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

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

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

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

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

According to media accounts the convicted swindler in Abscam described by Judge Fullam as an "archetypical, amoral fast-buck artist"[1] had a 3-year prison sentence waived and received $133,150 for his cooperation in the two-year investigation. Accounts in an internal Justice Department memorandum further indicate that he "would be paid a lump sum at the end of Abscam, contingent upon the success of the prosecution." In testimony the informer acknowledged that he expects to make more than $2,000,000 from his undercover activities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Isolation from other contacts and the need to be liked and accepted can have unintended consequences. "Playing the streets" may increase cynicism and ambivalence about the police role and make it easier to rationalize the use of illegal and immoral means. Writing of undercover agents in graphic terms in his novel Mother Night, Kurt Vonnegut tells us that "We are what we pretend to be, so we must be careful about what we pretend to be." Police may become corrupters or purveyors of the vice they set out to control. For example, as part of an investigation, a Chicago policeman posed as a pimp and ministered to a prostitution ring. He continued in the pimp role after the investigation ended and was suspended. A member of an elite drug enforcement unit in the Bahamas area became addicted and retired on a disability pension. The financial rewards from police corruption, particularly in gambling and narcotics, can be great and chances for avoiding detection rather good. Ironically, effective cross and supervisory checks for undercover work often go hand in hand. Police supervisors and lawmakers may have great difficulties in knowing what undercover police personnel are really up to.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

out since 1974. But a careful re-analysis of these data by fencing expert Carl Klockars (1980, "Jonathan Wild and the 'Modern Sting'" in C. Yapel, History and Crime: Implications for Contemporary Criminal Justice, Sage Publications, Beverly Hills, Cal.) casts serious doubt on the quality of these data and their interpretation. Klockars concludes that there is no sound statistical evidence to suggest that the sting operations produced a decline in the rate of property crime. An analysis of the use of Federal funds for anti-fencing projects in San Diego over a five year period concluded that neither the market for stolen property, nor the incidence of property crimes had been reduced (S. Pennell, Sept. 1978, "Fencing Activity and Police Strategy," The Police Chief). Mary Walsh in Strategies for Combatting the Criminal Receiver of Stolen Goods (1976, Washington, D.C.: Law Enforcement Assistance Administration) notes that police engaged in anti-fencing operations were positively effected by the experience, but had "... serious questions as to what had really been accomplished. If the evidence is thus far lacking that such tactics reduce crime on an aggregate basis, is it possible that along some variables they may actually increase it, or through other unintended effects make law enforcement more difficult?"

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

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

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

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

(1) Under what conditions are the gains worth the costs?

(2) Can the gains be obtained in less costly alternative ways?

(3) What additional policies, guidelines, oversight practices, procedures, and training are needed to minimize problems, for those cases of last resort where the tactic may be deemed appropriate?

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

B. TYPES OF UNDERCOVER ACTIVITY AND THE RECENT GUIDELINES

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

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[1] G. T. Marx, "The New Police Undercover Work" Urban Life, vol. 8, January 1980, 399-416.

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

TABLE I.—*Dimensions for contrasting undercover activities*

Source for initiating the investigation: In response to citizen complaints or crime patterns	On the basis of criminal intelligence
Criteria for selecting targets: Targets or locations chosen on the basis of	Random integrity tests
Responsibility for initiating the crime: Subject selects opportunity	Police supply opportunity
Degree of activity in undercover role: Passive	Active
Nature of the role: Victim	Criminal participant
Type of setting: Natural environment	Artificial environment
Who plays the undercover role: Police officers	Unwitting informers

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

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

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

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

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

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

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

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

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

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

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

THE GUIDELINES

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

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

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

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

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

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

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

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

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

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

Other areas in need of work or clarification are:

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

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

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

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

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

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

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

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

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

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

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

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

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

C. BROAD CHANGES IN SOCIAL CONTROL

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

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

Fifty years from now will observers find our wondering about the propriety of police agents trying to bribe Congressmen, distributing pornographic film, and running fencing operations equally quaint? FBI expenditures for undercover work have more than quadrupled in the last three years, going from one million to a requested 4.8 million dollars for 1978. In recent years millions of dollars of new federal aid has gone to local police for undercover activities.

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

Rather than only trying to decrease the opportunity structures for crime through a uniformed police presence or more overt "target hardening" approaches involving more secure physical structures and education for crime prevention, authorities now seek to selectively increase the risk of any structures for crime ("target weakening") operating under controlled conditions with new and broad police. Anticipatory police strategies have become more in fashion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

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

PREPARED STATEMENT OF PAUL CHEVIGNY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. CHEVIGNY. Thank you very much.

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

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

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

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

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

Nevertheless, there are weaknesses, structural weaknesses in them.

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

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

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

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

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

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

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

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

But the guidelines can be changed overnight. They have been changed repeatedly. And, furthermore, they are not even enforce-

able. There's no sanctions for them. If not followed—the failure to follow them doesn't give anybody any rights, at all.

