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long, lives undercover operations and all their problems and benefits and issues. So he is just a critical party.

Now, what happens is, a proposal comes in and if these officials with their various perspectives see a flaw in it, they modify it. They send it back to the field. They say it was not quite satisfactory in this fashion. See if you can come up with a safe way, with fewer risks.

Often a proposal will bounce back several times before it is finally judged to be sufficient. That's why at the final moment of decision, it really is a consensus. It isn't something where they have a vote and say 6 to 5, it's approved or rejected. It's a consultative process.

A consensus develops because, where there's problems, changes are ordered. So that's why the reference in the guidelines to consensus.

Mr. EDWARDS. Can I ask a question? How often does the committee meet?

Mr. MICHEL. It varies, Congressman, depending on the volume of new applications and renewals. It meets normally I think in the FBI headquarters. And I think it meets on a very regular basis. I can't tell you if it's weekly or biweekly or what. It meets on quite a regular basis.

Mr. EDWARDS. Have you ever attended a meeting?

Mr. MICHEL. I have not.

Ms. COOPER. Does the committee keep minutes?

Mr. MICHEL. Let me back up and answer both, to counsel's earlier question and something you alluded to. Mr. Chairman, the committee also includes senior officials from the FBI's Office of Legal Counsel and its service divisions, technical services, or whatever. So that all viewpoints and operations are brought to bear in that one setting, all the various kinds of expertise.

Ms. COOPER. Well, it seems to me that it's very hard for this oversight committee to really know what's going on. It sounds like sometimes, OLC or other divisions of the FBI or the Justice Department are included, but maybe not all the time.

Mr. MICHEL. No, no. The membership is the same except that added to the normal membership, in the case of a particular proposal, would be one or two or perhaps three individuals whose background relates to that particular proposal or the program it came from. But the committee itself is not a rotating membership. It's the same people and the same units of the FBI are represented at all sessions of the committee, such as Legal Counsel.

Ms. COOPER. Well, what about the Office of Legal Counsel? The operations that come to the Review Committee come to it because of the existence of sensitive circumstances. Doesn't that normally require some sort of evaluation of the legal and ethical problems that are involved in the operation?

Mr. MICHEL. It's certainly a good idea. And the process actually begins at the field office level. Every field office has its own in-house legal adviser. When an undercover proposal is first fashioned in the field office, that lawyer reviews the legal implications. Then it's submitted to FBI headquarters, either as you say because of some indicia of sensitivity, or if it involves substantial dollars,

whether or not there's other kind of sensitivity, and then there's further legal review there.

Now, where the committee, despite having some lawyers on it, it's got the two prosecutors and it's got the FBI headquarters' legal adviser on it, where even those lawyers have doubt about whether the legal issue has been well enough analyzed, they take matters up with the Justice Department's Office of Legal Counsel. And they get formal opinions where necessary.

So I think the legal base is rather thoroughly covered in the process.

Ms. COOPER. My question is, why aren't such members a permanent part of the committee, if these questions are occurring and constant in the policy decisions that are presented before the committee, rather than leave it to the permanent members who have a different perspective than other divisions and parts of the Department?

Mr. MICHEL. The FBI's Legal Counsel Division is represented on a committee in all of its meetings.

Ms. COOPER. One of the permanent members is a representative from the Office of Legal Counsel?

Mr. MICHEL. Of the FBI, yes.

Ms. COOPER. What about the Justice Department's?

Mr. MICHEL. No. Because our experience has been the majority of cases, we don't need to refer to the Justice Department's Office of Legal Counsel. No one from that office sits on the committee. Where necessary, issues are referred by the committee to the Department's Office of Legal Counsel for advice and sometimes for formal written opinions.

Ms. COOPER. What about the Office of Professional Responsibility of the Justice Department and the FBI? Are they permanent members of the committee?

Mr. MICHEL. No.

Ms. COOPER. Why not?

Mr. MICHEL. Because it's not viewed as necessary. I don't even recall any discussion of that, because the whole approach is to have rather clear procedures now embodied in guidelines. And where the direction is clear and appropriate, you avoid ethical questions. You don't need somebody who's an expert in judging ethical failures, because you avoid failures in the first place by having sound and clear limits set forth.

Ms. COOPER. Well, what's the purpose of having people of special expertise on the committee if it isn't to have special sensitivity about discerning the presence of those issues, a sensitivity that other people might not have?

Mr. MICHEL. Well, I don't agree if you're suggesting that all those officials from the Department and the FBI that I identified lack judgment to grapple with the issues of sensitivity. I don't think that's the case.

I think quite to the contrary; that the committee has demonstrated a very great sensitivity and a very fine judgment. In fact, the FBI should get credit apart from its role in the committee. That is, FBI headquarters frequently will not approve a proposal from the field, at least not without changes, and they send it back on their own. It never even gets to the committee. So that the committee's

time is reserved for projects that are in rather good shape. I think that supports the notion I'm suggesting, that there is good sensitivity among the membership of the committee.

Ms. COOPER. Well, I'm only suggesting that people who work in one area have more knowledge and more sensitivity about the area that they're used to working in.

Let me give you another example. One of the sensitive circumstances is the possibility or the probability of civil liability arising out of an undercover operation.

That suggests, it seems to me, an awareness on the part of the Justice Department and Attorney General that this is a serious risk in many, if not all, undercover operations.

Why then does the committee not have a permanent member from the Civil Division?

Mr. MICHEL. It is not a serious risk in many or all undercover operations. The truth is the opposite. That it is rarely a substantial risk that there will be appreciable civil liability.

And the reason is that we are very careful about that. There were a few, very bad experiences, such as Front-Load, back in earlier years.

But the kind of operations being undertaken now, rarely involve substantial questions of civil liability.

Now, with regard to expertise in the Civil Division, that is available and resorted to, much in the same fashion as we sometimes, when needed, refer matters to the Office of Legal Counsel.

Ms. COOPER. Let me ask you again what you didn't get a chance to answer. Are minutes kept of the meetings of the committee?

Mr. MICHEL. Records are kept of its determinations. I don't believe that minutes are kept in the sense that a court reporter is making a verbatim record of everything that we say.

Ms. COOPER. Would those records indicate who was participating?

Mr. MICHEL. Oh, sure.

Ms. COOPER. Is anybody who is participating part of the group that reaches a consensus? I don't want to say vote, because it doesn't sound like it's that formal.

But if someone is drawn into the committee from the Civil Division, for example, or some other part of the FBI or—the Justice Department normally doesn't sit on the committee. Do they take part in the final decisionmaking?

Mr. MICHEL. Well, they take part in the sense that the committee will endorse a proposal and forward it to the Assistant Director or the Director, who is really the final approving authority, unless anyone present and participating has substantial problems with it. So whether or not a sometime member of the committee technically has a vote, it really isn't relevant. If he has problems with it, it's unlikely that it will be endorsed by the committee and sent to the Assistant Director or the Director for final approval.

Ms. COOPER. Maybe I missed part of your answer. Did you indicate whether or not the records that are kept indicate who participated in the deliberations of the committee?

Mr. MICHEL. I believe that they do. But I've not inspected the records and so I can't be positive about that.

Ms. COOPER. And would the records also indicate how often, at what precise dates, the committee met in deliberating?

Mr. MICHEL. I assume so.

Ms. COOPER. What kind of data is presented to the committee from the field? What is the form of it?

Mr. MICHEL. Well, it is in writing, and it's gone through prior reviews and the views of reviewing officials are also recorded.

The level of detail and the extent of the written discussion of issues varies enormously, according to the particular operation and how major and sensitive it is.

Mr. EDWARDS. Well, they just don't meet and chat about the issue and reach a consensus. A careful record is kept of exactly what went on and the views of the different people, and so on, is that correct?

Mr. MICHEL. I think that's several yesses. I think in general, good records are kept concerning the committee's review of a project. I know that the facts about the project are elaborately written up. And I would think that they are the most important part of the matter because they discuss the issues.

And they get into matters like why the officials at lower levels who approved it think the risk is acceptable, or that such and such a problem has been controlled.

So that I think that if the question is: Could someone, looking back at the total record with regard to operation X, be able to reconstruct what issues were considered and how fully, and what sort of thinking served as a basis of their resolution, I think the answer is "Yes."

You would get a rather full picture.

Mr. EDWARDS. I think that's something that you ought to check and advise us about, though, because I'm not sure that you're certain of that.

Mr. MICHEL. I'm not certain what the minutes of the meeting, as we're calling it, show, because I've not inspected them.

I am certain of the level of detail of the application papers, so to speak, because in several particularly sensitive operations, I have, among some other Department officials, reviewed the full package. And they are exceedingly detailed and thorough, and contain a lot of analysis and discussion.

They frequently, for example, reflect extensive analysis by the U.S. attorney in the District. That's part of the paperwork that accompanies the package when it comes into headquarters in major cases, at least.

Mr. EDWARDS. Thank you, Mr. Boyd?

Mr. BOYD. Thank you, Mr. Chairman. Have there been any civil claims filed in connection with Abseam, Mr. Michel?

Mr. MICHEL. I don't know.

Mr. BOYD. We're all familiar with the leaks which came out during the early stages of the Abseam investigation and of former Attorney General Civiletti's attempts to find the sources of those leaks.

Could you tell us what has been done to eliminate the future possibility of leaks, given the number of people involved in the approval process?

Mr. MICHEL. Well, the first thing I would like to observe, because it's been raised before, is that the implementation of the guidelines will not add to the number of people with access to the facts of

sensitive undercover operations. That number will remain about the same as before the guidelines.

Second, that number we always try to keep to a minimum, just as in the context of classified information, agents try to limit access by following the well-known need-to-know principle.

