that, because that is as bad as public corruption by public officials. It is just as bad to have the FBI allow itself to be used, even inadvertently. I am not saying you consciously did it.

Mr. WEBSTER. I agree.

Mrs. SCHROEDER. By not having constant supervision.

Mr. WEBSTER. I agree, we should be very careful of that. The courts will decide, of course, whether we have any culpability in the cases of your constituents. If we do, I want to see them made whole.

Mrs. SCHROEDER. So do I.

Mr. WEBSTER. OK.

Mr. EDWARDS. Mr. Washington?

Mr. WASHINGTON. Thank you, Mr. Chairman.

Mr. Director, a lot of people, including myself, are still concerned with the knotty fundamental question of why under certain standards certain individuals are targeted.

Mr. WEBSTER. I am sorry?

Mr. WASHINGTON. Why and under what circumstances certain people are targeted. Now we have listened to this magnificent superstructure which you described; on paper it looks good. We are aware, of course, that you have made distinctions between special agents, informers, bagmen, and we listened very carefully to your description of the scenario you are trying to put together of structuring it in such a way that you get only those who are likely to come or, as you phrased it, select themselves.

The question remains, How could the name of Senator Pressler be involved in this, with the subsequent problems he has had politically? How could names like Congressman Rodino, for example, be brought in this, clearly innocent people, notwithstanding all of this careful structure that you put together, all of these instructions about entrapment that you have given ostensibly or purportedly to special agents, et cetera, et cetera? Yet certain people are today under color, unjustifiably so, color of doing wrong, unjustifiably so, because of what you put together.

How can you explain that? How did it get between the cracks the names of Pressler, Rodino, and so forth?

FBI UNDERCOVER GUIDELINES

OVERSIGHT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

FBI UNDERCOVER GUIDELINES

FEBRUARY 19, 25, AND 26, 1981

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FBI UNDERCOVER GUIDELINES

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.

I. 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 may 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 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.

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 analysis of these issues from the perspective of the forth amendment, and the recently promulgated Attorney General's Guidelines on FBI Undercover Operations.

1. 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 loyalty 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 1965, § 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. 3 (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, establisnes 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

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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 decision-making process for such operations and to fix responsibility for the decision, once made, are particularly commendable. The Guidelines also impose significant limits on undercover 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 committing 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. *United 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. *United 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, 430-436 (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 newspaper 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. ___ (Cr. 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 excessively 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[a] specifically permits the Director to approve "otherwise illegal activity involving a significant risk of violence or physical injury to individuals." While Paragraph I.5[a] prohibits undercover employees from engaging in illegal acts designed to obtain evidence, Paragraph I.11[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.6[c] 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 estaolished 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?

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.]

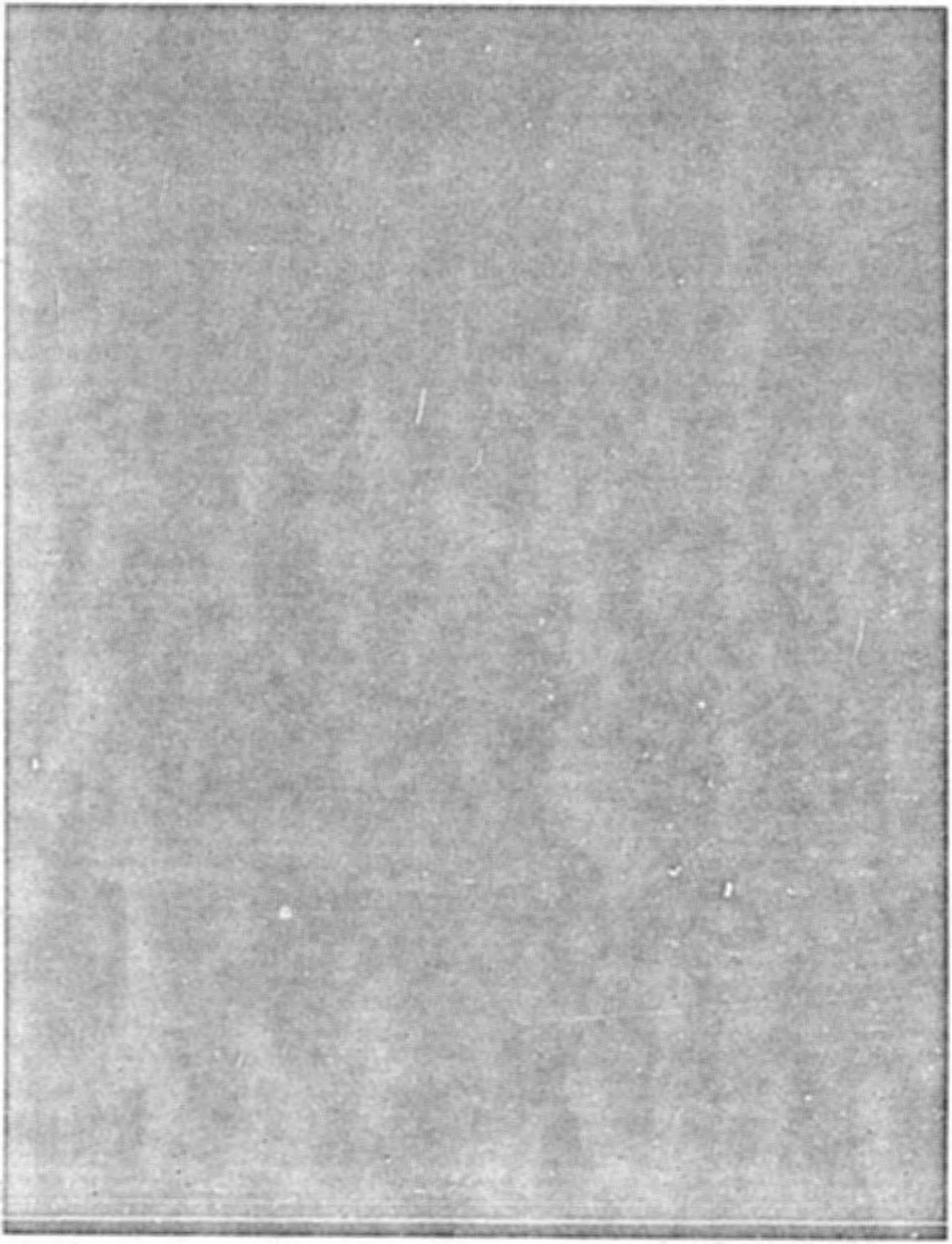
Mr. EDWARDS. The testimony of both Professor Seidman and Professor Stone has been very helpful. We thank you very much

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.]



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 on the 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 attention 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. Ronnie 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 and 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 not 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 the 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 pipeline 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 opportunity?

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 integrity 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 tape-recorded 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