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

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

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

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

We need a law.

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

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

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

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

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

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

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

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

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

Let it be reasonable suspicion.

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

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

Well, obviously, provisions can be made for emergencies.

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

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

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

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

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

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

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

I don't know why.

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

Mr. EDWARDS. Professor Chevigny———

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

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

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

Isn't that the problem?

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

Mr. HYDE. Yes.

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

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

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

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

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

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

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

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

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

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

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

Mr. HYDE. You want that public, though?

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

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

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

Mr. SENSENBRENNER. Would the gentleman yield?

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

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

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

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

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

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

Mr. SENSENBRENNER. Would the gentleman from Illinois yield?

Mr. HYDE. Yes.

Mr. SENSENBRENNER. Building on that particular statement——

Mr. CHEVIGNY. Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. HYDE. What about Operation Lobster?

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

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

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

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

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

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

Mr. CHEVIGNY. Yes, sir.

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

Mr. CHEVIGNY. Yes, sir.

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

Mr. CHEVIGNY. Yes.

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

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

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

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

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

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

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

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

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

Mr. CHEVIGNY. I'm all for that.

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

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

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

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

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

Mr. HYDE. Thank you.

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

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

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

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

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

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

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

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

Mr. EDWARDS. Thank you.

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

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

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

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

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

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

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

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

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

Mr. MARX. Yes.

Mr. HYDE. That's all.

Mr. EDWARDS. Mr. Kastenmeier?

Mr. KASTENMEIER. I have no questions.

Mr. EDWARDS. Mr. Lungren?

Mr. LUNGREN. Nothing.

Mr. EDWARDS. Counsel?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. LUNGREN. How about a Republican?

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

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

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

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

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

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

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

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

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

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

What would you, as a social scientist, need?

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

after they're gone. People are transferred. They've forgotten what happened.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. Thank you, Mr. Chairman.

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

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

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

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

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

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

Mr. CHEVIGNY. Oh, sure.

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

Mr. CHEVIGNY. Lack of what?

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

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

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

Mr. BOYD. Should good faith be a defense?

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

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

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

Mr. BOYD. After the fact?

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. CHEVIGNY. Yes.

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

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

Mr. KASTENMEIER. Thank you.

Mr. LUNGREN. Mr. Chairman?

Mr. EDWARDS. Mr. Lungren.

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

Mr. CHEVIGNY. Do you want to answer it?

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

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

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

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

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

Mr. CHEVIGNY. Yes.

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

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

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

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

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

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

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

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

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

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

Mr. MARX. Yes.

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

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

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

Mr. HYDE. Indeed.

Mr. LUNGREN. Fine.

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

Mr. HYDE. Excellent.

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

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

FBI UNDERCOVER GUIDELINES

THURSDAY, FEBRUARY 26, 1981

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

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

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

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

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

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

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

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

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

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

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

Mr. SENSENBRENNER. No remarks, Mr. Chairman.

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

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

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

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

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

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

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

Mr. EDWARDS. Is there objection?

Mr. SENSENBRENNER. No.

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

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

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

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

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

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

I may say that with regard to possible disruption that your colleague, Congressman McClory recently sent a letter to Attorney General Smith. The letter, which was dated January 23, asked whether the guidelines would have an adverse impact on the oper-

ational effectiveness of the FBI, and particularly whether their use—whether the guidelines would make the use of undercover operations by the Bureau difficult, if not practically impossible. That possibility, of course, was much in our mind from the outset of efforts to develop the guidelines. I know that in reviewing this issue, and indeed, in preparing materials which will soon result in a responsive letter to Congressman McClory, Director Webster has indicated that the guidelines do not make the task of the Bureau more difficult.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Well, at that point, the captain has started from being merely a subject, because of the information alleged, to possibly an intermediary. But he is going to bring in the bigger fish, ordinarily, and of course, we're even more interested in the [illegible] prosecute that individual than the captain.

So he becomes a middleman. He is not a willing middleman. Obviously, he has no idea that this gambling operation is phony and it's a setup in order to detect police corruption.

There are, of course, middlemen who are willing. They are referred to in FBI terminology as cooperating witnesses. They present special problems because of possible difficulties of total control by the Government. But it's important to recognize, I think, that in most situations the middleman is not totally manipulated by the Government. The middleman himself doesn't even know that it's an undercover operation.

Now, in the case where the middleman is a cooperating individual, is fully knowledgeable, there is a risk that he will misrepresent the statements or activities of a suspect, that he will produce at our warehouse, or wherever the location might be, individuals who in fact are innocent. There is, therefore, the risk that an innocent individual may be offered the criminal opportunity. There are two reasons why this risk, even aside from guidelines protection, is not very great. The first is, if a cooperating individual, a middleman, brings in an innocent person, we quickly discover that he's either exaggerating or he doesn't know what he's talking about, so we no longer put so much faith in what he says. It corrects itself rather fast.