Third, as a result of some experiences in the past, some additional steps have been made to eliminate marginally needed access.

Mr. BOYD. Those experiences you're talking about are the leaks?

Mr. MICHEL. Among others, yes.

Mr. BOYD. With regard to the guidelines and the potential violation of those guidelines, or a prior policy with regard to undercover activities, what types of disciplinary procedures are normally followed, and what kinds of sanctions?

Mr. MICHEL. I'm glad you raised that. One of the witnesses yesterday went into some length in his statement, to suggest that guidelines weren't taken seriously, weren't complied with, weren't enforced, had no sanctions, and so forth.

I believe that the witness was actually talking about guidelines involving New York City's police department rather than FBI guidelines. But in any event, he raised that issue. I think that two observations are in order on that score.

The first is, whatever other criticisms the FBI gets, or may even deserve in some occasions, it is not an organization of rogue elephants who go around breaking the rules. It's been suggested by Prof. James Q. Wilson in a thoughtful article on undercover operations, that second only to the U.S. Marine Corps, the FBI is the most rigidly disciplined organization from the standpoint of absolute compliance with internal rules and regulations.

By the way, Mr. Chairman, that article you might want to consider. I wouldn't request it. It's really up to you, you might want to consider making that article by Professor Wilson a part of the record.

It's called "The Changing of the FBI, the Road to Abscam." And it appeared in the Public Interest in a recent issue.

The second observation, I make, Mr. Boyd, is that where an FBI—excuse me, let me finish one other aspect first.

We've really had one very major compliance check on existing guidelines. That was a check done at little more than a year ago, I believe, of compliance with the undercover—I'm sorry—the informant guideline. And that was a study done by some academic people. I believe that the committee is familiar with it.

My recollection is that, that that study concluded, no surprise to me, that the level of compliance was extremely high, and that the occasions found where the guidelines were not followed were very few, and very peripheral, and obviously, basically innocent in nature.

So, I think, No. 1, that the guidelines are taken seriously, and they are followed, and we have proof of that.

No. 2, there are sanctions. The real sanction that's involved here is you can get fired. And FBI Directors have not hesitated to fire people who committed substantial wrongdoing.

And my own opinion is that that's probably much more effective than lots of other sanctions, if your job is on the line for breaking

the rules, and you're a disciplined professional. I think the reaction is going to be that you'll follow the rules.

Mr. BOYD. Let me interrupt for a second to note that FBI personnel are excepted personnel and are subject to being fired without cause unlike many Government employees.

Mr. MICHEL. Thank you.

Mr. BOYD. I have one other question.

Mr. EDWARDS. Take your time. Sure.

Mr. BOYD. With regard to disciplinary activity for violations of the guidelines, since these guidelines are rather new, there probably haven't been too many investigations for violations of them.

But if, in the future, when there are violations of these guidelines, there are investigations which result in sanctions, is it going to be the policy of the Department to announce to the public, after the fact, that investigations have taken place and that remedial action has been taken?

Mr. MICHEL. I don't know what the policy on public announcement might be. I think with regard to congressional oversight, that the Department, as before, would provide some reasonable form of access for committees and staff of how the rules and regulations are enforced.

But I have no idea what the future policy might be on public announcements about such inquiries.

Mr. BOYD. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Michel, section (B)(1) precludes the special agent in charge from initiating an operation when an undercover employee or cooperating private individual will be required to give sworn testimony in any proceeding in an undercover capacity.

Do you mean that in some cases, the witness might be testifying under oath, without revealing his real identity?

Mr. MICHEL. Well, the purpose of section B is to establish a trigger of what things have to be sent to headquarters. That's what that list of factors does—if one of those is likely to be present. Then the matter has to go to headquarters. Can't be decided only by the SAC.

Mr. EDWARDS. Well, under any circumstances, could the witness be authorized to commit perjury?

Mr. MICHEL. I think that the answer to that, under the Archer cases and other cases, is basically no.

And I don't believe that listing this as a trigger factor was intended to suggest that we're looking for opportunities to have witnesses testify improperly.

Mr. EDWARDS. Now, guidelines also permit the Director to approve operations that will involve the commission of crimes by the agent or informant.

Is there any limit to what kind of a crime might be authorized? Does it go as far as robbery, murder, or anything like that?

Mr. MICHEL. Of course not. And the point of reference would be to the informant guidelines.

You'll recall that the informant guidelines provide that informants are to be told they may not engage in violence.

So, the general rule is a prohibition on violence. And the exceptions are limited.

And certainly, we are not going to have people going around participating in armed robberies.

Mr. EDWARDS. Crimes are committed by agents from time to time. I guess in fencing operations or gambling or minor drug operations, aren't they?

Mr. MICHEL. Those are good examples and common examples. Ordinarily, they are relatively minor. Ordinarily, they are nonviolent and ordinarily, our role in the criminal activity is primarily passive in nature.

Mr. EDWARDS. Now, would these guidelines immunize the agent who has committed the crime from prosecution by a State or Federal court?

Mr. MICHEL. No. They couldn't as a matter of law and they certainly weren't intended to.

Mr. EDWARDS. Mr. Lungren?

Mr. LUNGREN. The only thing I'd ask, Mr. Chairman, is I have not had a chance to see Professor Wilson's article and I imagine some other members of the committee haven't. So I wonder if I could ask that that be included in the record.

Mr. EDWARDS. Without objection, so ordered.

[See appendix 3.]

Mr. MICHEL. Thank you, Mr. Lungren.

Ms. COOPER. In your testimony, you indicate that the Justice Department and the FBI has:

Systematically analyzed all major operations upon completion precisely for the purpose of refining our undercover techniques. The lessons that could be learned from the past are being learned and applied in present cases.

My question is, Is the Justice Department now or does it intend to review the record that is now being created in the undercover operations cases which are being subjected to due-process violations analysis? Reviewing that record with the eye toward determining whether or not the guidelines or the principles embodied in the guidelines have, in the past, been followed, or can be applied? Are they realistic guidelines?

Mr. MICHEL. Well, our approach is to turn to all available sources of information to help us improve our techniques. And that includes not only our internal records about an undercover operation, but as in the case you referred to, the court records as well.

Ms. COOPER. The reason I ask is because, frankly, I read your testimony today as not giving any credence to the kinds of assertions and evidence that have been presented in the Abscam due-process hearings. There is factual evidence that has been submitted in those cases, which may or may not rise to the level of due-process violation, but which certainly indicates serious problems with the way the case was administered; for example, the failure to keep written records, the failure to control informants in the conversations they had with the subjects, the ambiguity, sometimes deliberate, caused by the failure of both informants and agents in presenting inducements to make it clear the criminality of the offer being made to the subject.

All these things have been presented to the courts. Now, again, they may not reach the level of a due-process violation, but they do indicate that there have been problems.

Does the Justice Department categorically deny those are problems that ought to be considered in refining the guidelines?

Mr. MICHEL. Counsel, the statement that I submitted to this committee today was not intended in any way whatsoever to reflect opinions about the facts alleged in the court proceeding. No. 1, I don't know in detail the facts alleged. No. 2, I haven't formed opinions myself. And No. 3, you, in any event, can't take any position on that, while the matter is still under active litigation, which it is.

So, please don't misunderstand. Nothing in my statement was intended to reflect judgments on the credibility of witnesses who testified in that court proceeding.

With respect to whether the FBI is interested and the Justice Department is interested in undesirable events, even if they fall short of running afoul of the law, the answer is yes, of course we are.

I testified earlier that one of the principles on which the guidelines were written was to not only meet the requirements, the mandatory requirements set forth in the Constitution, but over and above that, to have practices that avoided to the maximum extent possible, untoward incidents and reflected sound law enforcement policy.

Ms. COOPER. What is the body that would be or is there a body that would be revising or considering revisions to the undercover guidelines?

Mr. MICHEL. I don't know the answer to that question.

Ms. COOPER. Is the committee that you're on still intact?

Mr. MICHEL. No.

Ms. COOPER. I'd like to get a bit of clarification about the function of guidelines. You stated that you don't think that one of the guiding principles was that the guidelines ought to be a catalog of do's and don'ts. Rather, it ought to formalize sound procedures.

Now, in other guidelines, such as the domestic security guidelines, there are certain do's and don'ts listed, certain techniques that are not to be used at certain stages that may be used in other stages. It's not a question of simply affixing that responsibility on higher authorities. There are definite do's and don'ts. Aren't there?

Mr. MICHEL. You're referring to the domestic security guidelines?

Ms. COOPER. Yes.

Mr. MICHEL. There are limitations in those guidelines on techniques that can be used in less-than-full investigations. And the limitations were imposed because of the peculiar risks in the context of investigating groups that maybe involved extensively or primarily in lawful activity.

And also because those guidelines, to a great extent, focus on what we call future crime. That is, the group under investigation under a domestic security guideline may not yet have committed any crime, even an incipient crime like conspiracy.

Therefore, there are risks that are unique to that circumstance. And those kinds of risks do not appear or appear to the same degree in undercover operations.

Ms. COOPER. But there are other risks that, in fact, are enumerated in the undercover guidelines?

Mr. MICHEL. There certainly are risks in undercover investigations and in other kinds of investigations, too. And if the question is, well, since there are risks, there should be absolute do's and don'ts, and our analysis, that for 18 months, developing these guidelines, led us to the conclusion that unlike the domestic security context, in the undercover context, it was neither feasible, nor desirable or necessary, to have categorical prohibitions.

Ms. COOPER. Well, let me move on to another area. From the perspective of this committee and the Appropriations Committee, as well as the whole Congress, the most important, overriding question is: Is it worth it? Do undercover operations really produce results which justify all the intrusions and risks that the guidelines so well identify? And do they justify the expense and the use of resources, which is increasing steadily at the Federal level, and probably also on the State and local level?