It is quite true, in the meantime, one or two individuals who are completely innocent might be drawn into the operation to the extent of having the offer made. But as, I think it was the second circuit, recently observed, that is not necessarily disastrous, because the honest man simply rejects the offer and departs.

It is a risk; it is undesirable. It is not a big risk, and the guidelines minimize it by, for example, stressing that the underlying criminal nature of the offer has to be made very clear and communicated directly to the suspect. No offers are made through third parties. They're face to face, and they're in clear terms.

And I might say that with regard to the clarity of the criminal nature, we frequently have had circumstances in actual operations where extensive script writing, in effect, was done by teams of lawyers from both the department and the FBI. So that the undercover agent who actually makes the offer—we don't let the middleman make the offer; the undercover agent makes the offer—does so in terms that are unmistakably clear that this is a crime that's being offered.

OK. Let me just make a couple general observations, if I may

First, the guidelines emphasize procedures. But the emphasis on procedures is not to minimize the importance of the judgment calls that have to be made in these operations. It really is judgment that's the key here.

And in this regard, the fact that the FBI now has been conducting major undercover operations in all areas of its investigative jurisdiction for several years means that we have a lot of experience. We can benefit from this experience, and we are benefiting from the experience.

It is important, I think, to avoid the confusion that may have plagued one or more of your earlier witnesses. There are, in effect, three time zones. There was the first year or so of major undercover activities. That's the first time period.

The second time period is the last year or two, pre-guideline, but we had the committee, the review committee. We had the structures in place. They just hadn't been formalized.

And then, of course, the third time period is the future.

Some of the celebrated undercover operations in which, obviously, problems have come up fall in the first period, where there were neither the informal procedures nor the committee, and, obviously, not the guidelines. Operation Front-Load is an example of that. It happened because the review committee wasn't in place.

Now, the important thing, as I tried to make clear earlier, is that while there's a huge difference between the first time period, where there was very little structure or not enough structure, at least, and the second time period is a vast difference. But the difference between the second time period—the last year or two—and the immediate future is very little. It is mostly a question of formalizing structure and policies and practices already in place.

Now, with regard to how that all works, I would like to make this observation. The guidelines emphasize the approval process, because that is what we thought deserved the most emphasis. That is what is going to bring the judgment of supervisors and outsiders to the field office involved to bear on this.

And as you know, the guidelines provide for the operation to be recertified by the committee and the appropriate senior FBI officials under any one of three tests. No. 1, at a minimum, every 6 months, no matter what else. No. 2, anytime the nature of the operation changes; if it changes every month, then there's a whole new review every month. And No. 3, any time the operation spends more than a trigger sum, which is $20,000.

The practical effect of those three triggers of renewed scrutiny by the committee is that in the largest and most sensitive operations, the reviews aren't every 6 months; they're much more frequent than that. In addition to formal reviews by the committee, however, there are reviews which sometimes are week-to-week, or even day-to-day in the most sensitive cases.

There are innumerable examples, for instance, where the Director of the FBI himself, personally reviewed whether a particular circumstance, as to a particular suspect, warranted the making of an offer of a criminal opportunity.

So, the control of these operations, and minimizing the risks of untoward events occurring, rest as much on this ongoing supervi-

sion at all levels of the chain of command in the FBI, as they do on the committee proposal certification process.

Now, I'd also ask the subcommittee, in reviewing the undercover operations guidelines, to keep in mind that those guidelines do not form the entire system for controlling undercover operations.

The guidelines perhaps could be analogized to the key-stone of an arch. But there are other stones in the arch and they're important stones. There are court decisions, statutes enacted by Congress.

You're familiar, for example, with limitations in our appropriations on using money in certain undercover operations contexts. Because these other provisions were already well established, formalized, written down, being followed, we didn't repeat them all in the guideline.

For example, the courts have elaborately developed and closely defined the law of entrapment. In the guideline, we don't repeat all that or try to even summarize it. We just say, of course, stay far away from entrapment.

Now, another point that I think bears keeping in mind in reviewing the guidelines is that they, of necessity, have to apply to an extraordinary variety of different kinds of operations. One of the troubles with the terminology, undercover operations, is that it might lead some to think that they're largely similar or that there may be two or three major categories. In my opinion, if you break it down into categories, you get into dozens or hundreds, and some of them are extremely different from others. The guidelines have to be designed to cover all of them.

It is also important to keep in mind which operations are essentially typical, and which are atypical.

The fencing sting-type operations are typical. And operations like Abscam are typical. I do not think that this is the best viewpoint to look at the guidelines, only or primarily from the standpoint of how they would effect one particular operation. The real question is: How do they effect the whole range of operations?

Now, in conclusion, I would urge members of the committee and the Congress to reserve judgment on the guidelines.

I'd suggest that the issues about whether these guidelines should be changed, whether they should be codified, if so, whether they should be codified in this form or some other form—all should be reserved.