We heard testimony from a sociologist who asserts that neither the Justice Department nor anybody else really is making any kind of objective, empirical analysis of whether or not these kinds of operations deter crime or whether particular investigations can be reached by more conventional methods.

What has the Justice Department done in the past to evaluate the effectiveness of undercover operations?

Mr. MICHEL. Well, first, much of what Professor Marx said clearly had to do with State and local police authorities and not with the FBI. The FBI has a very limited jurisdiction. And it's engaging in undercover operations on an extremely selective basis.

Less than 1 percent of the FBI's annual budget is devoted to money specifically earmarked for undercover operations. The operations are ones in which an assessment is made on a case-by-case basis that it's worth it, though—it's worth the trouble, the money, that the risks are not unduly high, that the benefits will justify the whole enterprise. That's made in every case on a determination of the facts of that particular case.

Ms. COOPER. But those judgments are made before the operation starts, right? It's not an evaluation after the fact as to what kind of results you're getting.

Mr. MICHEL. Well, keep in mind that the officials making the judgment on how worthwhile undercover operation No. 2 might be, are the same officials who just reviewed what happened in undercover operation No. 1 that just finished, and they are the same officials who authorized No. 1 in the first place.

So we would have to be asleep to not benefit from each operation during its progress. And once it's completed, we do review them. And we review them from many standpoints, including how worthwhile it was.

Now, I don't think there is anything that I can say that would materially add to the testimony of Director Webster or the Assistant Attorney General in charge of the Criminal Division before this committee nearly a year ago. They gave examples of past undercover operations. And it seems to me clear on the facts of those particular operations, that the benefits were enormous and the risks were manageable and reasonable.

And my own opinion is it's not even a close question. That in those particular questions, Operation Lobster and the rest, they were clearly worthwhile.

Ms. COOPER. That's right. They presented that evidence. Since then, there has been a good deal of subsequent analysis and evidence to indicate that those conclusions may not be entirely valid; for example, the Director talked about stolen certificates of deposit that were recovered in a recent case. There is evidence, although it's not proven yet, that those stolen certificates of deposit were, in fact, created by an informant for the FBI in Operation Lobster, the case which the Assistant Attorney General spoke about.

He also told the subcommittee about evidence that the crime rate had fallen dramatically subsequent to the raids made in that operation. What we don't know is whether that was a long-term effect of the operation or whether there was any displacement. So we don't have all the evidence on that.

The Dr. Marx who was here yesterday, told the subcommittee about a reevaluation of study that was done by the Justice Department that measured the effectiveness of antifencing sting operations, which showed a decrease in the level of crime. That reanalysis was very critical of those conclusions.

We haven't seen that yet. So I can't evaluate it. But there does seem to be a good deal of controversy about whether or not there really is any body of evidence that the Justice Department has collected to indicate the effectiveness of undercover operations in general; not the measure of an undercover operation by the number of indictments or convictions, which, of course, all successful operations must lead to, but the question of how really it affects the level of crime in a community.

Mr. MICHEL. Let me just make one response, which applies both to the questions you've just asked and some that you asked immediately before. The question is: Compared to what?

You say that there are risks to undercover operations, civil liability, leaks, et cetera. All quite true. But those risks also are present in most other forms of investigation.

Second, in terms of measuring the benefits, I don't find it myself very convincing to say, well, we had 10 sting operations in a 2-year period in city x. And at the beginning of the period, the burglary rate was so and so, and at the end of the period, the burglary rate was so and so, plus 5 percent. Because, again, the question is: Compared to what?

It may very well be that if the undercover operation had not put all those burglars and fences in jail, that the burglary rate at the end of the 2-year period would have not been 5 percent more than at the beginning, but it would have been 100 percent more. So you have to be awfully careful that you don't deceive yourself with analysis.

Now, I think that studies that may be done by scholars, by research organizations, by the Department or by others, can be valuable. And certainly, we would like to know more about the impact of our investigative programs and prosecutions than we sometimes know. I have no argument against that and I don't minimize the potential value of that.

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I do know that those studies and testimony of experts tends to be valuable in proportion to the focus on accurately describing the facts of real cases. I think it's so easy to be long on speculation and long on analysis and short on facts. And where that's the case, it's not very instructive.

Ms. COOPER. Why do you think that your undercover operations are effective in controlling crime?

Mr. MICHEL. I don't mean to be flip, but in a sense, the answer could be because they put people in jail, and they do it better than other techniques. They do it better because the odds of conviction are even higher. They do it better because the odds of pretrial motions resulting in the case never getting to an adjudication of guilt or innocence are vastly reduced. They do it better because they focus on major actors and criminal enterprises by stripping away the layers that ordinarily insulate those actors from effective investigative pursuit.

I may say, too, that I do not agree about the implication of some and the explicit testimony of Professor Chevigny that undercover operations are more intrusive. It seems to me that they are far less intrusive than most other significant techniques.

Again, I ask my question: Compared to what? Yes; an undercover operation can, in some circumstances, be fairly intrusive. But compared to what? Compared to wire tap? It seems to me a wire tap is far more intrusive. The wire tap gets everybody who uses the telephone. It gets every conversation. It's inherently indiscriminate. An undercover operation doesn't normally get into somebody's political or religious beliefs.

When people come to our sting operations or our other operations, they come to talk about crime. We don't get involved as we would dealing through informants, in peripheral aspects of their life.

The part of the value of undercover operations is it allows us to focus only on the criminal part of that person's life and not have to be involved in the other part, which is of no use to us and involves problems of privacy.

Mr. EDWARDS. I'd like, Mr. Michel, to get back just for a minute, to the middleman. I'm not satisfied that these middlemen are uncontrollable or that the guidelines have anything to say about how these middlemen are uncontrollable.

And I think we have good evidence of it in certain aspects of Abscam. We're certainly not going to discuss any of the specific cases, except that one or two of these purveyors did go in a completely uncontrollable way and try to get certain people over and over again and offer a lot of money over and over again. The mere approaching and offering damaged these people who happened to be in public life, personally, with their families, with their constituents, with their neighbors.

Now, what steps have been taken so that that kind of loose-cannon operation won't take place in the future?

Mr. MICHEL. Well, to some extent, the problem of cooperating individuals can't really be solved, because people who make good cooperating individuals or who make good informants usually are criminals or closely involved in criminal activities themselves and often are people of questionable traits.

But crime-fighting is inherently a little bit of a messy business. You can't find useful informants who are boy scouts, who are upright citizens. So, you, in the end, to some extent, face the choice of you're either not going to fight crime, because there are these unsavory characters who in giving you a report may be exaggerating or fabricating or doing crazy things themselves, or you proceed, but you try to limit the risks. You try to hedge your bet.

Now, both with regard to classic informants situation and with regard to cooperating individuals in undercover circumstances, we proceed and we try to minimize the risks.

I think that you're correct, that the cooperating individual poses special problems. That is part of the reason why, where we can, we prefer to have the middleman an unwitting middleman.

Look at some of the advantages to us of the unwitting middleman. If the unwitting middleman says that he can get a State legislator to take a certain action in return for money, then we're insulated from the implication that we had it in for that guy. No one can say that we picked on Mr. So and So for some nefarious reason, because we didn't identify him to begin with. The unwitting individual did and did it having no idea that he's really talking to the FBI, so the unwitting individual in some ways is safer and provides a kind of insulation to charges of improper target selection. On the other hand, he's a little bit harder to control than the cooperating individual.

And I think that the key point perhaps is this: We need to be very sure that our cooperating individuals are not themselves making any offers. If we can limit their role to being a middleman in the sense of a broker who brings together two parties, then we can get past the fact that the middle man may be lying or exaggerating or distorting or he's got it in for somebody and he's just trying to get the fellow in trouble for some personal vindictive reasons.

So we need to put very heavy emphasis on limiting the role of the middleman and by being sure that all the operative conversations are ones that are taking place between the suspect and undercover FBI agents, and not just between the middleman and the suspect. I don't think that there's anything more that we can do.

And again, I think it's important to remember that the harm to those individuals that you're referring to really was harm from leaks. Whether or not there had been an undercover operation as opposed to another kind of investigation, once there's an allegation that so and so is corrupt, the harm to that person, where he's totally innocent, someone is just misdescribing his activities, comes from the leak more than from the method that the allegation was acquired by.

So I think that much of the protection for wholly innocent people has to come through further efforts to avoid leaks as much as through further efforts to make sure that the controls on middlemen are as tight as they can feasibly be made.

Mr. EDWARDS. I'm sure that you recognize the danger and that you're substantially reexamining this particular situation.

Mr. MICHEL. Yes, we are.

Mr. EDWARDS. The scam within the scam has done great damage and the cases that I referred to earlier are regrettable, and I'm

sure you regret them. Have you had high-level discussions in the Department of Justice about this new philosophy?

When I was an agent many years ago, there weren't any such operations. Mr. Hoover was very much against them because he thought of what it might do to the agents themselves, what it does to society. It is a sort of new philosophy, as some of our witnesses have pointed out, in American law enforcement.

There are dangers of one American becoming suspicious of another. A husband suspicious of his wife, employer, employee, a business person wary of his competitor across the street, because the competitor might have a secret agent in his storeroom or something.

Now, are you thinking about things like that over at the Department and studying them, and are there courses given at Quantico to FBI agents by professors and others so that in-depth thought can be given?

Mr. MICHEL. I think the answer to all of those questions is yes. And I think that the whole motivation behind the guidelines was to respond to the undeniable fact that there are risks and risks mean that, in some circumstances, innocent people can be damaged. And it's very important to reduce that to the smallest possible amount or to eliminate it entirely, where that's possible.

I think it's ordinarily not possible to eliminate it altogether. But I think it is possible to reduce it to an absolute minimum.

I think that when you read the guidelines, they reflect the concern of the FBI and the Justice Department at all levels with making sure that there are appropriate controls and procedures and that we have minimized the risks.

Mr. EDWARDS. Well, an operation can go on for 6 months?

Ms. COOPER. Without approval.

Mr. EDWARDS. Without approval again. How do you know what's going on in an operation in 6 months? Under the Domestic Security Guidelines there is a review after 30 days, as I recall.

Mr. MICHEL. There is a little point of confusion on that, Mr. Chairman. The review by the Attorney General or his designee of ongoing domestic security investigations occurs annually.

Mr. EDWARDS. But an investigation has to stop after 30 days if something further hasn't developed.

Mr. MICHEL. Where you have a preliminary investigation only, there's a time limit on it. Most investigations that amount to much, under the domestic security guidelines, are full investigations. And they then come under that annual review.

I think the answer to your question, though, is that undercover operations are under continuous review and not just within the field office. As Director Webster indicated, the most sensitive ones resulted in his being briefed on a very frequent basis about specific details of a particular operation.

And needless to say, at only slightly lower levels of the FBI there is continuous scrutiny of what's going on in those undercover operations.

So there are parallel tracks. There's the committee review track, which focuses on events like initiation of the operation, and a major change where it switches to a different compass course. But

the other track is the regular chain of command supervision within the FBI, and that's a very lively, fast track.

I think from my own experience that the FBI officials at headquarters keep an exceedingly close watch on undercover operations. The more sensitive they are, the closer the watch.

So if we sit back and say, hell, they only look at this every 6 months, that really isn't the case at all. They look at it every week, sometimes every day. And they should.

The guideline - references to 6 months really was simply to have some automatic provision. Remember I said there were three triggers? If the purpose changes, the scope changes, then you have a review immediately, no matter if it's only been approved for 30 days or 50 days or whatever.

Second, if you're spending a significant amount of money, automatically you have a review. So the 6-month provision was just to have some automatic device, so that at a minimum, the operation would get a complete new look at 6 months. But they are under very close scrutiny on an ongoing basis, really on a daily basis.

And it's a shame, in a way, that the guidelines don't refer to that, because it's easy to forget on just reading the text of the guideline how close and frequent the review is.

Mr. EDWARDS. Mr. Boyd.

Mr. BOYD. With regard to sting operations as opposed to Abscam tape operations, you indicated sting operations are the most frequently used type of undercover operation. And I think you would agree that there are other factors beyond the control of the FBI which influence the effect which these operations have on deterring crime.

I wonder if the Department or if the Bureau has access to or has compiled any statistics to indicate, for example, with regard to the sting operation in Washington, before the Abscam operation, the percentage of convictions which were gained as a result of indictments flowing from that operation, the number of recidivists who were convicted, the extent to which these individuals were sentenced and the actual time spent incarcerated. Because individuals released after spending a short period of incarceration or time in jail often are in a position to commit more crime.

Mr. MICHEL. Well, the answer to your question is, "Yes, those are important things." Yes, we do some analysis of that sort. Anything else, it's limited in scope and in coverage because our resources are stretched very, very thin.

There are 800 or 900 fewer agents today than there were 5 years ago. But the crime rate even of Federal crimes didn't go down. It went way up. And with our increasing effort to go after higher level criminals and to get into some of the most difficult areas of investigation, which are very time consuming, that just adds to the burden on the resources.

So that, to some extent, like the committee, the Justice Department has to depend on studies done by scholars and think tanks, and so forth. But sure, we're interested in those things.

We do some of that kind of analysis and, as I think you may have been suggesting, one of the benefits of undercover operations, in addition to increasing the odds of convictions, is that they result

in higher level figures, and I think generally result in much longer sentences.

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

Mr. EDWARDS. Ms. Cooper?

Ms. COOPER. Thank you. I'd like to return to a point made by the Chairman about the sensitive circumstances listed in section B. At least on its face, the guidelines leave an inference that the sensitive circumstances are not prohibitions. They're simply sensitive circumstances that require an operation to be reviewed by higher authorities. And therefore, it leaves the possibility that any one of these sensitive circumstances can be approved. That is, an operation which has a possibility or probability of or certainty of employing one or developing one of the sensitive circumstances can be approved.

Now, when the chairman asked you about the Archer situation, about the possibility of an undercover employee perjuring himself, you indicated that you thought that that could not—that was against the principles of the case and, therefore, could not be approved. Are there any other circumstances listed here that you think fall into that category?

Mr. MICHEL. Well, first and most important, the guidelines are not intended to and do not and could not authorize activity that is against the law. The FBI, in effect, has to follow the law and also follow the guidelines. Nothing in the guidelines is in derogation of our obligation to follow the law.

So I was astounded by what I thought was one of the suggestions of one of the prior witnesses that the guidelines authorize the FBI to do things that are clearly illegal. I think that's preposterous.

That's certainly not what they're intended to do. They're intended, in fact, to prohibit, as a matter of policy, some things which would be legal, but which are too risky or are undesirable or unnecessary.

So the guidelines basically are intended to be more restrictive than the case law and the statutes, not less.

Ms. COOPER. Let me ask you about section H, which has to do with undercover employees posing as attorneys, physicians, clergymen or members of the media. With the approval of the higher ups, it seems that it is possible that those impersonations can be used to develop a confidential relationship, one that is ordinarily privileged under law.

Do the guidelines sanction an agent violating his own ethical and professional responsibilities? For example, if the agent is an attorney himself, posing as someone else's attorney and thereby getting into a confidential relationship with the subject?

Mr. MICHEL. I guess the question is whether the guidelines overrule the canons of ethics. The answer is "no."

Ms. COOPER. OK. Let me ask you something on a different issue. During stage 2, which you described, where there were principles but not formal guidelines, principles that were enunciated before the subcommittee last March, how was the field made aware of those principles? The field, that is, that was engaged in undercover operations?

Mr. MICHEL. Well, by the normal FBI communications that you're familiar with, airtels and letters and conversations, tele-

phone calls, meetings of various kinds, field inspections, special visits on particular visits, conversations with Justice Department officials here in Washington and with U.S. attorneys in the field.

Ms. COOPER. Is that the same sort of process you expect to use with the formal guidelines?

Mr. MICHEL. I don't understand the question.

Ms. COOPER. How are you going to educate the people in the field about the guidelines and make sure that they do understand them?

Mr. MICHEL. The FBI is transmitting the text of the guidelines to all field offices and units and engages in training of personnel in those offices and units whenever there is some new policy or a clarification of an existing policy or practice. And so that's the procedure that will be followed here.

The full text will be disseminated and it will be the subject of training and seminar-type discussions. And it will, in due course, become the subject of inspections, visits of field offices to be sure that they're following them.

Ms. COOPER. Has the FBI's Inspection Division ever considered undercover work other than from the perspective of whether or not the agents are complying with regulations or understand the regulations and guidelines?

Mr. MICHEL. I don't know.

Ms. COOPER. Is there any reason why they shouldn't?

Mr. MICHEL. I don't know the answer to that question or the question whether there is any reason why they should. I guess the considerations are how are all the other techniques they use working? How well they work. And I'm not an expert on that subject and I don't have any well-informed views. So I don't think I ought to just speculate or guess.

Ms. COOPER. Finally, Professor Marx speculated yesterday that at least in some circumstances, undercover tactics may, actually, amplify the level of crime in an area, both by generating a market for stolen goods, by generating capital which could be used in other sorts of crimes, by generating motives, by creating scarce skills and resources, and so forth and so on.

How does the Justice Department know whether or not this is happening or do you care?

Mr. MICHEL. Of course we care. And we know how it's happening because, for example, if there is a given city that has very little burglary and no fencing operations, there is no point in us setting up our own undercover fencing operation in that city. The kind of place that's likely is one where we have clear information that there are already 10 of them out there.

We're not creating a market. The market's already there and the business is flowing. We're stepping in to cut it off.

Now, it may be that for a very short period after we step in and before we lower the boom and put everybody in jail, that it's possible that the number of fenced items would go up for that short period. But our experience, I believe, has been that in the longer run, there is a big drop in the traffic because a lot of the operators are put out of business, put in jail.

Ms. COOPER. Do you base that last conclusion on evidence that the Justice Department has put together?

Mr. MICHEL. We base it on information that we have access to through local police and sometimes through our own files. We don't, as I tried to indicate in answer to Mr. Boyd's question earlier, conduct a lot of very comprehensive or detailed studies, because we're not equipped to do that.

Mr. EDWARDS. Thank you very much, Mr. Michel, for very useful testimony. We appreciate your coming up here today.

Mr. MICHEL. Thank you.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS

The following guidelines on use of undercover operations by the Federal Bureau of Investigation are issued under authority of the Attorney General as provided in 28 U.S.C. 501, 510, and 533. They are consistent with the requirements of the proposed FBI Charter Act, but do not depend upon passage of the Act for their effectiveness.

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INTRODUCTION

The FBI's use of undercover employees and operation of proprietary business entities is a lawful and essential technique in the detection and investigation of white collar crime, political corruption, organized crime, and other priority areas. However, use of this technique inherently involves an element of deception, and occasionally may require a degree of cooperation with persons whose motivation and conduct are open to question, and so should be carefully considered and monitored.

DEFINITIONS

An "undercover employee," under these guidelines, is any employee of the FBI—or employee of a federal, state or local law enforcement agency working under the direction and control of the FBI in a particular investigation—whose relationship with the FBI is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity.

An "undercover operation" is any investigative operation in which an undercover employee is used.