For one thing, we need substantial experience actually operating under the guidelines before we'll all have a sound basis for making final conclusions on these kinds of matters. For another thing, Attorney General Smith certainly should be given the opportunity to reach his own conclusions concerning these guidelines. I would suggest that what matters is how they actually work in practice. That's how they should be judged. Experience is really the best test.

I know that you've had eminent lawyers, and law professors, and scholars testifying about the guidelines, and I've carefully reviewed their prepared statements. And I think that observations of all interested and knowledgeable parties can be helpful. But I would suggest to the committee that law professors and lawyers—so I'm including myself—have an inherent tendency to microscopically

examine language and to think that that's the most important thing.

I would suggest with regard to these guidelines, that's not the most important thing. The most important thing is: How do they actually work in practice?

After an appropriate period of trial and error, looking back in actual cases where they were applied, are the results seem to be satisfactory, or not?

I think that the process followed with regard to the Levi guidelines maybe serves as a good model. They were put into effect. They were followed for an extensive period. And then the examination activity began to really come to bear. I would suggest that the approach adopted by Congress regarding the Levi guidelines might also be the best approach regarding these undercover operations guidelines.

Mr. Chairman, that concludes my statement. And I want to apologize about the fact that we got it to the committee so late. But we are in still a transitional circumstance at the department, and there were a number of reasons why it was difficult to provide the statement earlier.

I'd like to stop now, because I've talked for so long, and perhaps too long, I would ask if it meets with your approval, Mr. Chairman, if at some point after responding to questions by the members, I might have just a few minutes to quickly respond to a few selected points made by Professors Seidman, Chevigny, and Marx.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Michel. It's always a pleasure to have you here.

Mr. Michel's prepared statement follows:

PREPARED STATEMENT OF PAUL R. MICHEL, ASSISTANT DEPUTY ATTORNEY GENERAL, OFFICE OF THE DEPUTY ATTORNEY GENERAL

ATTORNEY GENERAL'S GUIDELINES ON UNDERCOVER OPERATIONS

Chairman Edwards and members of the Subcommittee on Civil and Constitutional Rights, I am pleased to have the opportunity before the Subcommittee on several pending matters in the Department of Justice policy governing FBI undercover operations, to wit: [illegible] the Guidelines issued by Attorney General Civiletti on [illegible]. I'm not prepared to testify about the Guidelines at this time because I [illegible] and [illegible] questions about the [illegible] part of the [illegible] Guidelines. Attorney General Smith, along with other [illegible] considering the [illegible] Guidelines in order to [illegible]

Last March, the Subcommittee [illegible] the Director of the FBI and the Assistant Attorney General in charge of the Criminal Division. Their appearance followed a [illegible] public disclosure of several [illegible] undercover operations, including ABSCAM. In the meantime, [illegible] all the defendants brought to trial on the basis of ABSCAM, although the [illegible] surrounding some aspects of that operation continue to the [illegible] debate. Also, the Department and the FBI, after [illegible] completed Guidelines on Undercover Operations. With Director Webster's concurrence, these Guidelines were issued by Attorney General Civiletti [illegible].

The Guidelines do not differ substantially from established procedures and practices. These practices and procedures were gradually and carefully developed over the past 2 years. Their implementation of the Guidelines should not cause confusion or disruption. Indeed, I have been advised by FBI officials, including the Assistant Director of the FBI's Criminal Investigative Division, that the FBI has no significant questions of interpretation and anticipates no real problems. This fact

came as no surprise because of the careful and cooperative process which produced the Guidelines.

In the early Fall of 1979, the Attorney General asked the Assistant Attorney General in charge of the Criminal Division to supervise the drafting of possible Guidelines on various topics, including Informants, General Criminal Investigations and Undercover Operations. The broad outlines of these Guidelines were taken from the proposed FBI Charter which had been developed in the preceding year by FBI and Department officials working together. Under the Charter, the Department was required to issue Guidelines on major areas of investigative activity. The Attorney General determined, however, that the benefit of Guidelines to the effectiveness of FBI operations had been sufficiently established that interim Guidelines should not await Congressional action on the proposed Charter.

Although Congress did not take action on the Charter proposal submitted in the Summer of 1979, various committees, including this one, held hearings on various parts of the Charter. The hearings sharpened the issues and helped [illegible] the reasons underlying each of the provisions of the proposed Charter. The hearings underscored the need to assure that law enforcement activities are not only conducted vigorously and effectively, but also lawfully and [illegible].

The Guidelines, like the Charter, went through numerous drafts which were circulated widely for comment. The drafts were written on the basis of extensive consultation with the FBI officials administering and supervising the Organized Crime, White Collar Crime and other investigative programs. The initial drafting was done by Departmental Attorneys who were members of the Undercover Operations Review Committee which is composed of FBI and Department officials. The drafts were then reviewed by FBI employees at every level in both Headquarters and in the field. This included the Special Agent Investigator, the so-called "street agent." Written comments were prepared and became the basis of extensive discussion among members of the Guideline Review Committee chaired by the Assistant Attorney General in charge of the Criminal Division and included, among others, the Assistant Director of the Criminal Investigative Division, his deputy, the Chiefs of the Organized Crime Section and the Selective Operations Unit, the Special Assistant to the Director, several career Department prosecutors and myself.

While the text changed somewhat during this long process, there was full agreement from the start between the FBI and Department officials on the basic principles. As the process proceeded, only minor disagreements arose and all of them were resolved rather readily in a mutually satisfactory manner. In fact, by the end, there was full agreement by everyone on the Committee. Not a single issue had to be submitted to Director Webster or the Attorney General for resolution. Both personally reviewed the final draft which the Attorney General promulgated.

The process followed was not invented for this particular project. We simply followed the basic model established in 1976 when a Committee commissioned by Attorney General Edward Levi developed Guidelines on Informants, Domestic Security Investigations and Civil Disturbance Investigations. Indeed, some of the members of the earlier Committee also participated in this project. A prime example is Inspector John Hotis of the FBI who, in addition, along with former Deputy Assistant Attorney General Mary Lawton of our Office of Legal Counsel, was a principal draftsman of the proposed FBI Charter.

The Guidelines on Undercover Operations, like those on other topics, were drafted on the basis of certain underlying principles. The three most important of these are:

First, the guidelines should not be a catalogue of detailed do's and don'ts. Rather, they should focus on establishing or formalizing sound procedures to assure that critical judgments are made at appropriate levels of authority and are recorded and susceptible to subsequent review. Second, the Guidelines must be clear enough to be readily understood and followed by all agents and contain standards which are realistic enough so as to not interfere with effective and appropriate investigative activity. Third, the Guidelines should not only meet the requirements of Constitutional and statutory law, but also should reflect sound law enforcement policies.

The Guidelines Committee sought to follow these three basic principles. No one would claim that the Guidelines are perfect. But they are based on ideas which have been proven in practice. The design of the Guidelines is to insure that investigations are conducted both effectively and lawfully. The latter consideration is as important to the continuing efforts of the Government to combat crime as the former because crimefighting ultimately requires acceptance of our work by the courts, including the appellate courts which review the convictions we [illegible] and the Congress which annually appropriates the funds we need and affords the authorities for our activities.

There is, however, one sense in which these Guidelines (or any other possible version) could be found unsatisfactory: the Guidelines cannot guarantee that no

undesirable incident will ever occur. They vastly reduce the risk, but they do not and cannot prevent it from ever happening.

Two examples will illustrate this point. The first involves the provisions establishing the tests which must be met before a suspect may be offered an opportunity to commit a criminal act. While the Guidelines cannot guarantee that an honest person will never receive such an offer, they do make it unlikely. Some outside observers have suggested that the Government must have probable cause of similar past crimes by an individual before it offers him an opportunity for crime such as a bribe. This is impractical. The effect would be to immunize from investigation probably the majority of those who in past operations actually accepted such offers. There are other problems too. For one thing, we often do not know the identity of the subject until he appears at the location where the offer will be made. More fundamentally, this suggestion misunderstands the evolutionary nature of investigations. They ordinarily begin with suspicion and end with probable cause to arrest and indict. To require probable cause before we can make an offer is to trap the FBI in a "Catch-22". If we already had probable cause of a past crime, we could simply arrest and prosecute for the past crime. The reason for making the offer is to convert a reasonable indication of criminality into evidence amounting to probable cause.

The second example involves the provisions governing the handling of intermediaries. Often, all we have to go on when we first focus on an individual is the word of a middleman that he has been criminally involved with the individual in the past or that individual indicated an interest in such involvement. But his credibility will rarely be beyond question. What is law enforcement to do?

Often the only way to corroborate the middleman's assertion is to make the offer. If the middleman brings in innocent individuals who refuse our offer, we will quickly realize we cannot trust him. There is some risk in the meantime that these more innocent individuals will be tempted by criminal opportunity. Under the guidelines, we can generally make the offer only under these circumstances: (1) a middleman implicates and produces the suspect, or, 2) the suspect, hearing of our reputation, comes in on his own. Moreover, once the suspect is there, the offer made to him must be clearly criminal, one that is modeled on real life situations and one in which the incentive, such as the size of a bribe, is not disproportionate to the service sought. The honest man, of course, simply refuses and departs.

We cannot entirely prevent this anymore than we can prevent any innocent person from ever being investigated with conventional techniques such as interrogation of witnesses and examination of documents. Indeed, even searches with warrants, which are far more intrusive of privacy and which do require probable cause, sometimes are directed at persons who turn out to be innocent. Nor can we forego using middlemen, relying only on Special Agents with undercover identities, since it is the real life con men who know and are known by the criminals while our undercover agent, a stranger, would rarely be admitted to the confidences of the criminal suspect.