A "proprietary" is a sole proprietorship, partnership, corporation, or other business entity owned or controlled by the FBI, used by the FBI in connection with an undercover operation, and whose relationship with the FBI is not generally acknowledged.

GENERAL AUTHORITY

(1) The FBI may conduct undercover operations, pursuant to these guidelines, that are appropriate to carry out its investigative responsibilities in domestic law enforcement.

Under this authority, the FBI may participate in joint undercover operations with other federal, state, and local law enforcement agencies; may seek operational assistance for an undercover operation from any suitable informant, confidential source, or other cooperating private individual; and may operate a proprietary on a commercial basis to the extent necessary to maintain an operation's cover or effectiveness.

(2) Undercover operations can be authorized only at the "full investigation" stage in Domestic Security Investigations.

AUTHORIZATION OF UNDERCOVER OPERATIONS

All undercover operations under these guidelines fall into one of two categories: (1) those undercover operations that can be approved by the Special Agent in Charge (SAC) under his own authority, and (2) those undercover operations that can only be authorized by the Director or designated Assistant Director, upon favorable recommendations by the SAC, Bureau headquarters (FBHQ), and the Undercover Operations Review Committee. Undercover operations in the latter category are those that involve a substantial expenditure of government funds, or otherwise implicate fiscal policies and considerations. Paragraph A. Also included in this latter category are undercover operations that involve what are termed "sensitive circumstances." In general, these are undercover operations involving investigation of public corruption, or undercover operations that involve risks of various forms of harm and intrusion. Paragraph B. Of course, in planning an undercover operation, these risks of harm and intrusion will be avoided whenever possible, consistent with the need to obtain necessary evidence in a timely and effective manner.

A. *Undercover operations that may not be approved by the special agent in charge because of fiscal circumstances*

(1) Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation if there is a reasonable expectation that:

(a) The undercover operation could result in significant civil claims against the United States, either arising in tort, contract or claims for just compensation for the "taking" of property;

(b) The undercover operation will require leasing or contracting for property, supplies, services, equipment, or facilities for any period extending beyond the September 30 termination date of the then current fiscal year, or with prepayment of more than one month's rent; or will require leasing any facilities in the District of Columbia;

(c) The undercover operation will require the use of appropriated funds to establish or acquire a proprietary, or to operate such a proprietary on a commercial basis;

(d) The undercover operation will require the deposit of appropriated funds, or of proceeds generated by the undercover operation, in banks or other financial institutions;

(e) The undercover operation will involve use of proceeds generated by the undercover operation to offset necessary and reasonable expenses of the operation;

(f) The undercover operation will require indemnification agreements for losses incurred in aid of the operation, or will require expenditures in excess of \$1500 for property, supplies, services, equipment or facilities, or for the construction or alteration of facilities;

(g) The undercover operation will last longer than 6 months or will involve an expenditure in excess of \$20,000 or such other amount that is set from time to time by the Director, with the approval of the Attorney General. However, this expenditure limitation shall not apply where a significant and unanticipated investigative opportunity would be lost by compliance with the procedures set forth in paragraphs D, E, F, and G.

B. Undercover operations that may not be approved by the special agent in charge because of sensitive circumstances

Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation that involves sensitive circumstances. For purposes of these guidelines, an undercover operation involves sensitive circumstances if there is a reasonable expectation that:

(a) The undercover operation will concern an investigation of possible corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious or political organization, or the activities of the news media;

(b) The undercover operation will involve untrue representations by an undercover employee or cooperating private individual concerning the activities or involvement of an innocent person;

(c) An undercover employee or cooperating private individual will engage in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime—except this shall not include criminal liability for the purchase of stolen or contraband goods or for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary;

(d) An undercover employee or cooperating private individual will seek to supply an item or service that would be reasonably unavailable to criminal actors but for the participation of the government;

(e) An undercover employee or cooperating private individual will run a significant risk of being arrested and seeking to continue undercover;

(f) An undercover employee or cooperating private individual will be required to give sworn testimony in any proceeding in an undercover capacity;

(g) An undercover employee or cooperating private individual will attend a meeting between a subject of the investigation and his lawyer;

(h) An undercover employee or cooperating private individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will be led into a professional or confidential relationship with the undercover employee or cooperating private individual as a result of the pose;

(i) A request for information will be made by an undercover employee or cooperating individual to an attorney, physician, clergyman, or other person who is under the obligation of a legal privilege of confidentiality, and the particular information would ordinarily be privileged;

(j) A request for information will be made by an undercover employee or cooperating private individual to a member of the news media concerning any individual with whom the newsman is known to have a professional or confidential relationship;

(k) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant;

(l) There may be a significant risk of violence or physical injury to individuals or a significant risk of financial loss to an innocent individual.

C. Undercover operations that may be approved by the special agent in charge

(1) The SAC may authorize the establishment, extension or renewal of all other undercover operations, to be supervised by his field office, upon his written determination, stating supporting facts and circumstances, that:

(a) Initiation of investigative activity regarding the alleged criminal conduct or criminal enterprise is warranted under the Attorney General's Guidelines on the Investigation of General Crimes, the Attorney General's Guidelines on Domestic Security Investigations, the Attorney General's Guidelines on Investigation of Criminal Enterprises Engaged in Racketeering Activity, and any other applicable guidelines;

(b) The proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; this should include a statement of what prior investigation has been conducted, and what chance the operation has of obtaining evidence or necessary information concerning the alleged criminal conduct or criminal enterprise;

(c) The undercover operation will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner;

(d) Approval for the use of any informant or confidential source has been obtained as required by the Attorney General's Guidelines on Use of Informants and Confidential Sources;

(e) There is no present expectation of the occurrence of any of the circumstances listed in paragraphs A and B;

(f) Any foreseeable participation by an undercover employee or cooperating private individual in illegal activity that can be approved by a SAC on his own authority (that is, the purchase of stolen or contraband goods, or participation in a nonserious misdemeanor), is justified by the factors noted in paragraph F1.

D. Approval by Headquarters (Undercover Operations Review Committee, and Director or Designated Assistant Director), with concurrence of U.S. attorney, or Strike Force Chief, where sensitive or fiscal circumstances are present

The Director of the FBI or a designated Assistant Director must approve the establishment, extension, or renewal of an undercover operation if there is a reasonable expectation that any of the circumstances listed in paragraphs A and B may occur.

In such cases, the SAC shall first make application to FBI Headquarters (FBIHQ). See paragraph E below. FBIHQ may either disapprove the application or recommend that it be approved. A recommendation for approval may be forwarded directly to the Director or designated Assistant Director if the application was submitted to FBIHQ solely because of a fiscal circumstance listed in paragraph A(b)-(e). In all other cases in which FBIHQ recommends approval, the application shall be forwarded to the Undercover Operations Review Committee for consideration. See paragraph E. If approved by the Undercover Operations Review Committee, the application shall be forwarded to the Director or designated Assistant Director. See paragraph G. The Director or designated Assistant Director may approve or disapprove the application.

E. Applications to Headquarters

(1) Each application to Headquarters from a SAC recommending approval of the establishment, extension, or renewal of an undercover operation involving circumstances listed in paragraphs A and B shall be made in writing and shall include, with supporting facts and circumstances:

(a) A description of the proposed undercover operation, including the particular cover to be employed and any informants or other cooperating persons who will assist in the operation; a description of the particular offense or criminal enterprise under investigation, and any individuals known to be involved; and a statement of the period of time for which the undercover operations would be maintained;

(b) A description of how the determinations required by paragraph C1(a)-(d) have been met;

(c) A statement of which circumstances specified in paragraphs A and B are reasonably expected to occur, what the operative facts are likely to be, and why the undercover operation merits approval in light of the circumstances, including:

(i) for any foreseeable participation by an undercover employee or cooperating private individual in activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime—but not including the purchase of stolen or contraband goods or making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary—a statement why the participation is justified by the factors noted in paragraph h1), and a statement of the federal prosecutor's approval pursuant to paragraph h2);

(ii) for any planned infiltration by an undercover employee or cooperative private individual of a group under investigation as part of a Domestic Security Investigation, or recruitment of a person from within such a group as an informant, a statement why the infiltration or recruitment is necessary and meets the requirements of the Attorney General's Guidelines on Domestic Security Investigations; and a description of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity;

(d) A statement of proposed expenses;

(e) A statement that the United States Attorney or Strike Force Chief is knowledgeable about the proposed operation, including the sensitive circumstances reasonably expected to occur; concurs with the proposal and its objectives and legality; and agrees to prosecute any meritorious case that is developed.

(2) In the highly unusual event that there are compelling reasons that either the United States Attorney or Strike Force Chief should not be advised of the proposed Undercover Operation, the Assistant Attorney General in charge of the Criminal Division, or other Department of Justice attorney designated by him, may substitute for such person(s) for purposes of any authorization or other function required by these guidelines. Where the SAC determines that such substitution is necessary, the application to FBIHQ shall include a statement of the compelling reasons, together with supporting facts and circumstances, which are believed to justify that determination. Such applications may only be authorized pursuant to the procedures prescribed in paragraph F, below, whether or not consideration by the Undercover Operations Review Committee is otherwise required, and upon the approval of the Assistant Attorney General in charge of the Criminal Division.

(3) An application for the extension or renewal of authority to engage in an Undercover Operation should also describe the results so far obtained from the operation or a reasonable explanation of any failure to obtain significant results, and a statement that the United States Attorney or Strike Force Chief favors the extension or renewal of authority.

F. Undercover Operations Review Committee

(1) There shall be an Undercover Operations Review Committee, consisting of appropriate employees of the FBI designated by the Director, and attorneys of the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division, to be chaired by a designee of the Director.

(2) Upon receipt from FBIHQ of a SAC's application for approval of an undercover operation, the Committee will review the application. The Justice Department members of the Committee may consult with senior Department officials and the United States Attorney or Strike Force Chief, as they deem appropriate. If the Committee concurs in the determinations contained in the application, and finds that in other respects the undercover operation should go forward, see paragraph F(3) and (4) below, the Committee is authorized to recommend to the Director or designated Assistant Director, see paragraph G, that approval be granted.

(3) In reviewing the application, the Committee shall carefully assess the contemplated benefits of the undercover operation, together with the operating and other costs of the proposed operation. In assessing the costs of the Undercover Operation, the Committee shall consider, where relevant, the following factors, among others:

- (a) the risk of harm to private individuals or undercover employees;
- (b) the risk of financial loss to private individuals and businesses, and the risk of damage liability or other loss to the government;
- (c) the risk of harm to reputation;
- (d) the risk of harm to privileged or confidential relationships;
- (e) the risk of invasion of privacy;
- (f) the degree to which the actions of undercover employees or cooperating private individuals may approach the conduct proscribed in paragraph J below; and
- (g) the suitability of undercover employees' or cooperating private individuals' participating in activity of the sort contemplated during the Undercover Operation.

(4) If the proposed undercover operation involves any of the sensitive circumstances listed in paragraph B, the Committee shall also examine the application to determine whether the undercover operation is planned so as to minimize the incidence of such sensitive circumstances, and to minimize the risks of harm and intrusion that are created by such circumstances. If the Committee recommends approval of an undercover operation involving sensitive circumstances, the recommendation shall include a brief written statement explaining why the undercover operation merits approval in light of the anticipated occurrence of such sensitive circumstances.

(5) The Committee shall recommend approval of an undercover operation only upon reaching a consensus, provided that:

(a) If one or more of the designees of the Assistant Attorney General in charge of the Criminal Division does not join in a recommendation for approval of a proposed undercover operation because of legal, ethical, prosecutive or Departmental policy considerations, the designee shall promptly advise the Assistant Attorney General and there shall be no approval of the establishment, extension, or renewal of the undercover operation until the Assistant Attorney General has had the opportunity to consult with the Director;

(b) If, upon consultation, the Assistant Attorney General disagrees with a decision by the Director to approve the proposed undercover operation, there shall be no establishment, extension, or renewal of the undercover operation.

until the Assistant Attorney General has had an opportunity to refer the matter to the Deputy Attorney General or Attorney General.

(6) The Committee should consult the Legal Counsel Division of the FBI and the Office of Legal Counsel or other appropriate division or office in the Department of Justice about any significant unsettled legal questions concerning authority for or the conduct of a proposed undercover operation.

G. Approval by Director or designated Assistant Director

The Director or a designated Assistant Director shall have authority to approve operations recommended for approval by the Undercover Operations Review Committee, provided that only the director may authorize a proposed operation if a reasonable expectation exists that:

- (a) There may be a significant risk of violence or physical injury to individuals;
- (b) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant or confidential source, in which case the Director's authorization shall include a statement of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity; or
- (c) A circumstance specified in paragraph A-b-c-e is reasonably expected to occur, in which case the undercover operation may be implemented only after the Deputy Attorney General or Attorney General has specifically approved that aspect of the operation in accordance with applicable law.

H. Duration of authorizations

- (1) An undercover operation may not continue longer than is necessary to achieve the objective of the authorization, nor in any event longer than 6 months without new authorization to proceed.
- (2) Any undercover operation initially approved by a SAC must be reauthorized by an Assistant Director or the Director, pursuant to paragraphs D-G, if it lasts longer than 6 months or involves expenditures in excess of the amount prescribed in paragraph A-g.

I. Authorization of participation in "otherwise illegal" activity

Notwithstanding any other provision of these guidelines, an undercover employee or cooperating private individual shall not engage, except in accordance with this paragraph, in any activity that would constitute a crime under state or federal law if engaged in by a private person acting without the approval or authorization of an appropriate government official. For purposes of this paragraph, such activity is referred to as "otherwise illegal" activity.

(1) No official shall recommend or approve an undercover employee's or cooperating private individual's planned or reasonably foreseeable participation in otherwise illegal activity unless the participation is justified in order:

- (a) to obtain information or evidence necessary for paramount prosecutive purposes;
 - (b) to establish and maintain credibility or cover with persons associated with the criminal activity under investigation; or
 - (c) to prevent or avoid the danger of death or serious bodily injury.
- (2) Participation in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime—but not including the purchase of stolen or contraband goods or the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary—must be approved in advance by an Assistant Director on the recommendation of the Undercover Operations Review Committee pursuant to paragraphs D-G, except that the Director's approval is required for participation in any otherwise illegal activity involving a significant risk of violence or physical injury to individuals. Approvals shall be recorded in writing.

A recommendation to FBIHQ for approval of participation in such otherwise illegal activity must include the views of the United States Attorney, Strike Force Chief, or Assistant Attorney General on why the participation is warranted.

(3) Participation in the purchase of stolen or contraband goods, or in a nonserious misdemeanor, must be approved in advance by the Special Agent in Charge. Approvals by the SAC shall be recorded in writing.

(4) The FBI shall take reasonable steps to minimize the participation of an undercover employee or cooperating private individual in any otherwise illegal activity.

(5) An undercover employee or cooperating private individual shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts, or use unlawful investigative techniques to obtain information or evidence for the FBI (e.g., illegal wiretapping, illegal mail openings, breaking and entering, or trespass amounting to an illegal search).

(6) If it becomes necessary to participate in otherwise illegal activity that was not foreseen or anticipated, an undercover employee should make every effort to consult with the SAC. For otherwise illegal activity that is a felony or a serious misdemeanor, the SAC can provide emergency authorization under paragraph N. If consultation with the SAC is impossible and there is an immediate and grave threat to life or physical safety (including destruction of property through arson or bombing), an undercover employee may participate in the otherwise illegal activity so long as he does not take part in and makes every effort to prevent any act of violence. A report to the SAC shall be made as soon as possible after the participation, and the SAC shall submit a full report to FBIHQ. FBIHQ shall promptly inform the members of the Undercover Operations Review Committee.

(7) Nothing in these guidelines prohibits establishing, funding, and maintaining secure cover for an undercover operation by making false representations to third parties in concealment of personal identity or the true ownership of a proprietary (e.g., false statements in obtaining driver's licenses, vehicle registrations, occupancy permits, and business licenses) when such action is approved in advance by the appropriate SAC.

(8) Nothing in paragraph F-5 or (6) prohibits an undercover employee from taking reasonable measures of self-defense in an emergency to protect his own life or the life of others against wrongful force. Such measures shall be reported to the SAC and the United States Attorney, Strike Force Chief, or Assistant Attorney General as soon as possible.

(9) If a serious incident of violence should occur in the course of a criminal activity and an undercover employee or cooperating private individual has participated in any fashion in the criminal activity, the SAC shall immediately inform FBIHQ headquarters shall promptly inform the Assistant Attorney General in charge of the Criminal Division.

J. Authorization of the creation of opportunities for illegal activity

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would otherwise not be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in illegal activity, the approving authority should be satisfied that:

(a) The corrupt nature of the activity is reasonably clear to potential subjects;

(b) There is a reasonable indication that the undercover operation will reveal illegal activities; and

(c) The nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.

(3) Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that that particular individual has engaged, or is engaging, in the illegal activity that is properly under investigation. Nonetheless, no such undercover operation shall be approved without the specific written authorization of the Director, unless the Undercover Operations Review Committee determines (See paragraph F) insofar as practicable, that either:

(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in illegal activity, shall be based solely on law enforcement considerations.

K. Authorization of investigative interviews that are not part of an undercover operation

Notwithstanding any other provision of these guidelines, routine investigative interviews that are not part of an undercover operation may be conducted without the authorization of FBIHQ, and without compliance with paragraphs C, D, and E. These include so-called "pretext" interviews, in which an FBI employee uses an alias or cover identity to conceal his relationship with the FBI.

However, this authority does not apply to an investigative interview that involves a sensitive circumstance listed in paragraph B. Any investigative interview involving a sensitive circumstance—even an interview that is not conducted as part of an undercover operation—may only be approved pursuant to the procedures set forth in paragraphs D, E, F, and G, or pursuant to the emergency authority prescribed in paragraph N, if applicable.

MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

L. Continuing consultation with United States Attorney or strike force chief

Throughout the course of any undercover operation that has been approved by Headquarters, the SAC shall consult periodically with the United States Attorney, Strike Force Chief, or Assistant Attorney General concerning the plans and tactics and anticipated problems of the operation.

M. Serious legal, ethical, prosecutive, or departmental policy questions, and previous, or unforeseen sensitive circumstances

(1) In any undercover operation, the SAC shall consult with Headquarters whenever a serious legal, ethical, prosecutive, or Departmental policy question is presented by the operation. FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of any such question and its proposed resolution.

(2) This procedure shall always be followed if an undercover operation is likely to involve one of the circumstances listed in paragraphs A and B and either: (a) The SAC's application to FBIHQ did not contemplate the occurrence of that circumstance; or (b) the undercover operation was approved by the SAC under his own authority. In such cases the SAC shall also submit a written application for continued authorization of the operation or an amendment of the existing application to Headquarters pursuant to paragraph E.

Whenever such a new authorization or amended authorization is required, the FBI shall consult with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with the Department of Justice members of the Undercover Operations Review Committee on whether to modify, suspend, or terminate the undercover operation pending full processing of the application or amendment.