The Guidelines intend to minimize the risk that middleman will misstate or exaggerate what a suspect has said or done. There is simply no practical way to eliminate such possibilities altogether.

There is, however, an impractical way—that is to require that every such preliminary conversation between a suspect and a middleman be recorded. If such requirement were imposed, a wary criminal could then insist on face to face meetings and search the intermediary, knowing that if the suspected middleman is cooperating with the Government he will be wearing recording equipment and if he is not, he cannot possibly be cooperating with the FBI. Consider too, the risk to the cooperating individual. How many persons will cooperate and act as an intermediary if required to always wear recording equipment, which if detected may result in his being killed?

Finally, I should like to point out that the Guidelines attempt to provide a rational structure for the careful exercise of judgment by requiring increasingly sensitive matters to be reviewed by increasingly higher levels of authority. The emphasis on procedures, however, does not minimize the importance of the judgments themselves. Now that the FBI has been conducting major undercover operations in all areas of criminal activity within its investigative jurisdiction for a number of years, this exercise of judgment will benefit from these experiences. Therefore, we are confident that a few unfortunate events which may have occurred in a few of the past operations are unlikely to be repeated. In fact, we systematically analyze all major operations upon completion precisely for the purpose of refining our undercover techniques. The lessons which can be learned from the past are being learned and applied in present cases.

In the Subcommittee's review of the Undercover Operations Guidelines, it should keep in mind that the Guidelines are not the entire system for controlling such operations. In addition to the Guidelines, there are statutes and court decisions applicable to various aspects and there are also internal working papers of the FBI and the Department. Accordingly, the Guidelines build on but do not repeat provisions already established elsewhere. For example, the Guidelines do not contain lengthy or detailed provisions on entrapment. The reason is that the law is well settled by the courts and this subject therefore did not further development and exposition in the Guidelines.

It is also important to keep in mind that the Guidelines were designed to apply to all kinds to undercover operations—fencing operations, drug purchases, commercial entities such as bars and waste disposal companies and all the rest. These are the typical operations; ABSCAM was atypical. Thus, the Guidelines should be viewed from the standpoint of whether they adequately control, but not unduly encumber, the entire range of undercover operations.

In conclusion, I would urge Members to reserve judgment on the Guidelines in their present form or some modified form and whether to codify them until we have had more experience under them. In addition, Attorney General Smith should be given the opportunity to reach his own conclusions concerning these Guidelines. I submit that now they actually work in practice as what should be judged. Experience is the best test. Rather than evaluating them, as law professors or lawyers might be inclined to do, by closely analyzing the precise language in the text, I suggest instead that we wait and see how they work in real cases. That was the approach adopted by the Legislative Branch regarding Guidelines previously promulgated by Attorney General Levi, and I would suggest, is also the best approach regarding these Guidelines.

Thank you.

Mr. EDWARDS. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Michel, how long do you think it will be before the Attorney General is able to review these guidelines and to respond to Congressman McClory's letter of January 23?

Mr. MICHEL. Congressman, there are really two questions there, and I can only answer one, and that is the second one. That is I know with regard to responding to Congressman McClory's letter, Director Webster has sent material to the Attorney General and I believe that the Attorney General will have that material today.

Therefore, I'm sure that Congressman McClory will promptly receive a substantive response from Attorney General Smith on the points raised in his letter.

Your first question about when will the Attorney General complete his evaluation or review of the guidelines, I really just have no basis of making a guess on that. I wouldn't think too long because I know it is a matter of importance to him. But I really can't give a time frame, because I have no way of predicting.

Mr. SENSENBRENNER. Mr. Chairman, in order to make the record complete, I would ask unanimous consent that the Attorney General's response to Congressman McClory be included in the record of these proceedings.

Mr. EDWARDS. Without objection, so ordered.

[Information follows:]

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Ninety-seventh Congress

[illegible]

[illegible]
[illegible]
[illegible]
[illegible]

Dear Attorney General [illegible]:

[illegible]

Specifically, I [illegible] concerned about the extent to which [illegible] has been removed from the special agent in charge [illegible] and from the Director of the FBI himself. I am also concerned about the wide distribution given undercover operations proposals within the Department. In light of the recent ABSCAM investigation, and the leaks to the press attendant thereto, I believe it is unwise to involve too many people in the approval process.

Further, while I am sensitive to the risks which the Undercover Operations Review Committee should examine relative to the effect of the undercover operation proposal on private citizens, I would hate to see such operations become so difficult as to make their use by the Bureau difficult if not practically impossible.

I have been informed that the Judiciary Subcommittee on Civil and Constitutional Rights intends to hold hearings on or about February 16, and I would hope that by that time you will have been able to reach your own conclusions on the validity of my request.

I look forward to seeing and meeting with you at that time.