N. Emergency authorization

Notwithstanding any other provision of these guidelines, any SAC who reasonably determines that:

(a) an emergency situation exists requiring the establishment, extension, renewal, or modification of an undercover operation before an authorization mandated by these guidelines can with due diligence be obtained, in order to protect life or substantial property; to apprehend or identify a fleeing offender; to prevent the hiding or destruction of essential evidence; or to avoid other grave harm; and

(b) there are grounds upon which authorization could be obtained under these guidelines, may approve the establishment, extension, renewal, or modification of an undercover operation if a written application for approval is submitted to Headquarters within 48 hours after renewed, or modified. In such an emergency situation the SAC shall attempt to consult by telephone with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with a designated Assistant Director. FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of the emergency authorization. In the event the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation shall be submitted to the Director, who shall inform the Deputy Attorney General.

O. Annual report of Undercover Operations Review Committee

(1) The Undercover Operations Review Committee shall retain a file of all applications for approval of undercover operations submitted to it, together with a written record of the Committee's action on the applications and any ultimate disposition by the Director or a designated Assistant Director. The FBI shall also prepare a short summary of each undercover operation approved by the Committee. These records and summaries shall be available for inspection by a designee of the Deputy Attorney General or of the Assistant Attorney General in charge of the Criminal Division.

(2) On an annual basis, the Committee shall submit to the Director, the Attorney General, the Deputy Attorney General, and the Assistant Attorney General in charge of the Criminal Division, a written report summarizing: (a) the types of

undercover operations approved; and (b) the major issues addressed by the Committee in reviewing applications and how they were resolved.

P. Preparation of undercover employees

(1) The SAC or a designated supervisory agent shall review with each undercover employee prior to the employee's participation in an investigation the conduct that the undercover employee is expected to undertake and other conduct whose necessity during the investigation is foreseeable. The SAC or designated supervisory agent shall expressly discuss with each undercover employee any of the circumstances specified in paragraphs A and B which is reasonably expected to occur.

Each undercover employee shall be instructed generally, and in relation to the proposed undercover operation, that he shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts; use unlawful investigative techniques to obtain information or evidence; or engage in any conduct that would violate restrictions on investigative techniques or FBI conduct contained in Attorney General Guidelines or other Department policy; and that, except in an emergency situation, he shall not participate in any illegal activity for which authorization has not been obtained under these guidelines. When the FBI learns that persons under investigation intend to commit a violent crime, any undercover employee used in connection with the investigation shall be instructed to try to discourage the violence.

(2) To the extent feasible, a similar review shall be conducted by a Special Agent with each cooperating private individual.

Q. Review of undercover employee conduct

(1) From time to time during the course of the investigation, as is practicable, the SAC or designated supervisory agent shall review the actual conduct of the undercover employee, as well as the employee's proposed or reasonably foreseeable conduct for the remainder of the investigation, and shall make a determination whether the conduct of the employee has been permissible. This determination shall be communicated to the undercover employee as soon as practicable. Any findings of impermissible conduct shall be promptly reported to the Director, and consultation with the Director shall be undertaken before the employee continues his participation in the investigation. To the extent feasible, a similar review shall be made of the conduct of each cooperating private individual.

(2) A written report on the use of false representations to third parties in concealment of personal identity or the true ownership of a proprietary, for establishing, funding, and maintaining secure cover for an undercover operation, shall be submitted to the SAC or designated supervisory agent at the conclusion of the undercover operation. A written report on participation in any other activity proscribed by federal, state or local law shall be made by an undercover employee to the SAC or designated supervisory agent every 60 days and at the conclusion of the participation in the illegal activity.

R. Deposit of proceeds; liquidation of proprietaries

As soon as the proceeds from an undercover operation are no longer necessary for the conduct of the operation, the remaining proceeds shall be deposited in the Treasury of the United States as miscellaneous receipts.

Whenever a proprietary with a net value over \$50,000 is to be liquidated, sold, or otherwise disposed of, the FBI, as much in advance as the Director or his designee shall determine is practicable, shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or other disposition, after obligations are met, shall be deposited in the Treasury of the United States as receipts.

RESERVATION

These guidelines on the use of undercover operations are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

BENJAMIN R. CIVILETTI
Attorney General

APPENDIX 2

FBI OVERSIGHT

TUESDAY, MARCH 4, 1980

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

The subcommittee met at 10 a.m., in room 2141, of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Kastenmeier, Seiberling, Drinan, Volkmer, Hyde, and Sensenbrenner.

Also present: Representative Rodino.

Staff present: Thomas P. Breen, counsel; Catherine LeRoy and Janice Cooper, assistant counsel; and Thomas Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I will ask unanimous consent that these proceedings may be open to television and other camera and video.

Mr. EDWARDS. Without objection, it is so ordered.

The hearing today has to do with the undercover operations of the Federal Bureau of Investigation. The subcommittee is presently considering the budget of the FBI for 1981, and the budget for 1981 has an increase in undercover expenditures from \$3 million up to \$4.8 million.

We have two witnesses today, and I suggest that the judge, the Director of the FBI, will go first, and then Mr. Heymann, and then we will have questions after that, if that is agreeable with the witnesses.

At this time I yield to the very distinguished chairman of the House Judiciary Committee, the gentleman from New Jersey, Mr. Rodino.

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

I am pleased to welcome the Director of the Federal Bureau of Investigation, Mr. Webster, and the Assistant Attorney General in charge of the Criminal Division, Mr. Heymann, this morning.

I consider this a very important responsibility of the Judiciary Committee, and especially of this subcommittee that is so ably chaired by Mr. Edwards, the Subcommittee on Civil and Constitutional Rights, and I believe that that subcommittee was appropriately named because it has been a bulwark of strength in attempting to assure that the agencies of Government entrusted with law enforcement recognize that they have a very principal responsibility; that is, not to overly intrude into the rights that are guaranteed in the Constitution, the civil liberties that we all hold and cherish so dearly.

This particular hearing, I believe, which is a hearing that was scheduled some time ago by the chairman of the subcommittee, is one that is, I think, very significant because it comes on the heels of investigations that were conducted by the Department of Justice and the FBI where many, many questions have been raised.

This committee, first of all, prides itself on—and I am talking about the full Judiciary Committee—prides itself on acting responsibly in all cases, and I think that the committee, as a matter of fact, showed that it cannot only act responsibly, but is certainly very, very anxious that the whole world know. This committee had before it, 2 weeks ago, a resolution of inquiry, which the committee felt was not responsible, which the committee reported adversely, and the Congress, acting pursuant to the recommendation of that committee, did act also responsibly. I think the whole tenor of the argument was that while we want to assure that the Justice Department is guaranteed all the tools necessary, and the funding, to go forward, to ferret out criminal conduct in order to protect our society; at the same time I think that we have the principal responsibility of assuring, however, that the Department does not abuse that authority.

So I am especially interested, Mr. Director and Mr. Heymann, in what you have to say. I say that because on July 31, as the sponsor of the FBI Charter, I made the following statement prior to my introducing that proposal.

I stated at that time that I was very pleased with what you are attempting to do, and I direct this to you, Mr. Webster, because the FBI had come under some criticism—and I think justly so—for its past actions over the many years, and I stated then, and I'd like to merely repeat that statement:

It would appear to me that the goals of the American people are as follows: that the focus of all FBI investigations is criminal conduct, and not activities otherwise protected by the Constitution.

I went on to say that I did have concerns and reservations generally about the absence of specific guidelines dealing with matters such as the identity of informants, the use of various techniques in investigations, the retention and use of information, and the Bureau's criminal records, and other areas which touch on sensitive questions of civil liberties.

Then I also added:

Therefore, I am particularly pleased that the charter calls for the promulgation of guidelines which will set forth with particularity the work rules in these and other important areas.

I am confident that the Attorney General's guidelines, work on which I have been made to understand has already begun, will protect the full enjoyment of all constitutional rights, the freedom against unreasonable intrusions, by whatever technology, while at the same time providing safe, sound, and effective law enforcement.

I must say, Mr. Director, that while I made that statement in full confidence that the work rules were going to be such that they would deal with specificity, I would like to know at this time, and during the course of the questioning, after listening to your statement, whether or not you have, because I do have some grave reservations in my mind as to whether or not if you do not have specific guidelines, you can operate and do the job that is necessary in the area of law

enforcement, at the same time guaranteeing the constitutional rights of individuals without intruding on their liberties.

Thank you very much, Mr. Chairman.

[The complete statement follows:]

STATEMENT OF CHAIRMAN PETER W. RODINO, JR.

I am pleased to have the opportunity to participate in this important aspect of the work of the Committee on the Judiciary.

There has been some concern expressed to the effect that the Congress, and this Committee, should do nothing until the current investigative effort of the Department of Justice is complete. This view, if it prevailed, would mean an abdication of this Committee's constitutional obligations to authorize funds for and exercise legitimate oversight over the Department of Justice.

This Committee will not interfere with the process of pending cases, nor will it tamper with or prematurely attempt to examine any evidence in such cases.

We have in the past and will continue to look at the priority programs of the Department of Justice and the Federal Bureau of Investigation. If we are to provide appropriate funding, we must understand the programs of the Department.

Undercover operations are difficult, often dangerous and, by their nature difficult to control. Since these operations often involve activities by persons not directly employed by the government we must assure ourselves, to the extent possible, that all logical steps are being taken to control their activities. The danger of improperly involving or implicating innocent citizens in these sensitive investigations is a result which we have a duty to prevent if at all possible.

This Subcommittee has been deeply involved in hearings on the FBI Charter. In July, when the Charter was initially introduced, I stated that certain concepts which are embodied in the Charter would make the work of the FBI more nearly conform to the desires of the American people. Two of the concepts which I discussed were (1) that investigative techniques be examined with the requirement for minimal levels of intrusiveness into protected activities and (2) that periodic review of investigative activities be addressed.