Sincerely,

Robert McClory
Ranking Minority Member

RMcC:tch
cc: Director William Webster,
Federal Bureau of Investigation

Office of the Attorney General
Washington, D. C. 20530

FEB 9 [illegible]

Sincerely,

Bill

William French Smith
Attorney General

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Mr. SENSENBRENNER. Second, Mr. Michel, it is my understanding that there is some litigation going on in New York, which addresses some of the points this committee has received in testimony from earlier witnesses.

Is that the case, and could the Department make available, at least, those parts of the transcript which are relevant to the earlier testimony, for inclusion in the record?

Mr. MICHEL. Congressman Sensenbrenner, I think that the testimony, which was extensive—as you know there were several weeks of hearings—isn't presently available. But I assume it will become available before too long and certainly we can make sure that the committee and its staff has access to it, and that it is made a part of the record of the committee. I just don't know now just we can do it, but we'll certainly do it.

Mr. SENSENBRENNER. I have no further questions.

Mr. EDWARDS. Mr. Lungren?

Mr. LUNGREN. No questions.

Mr. EDWARDS. Well, Mr. Michel, I'm sure you know that this subcommittee is supportive of the guidelines. I would point out, though, that when you mentioned the guidelines on domestic security, that Attorney General Levi worked very closely with this subcommittee in the drafting of the guidelines. In contrast we saw these guidelines only after they already had been promulgated, and presumably sent to all the field offices early this year. Of course, we are reserving judgment, but we have our responsibilities, too.

I might also point out that at a hearing just about a year ago, March 1980, the Director of the FBI Webster and the Assistant Attorney General Heymann testified that there was total control of the undercover operations at that time, that all the decisions made in connection with the undercover operations that this subcommittee was inquiring into had been supervised by the Bureau and Department of Justice on a daily basis.

Yet your testimony today points out, and rightly so, that that was not quite the fact. You have stage 1, stage 2, stage 3. You were in stage 1 at that time. Is that correct? And some problems did arise?

Mr. MICHEL. No, Mr. Chairman. The testimony of Director Webster and Mr. Heymann on March 4 of 1980, was describing circumstances in the immediately preceding months. And those months are in the period I categorized as period number 2.

The procedures were in place. The Undercover Operations Review Committee was functioning. So that in terms of what the current situation was, in late 1979 and early 1980, all the controls were in place at that time.

They had not been in place back in the period 1977, 1978, and perhaps into parts of 1979.

Mr. EDWARDS. In other words, Operation Front-Load was in stage 1?

Mr. MICHEL. That's correct.

Mr. EDWARDS. What you're saying is Abscam was in stage 2?

Mr. MICHEL. Most of Abscam was in stage 2. I believe the very beginning, so if it were in stage 1.

Mr. EDWARDS. You mentioned one of the key elements in those undercover operations, the risk of middlemen, often enticing

agents of the Federal Government, approaching innocent persons and sometimes doing damage to innocent persons.

Often, these middlemen are conmen or people with long criminal records, and sometimes they are in the pay of the Bureau or of the Department of Justice. Is that correct, also?

Mr. MICHEL. That's correct. There are both types. The first type is the far more common.

Mr. EDWARDS. Is there no auditing done? How do you control these people, these people floating around? One of them got as far as San Jose, Calif., and did great damage to an innocent businessman.

How do you stop them from approaching one person after another and then approaching the same person again, and enticing the same innocent person again and again and again? And going to the neighbors of an innocent person and saying, do you know anything about this guy, and so on?

Mr. MICHEL. Let me take it separately. With regard to the unwitting conman, there is no way we can stop them. And we didn't start them. He was already out there doing that.

Mr. EDWARDS. No, but you're paying him money to continue.

Mr. MICHEL. No, no, not the unwitting conman. He thinks that he's working with criminals and at both ends, and so, he's just operating in his normal fashion.

And we didn't put him into that business, and we're not in a position to put him out of that business, so that it just isn't a question of how can the Government let him do that? The Government ordinarily has little capacity to stop him from doing that.

Now, in the case of the witting intermediary, who is being paid, in some instances, by the FBI, certainly is receiving direction from the FBI, that's quite a different circumstance. In that case, there's a lot that we can do and do do to minimize as much as possible, the risk of innocent people being drawn into this web, if you will.

One of the things we do is that we require, to the extent possible, that his contacts with people that he says are corrupt, or are racketeers, or whatever the nature of the enterprise is, we require him to develop the best possible evidence.

For example, if there are telephone conversations between the witting conman and the suspect, those conversations may be recorded with consent of the cooperating individual. So that we aren't dependent on his word that the suspect showed an interest in committing a crime. The words of the suspect himself or herself are available to us. So that eliminates the risk that the middleman is lying in that kind of circumstance. Now, it is not always practical to have tape recordings done. But that's done where it can be done.

Another device we use is that the witting middleman is questioned closely after each material meeting or contact with a suspect. And he reports or produces information, detailing precisely what was allegedly said.

Sometimes, the specifics in these reports can be corroborated through independent investigations, so that would serve on a check that the conman is conning us and lying about someone being interested in committing a crime.

So those are the principal protections that prevent an innocent person from ever getting to the stage of being at one of our locations.

And then, as I mentioned earlier, the second line of defense, the second safety net, is our strong emphasis on making it absolutely clear that we're talking about crimes and make sure that the contact is directly between the agent and the suspect, and no one is speaking for the suspect. He's speaking for himself.

And in that way, if there was anything that slipped through and an innocent person gets in there, then when he's face to face across the table with the undercover agent, who makes it clear that they're talking about outright criminality, well, then he leaves.

It's not perfect. It's not risk-free. But neither is any other investigative technique.

You talked about businessmen or public figures who were innocent, being embarrassed or injured in their public or business life. No. 1, I have to point out that the injury comes almost always not from the fact of the investigation, but from the leak. The problem is leaks.

Second, those same kinds of injuries occur even in the most limited sort of investigations, investigations that depend only on questioning witnesses. The same thing happens.

He comes in and tells us Congressman so and so is corrupt. He takes bribes. And it may not be true. We do an investigation. So there's nothing—there's no danger that's of the sort that you focus on, that's increased by the fact that we do undercover operations. The danger is already there and it is real danger. We do everything we can to minimize it. But in no context is criminal investigation an entirely safe and fool-proof enterprise.

Mr. EDWARDS. Well, we do not agree, Mr. Michel, on the question of whether the danger is increased when there's a thug, a con man and he or she is being utilized as a middleman by the Bureau by another undercover agent of the Bureau. Based upon discussions with the undercover FBI agent, who the middleman thinks a big businessman or something, the middleman is egged on or promised good things by the FBI undercover agent.

As a result, the middleman continues in business and perhaps increases the amount of his business.

Isn't that correct?

Mr. MICHEL. I think the answer—I hate to give this kind of answer. I think the answer is no in a way and yes in a way.

When you say he's in business because the FBI is egging him on, I don't think that's quite right. He was in business before the FBI came on the scene. And likely—I can't prove it in every case—but likely, he would have remained in whatever that business is, whether or not he became involved with the FBI.

There is a danger that if excessive inducements are offered to this unwitting con man, that that may increase the risk of innocent people being brought in. But as I said before, there's a certain self-correcting mechanism. If the con man keeps bringing in people who are—who don't go through with the deal, then he loses face, loses credibility with the FBI guy who he thinks is a criminal associate.

So there's a disincentive for him to be wrong very often. But there are risks there and they just can't be eliminated.

Mr. EDWARDS. I don't want to take all the time. Do you have some questions, Mr. Lungren?

Mr. LUNGREN. No.

Mr. EDWARDS. Counsel?

Ms. COOPER. I'd like to ask a few questions about the Undercover Review Committee. The description in the guidelines of the committee's makeup is somewhat vague. It talks about appropriate employees of the FBI designated by the Director and attorneys designated by the Assistant Attorney General for the Criminal Division. What does this mean in terms of numbers, first of all?

Mr. MICHEL. The committee is basically six or seven individuals, two departmental attorneys, career attorneys, long experience, extensive prior involvement in undercover operations. One is a section chief and the other is slightly below that level. The FBI members, including the Deputy Assistant Director of the Criminal Investigation Division, and I believe the head of the Selective Operations Unit; that is, in effect, the undercover unit and senior officials of the program involved. If it's a property crime matter, then they sit on it. If it's an organized crime matter, then people from that section sit on it, and so on.

Ms. COOPER. So when it sits, it might have anywhere from six or seven to three or four people, making a decision?

Mr. MICHEL. I think ordinarily, the range is about 5 to 10 members on a given proposal.

Ms. COOPER. Well then, is it an established membership? Are people definitely on the committee or definitely sometimes on the committee?

Mr. MICHEL. Some of each. The committee is chaired by the Deputy Assistant Director of Criminal Investigative Division. He is always on it. The two departmental attorneys are always on it. Some of the FBI membership changes, depending on which investigative program a particular proposal falls in. But most of the members of the committee are, in fact, permanent members.

Ms. COOPER. It is just the permanent members, then, that would function in the way of receiving the annual reports, for example; is that right?

Mr. MICHEL. Well, they would be the formal receivers. They may share all kinds of studies and reports with other people. But I think the answer to your question is yes.

Ms. COOPER. OK. The guidelines provide for a decision being made by a consensus of the members. What does that mean if there's a substantially changing or at least possibly changing number and makeup on the committee?

Mr. MICHEL. Well, let me highlight what really the most important function of the committee is. It's not a rejection committee. And it's not a rubber-stamp committee. It is a double check on the judgment of officials down the chain of command. It is a check that brings to bear some expertise.

When you're talking about the committee including the Chief of Selective Operations Unit, permanent member, here's the individual who probably more than anybody else in the whole FBI, all day