These two concepts, I believe, go hand in hand, for without ongoing review and guidance of investigative activities, there is the risk of intrusiveness and violation of protected activities.

When I introduced H.R. 5030 (the proposal for the FBI Charter), I particularly emphasized that the focus of all FBI investigations should be criminal conduct and that the proposed Charter provides a method for systematic accountability by the Bureau. Our purpose today is to examine these precepts in detail to see if undercover activities conducted by informants adhere to the Charter's standards and to such guidelines as the Attorney General has established for protecting the constitutional rights of persons being investigated with respect to electronic surveillance and all other aspects of undercover activities.

I am particularly concerned about the degree of ongoing review which the Bureau and the Department utilize in their undercover activities. The process through which the FBI Charter as introduced was forged involved detailed analyses of, among other things, undercover operations. I will be very interested to hear from our witnesses today about the degree to which current operations have conformed to the prescriptions in the draft Charter. If there are inadequacies in the Charter from a realistic day-to-day undercover operations perspective, it is imperative that we understand these inadequacies.

I welcome the opportunity to hear from our distinguished witnesses on this subject and look forward to a continuing mutual effort to make our criminal justice system the best that fair minds can devise.

Mr. EDWARDS. Thank you, Mr. Rodino.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I would like to welcome Director Webster and Mr. Heymann, and express my gratitude to the chairman for his having scheduled hearings on the matter of the FBI's undercover operations, commonly referred to as sting operations.

We in the Congress have, as you know, Director Webster, only recently become sensitized to the potential impact of undercover operations, which the Bureau stages.

In fact, the chairman has been quoted as saying that the Abscam operation, just completed, would not have been possible under the proposed charter.

My reading of that document, however, indicates to me that proposed section 533(b) (1) specifically permits the Bureau to conduct an investigation on the basis of facts or circumstances which "reasonably indicate that a person has engaged, is engaged, or will engage" in a criminal activity.

I invite you to confirm or correct my interpretation of that section of the proposed bill.

In the course of this hearing, I expect to ask a number of questions designed to establish the overall effectiveness of these operations, the conviction rate relative to other investigations, and the investigative costs per conviction, and similar questions.

I suppose parenthetically it's too much to hope that the cost accounting that you will be required to make be applied to the Department of Housing and Urban Development, or HEW, but we can hope.

I am also quite concerned, as you might suspect, about the extent to which you do engage counsel to monitor these activities.

Now it seems to me that audio and video recordings, legally acquired during these sting operations, constitute the best evidence within the meaning of the rules of evidence, and most clearly demonstrate to a jury the actual events in the particular case at bar as they occurred. Video and audio recordings help to resolve many otherwise troublesome problems of identification, and exactly what was said or done, and under what circumstances.

We are also concerned about the leaks which may well have prejudiced the rights and the reputations of some, but also which sabotaged, rather effectively, your ongoing investigation.

I look forward to hearing your statement and your response to my concerns.

Mr. EDWARDS. The gentleman from Ohio, Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. Webster and Mr. Heymann, I have read your draft statements, prepared statements. I haven't read the final version. I presume there are no major substantive differences; is that correct?

Mr. WEBSTER. Yes.

Mr. SEIBERLING. I noticed that in both statements, it is pointed out that the FBI and the Justice Department are not prepared to back off or to curtail investigations of this type.

I think that is a bit of a strawman, because I don't know anybody who has suggested that you back off or curtail these investigations.

I certainly think that wherever you have any reasonable or probable cause to believe that officials or anyone else are engaged in corrupt activities, you have the obligation to go ahead and investigate those, and pursue them to the end, as you say in your statement.

I am, however, concerned with some of the implications of the techniques used. Perhaps this is a novel approach or perhaps we just didn't know about it before now; but, in any event, we now have some curtains drawn aside, and we have had revealed to us some of the techniques that have been used in trying to ferret out possible violators and possible corrupt officials.

I think we should not try to explore your activities in connection with any of the people whom you have some reason to believe may have been corrupt, and I don't think this committee should, as long as there is a possibility of prosecution, but I do think that we can investigate the processes used in connection with those who were the targets of investigation and were not found to be corrupt, and those names have been revealed in the newspapers, again perhaps unfortunately, because it does put some kind of a cloud over them.

I think that we owe it to the Congress and to the country to explore the techniques and find out how it is that people who have turned out to have no predisposition, to have no corrupt motives, to have in effect not been enticed by any snares that were set, how they could have been brought into, first of all, an investigation posture; and second, how they could be brought to go to whatever houses or other places where you had these video cameras and so forth, and what was used to entice them. We have one case of a Senator who, as far as I can determine from the newspaper reports, was enticed by the prospect of perhaps a campaign contribution; a perfectly legitimate thing. Although when he found out that there was some sort of money for possible legislation, why, he immediately turned it down.

You have another one reported where a lawyer, not a Member of Congress, but a lawyer, was approached on the possibility of some Arab sheik hiring him on a retainer basis; again a perfectly legitimate thing; and when he found out what the other conditions were, he said, "Nothing doing."

Now we have other instances of Congressmen who were apparently intrigued into exploring promises that there were some big investors who wanted to invest in their district. Every single Member of Congress wants to have investments in his district to help the employment situation and produce an expanding economy, and that is a perfectly legitimate thing.

I really think we owe it to the country to explore to what extent honest motives were used to suck people in to what might have been a trap, had they turned out not be honest people. I think we ought to explore it only in the case of those who turned out to be honest and not to have corrupt motives. We must see how this could happen, because I think that those cases carry the most serious implication of all the very serious implications in this entire affair. If necessary, I think we should go into secret session, if otherwise we would be revealing methods of the FBI or embarrassing individuals.

I thank you, Mr. Chairman, for this opportunity to express my mind on this very, very important subject.

Mr. EDWARDS. The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. I'd just like to briefly say that I wish to renew my confidence in the Director, but I also have the same concerns as the gentleman from Ohio who has just spoken, and it's not with just how this applies to this one operation, but how it may apply to other operations with other people throughout the country who are, I would assume, innocent until proven guilty, and good people in their community, and how they, too, may be caught up into some type of operation, any type of operation, unless there is—and the thing I'd like to focus on sometime, if not today or tomorrow, maybe 6 months from

now, or sometime when it can be, as to the management of these operations and how detailed that management actually is, and the scope of involving people, because of the matter of Senator Pressler and how that came about, and how the—well, some way enticement was brought about, as the gentleman from Ohio has pointed out, purely legitimate.

To be honest with you, if somebody had walked up to me and said, "Harold, I know some people who would like to give you \$1,000 or \$500, even \$100, for your campaign. There is a group of them down the street, I'd like for you to come down and visit with them and talk to them about your campaign," Mr. Director, I'm afraid that I'd say, "Sure, I'll be glad to go down."

I don't think there are very many Members of Congress that wouldn't. The same thing would apply to certain just private individuals, as well as other purposes, business investments and what-have-you. That's what concerns me.

Thank you very much, Mr. Chairman.

Mr. EDWARDS. Without objection, both statements will be made a part of the record in full, and I recognize the distinguished Director of the FBI, Judge William H. Webster.

[The complete statements follow:]

STATEMENT OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE.

Mr. Chairman and members of the subcommittee, I am pleased to be here today to discuss the role of undercover operations in federal law enforcement. I would first like to discuss why undercover techniques are so important to effective enforcement, and then to describe the legal and policy safeguards which we believe set an appropriate role for use of the technique.

1. THE UNDERCOVER TECHNIQUE IS A LONG-ESTABLISHED AND CRUCIAL LAW ENFORCEMENT METHOD.

The term "undercover operations" embraces a wide variety of investigative techniques which can successfully ferret out and deter a broad range of significant crimes. Undercover operations span a gamut which may include: a police officer posing as an old woman vulnerable to mugging or more severe physical attacks in a park; agents infiltrating a drug-smuggling conspiracy intent on making controlled narcotics buys from large-scale dealers; a modest business front, such as a local tavern, susceptible to extortion by local organized crime elements or official inspectors seeking graft; or an elaborate, posh enterprise designed to recover expensive stolen art, jewelry and other valuables. Such an operation may include only a single agent or a single cooperating citizen or informant or it may involve many agents, the use of video and oral tape recordings, judicially-authorized wiretaps, cooperation by several private individuals or businesses, and a number of overt investigative techniques.

Undercover operations have been and will continue to be effective in capturing and convicting those engaged in both violent and economic crimes, including narcotics trafficking, terrorism, labor racketeering, truck hijacking, arson-for-profit, and white collar frauds, as well as political corruption. Judge Webster has noted some of the Bureau's most recent successful operations in these areas. Other federal investigative agencies such as the Drug Enforcement Administration, the Department of Agriculture, and the Bureau of Alcohol, Tobacco and Firearms, as well as local police forces also utilize undercover operations.

Judge Webster has mentioned the investigative advantages which undercover operations provide. In essence, they allow the investigators to pierce the carefully constructed walls of secrecy and layers of insulation behind which the most sophisticated and potentially dangerous criminals work. They permit investigators to discern types of "consensual" crime which generally go unreported and in which the victim is the public at large. If a night club owner bribes a local inspector to overlook fire code violations, in order to avoid more expensive repairs, neither

party is likely to report the criminal transaction. Without undercover techniques, the matter may never come to public attention or may come only after a fire has trapped and killed innocent patrons of the club. As one writer puts it, consensual crimes generally "do not announce themselves."

From the prosecutor's perspective, undercover operations are extremely effective in aiding us to identify, prosecute and convict the guilty and to reduce the chances that innocent parties will be caught up in the criminal process. Undercover operations permit us to prove our cases with direct, as opposed to circumstantial, evidence. Instead of having to rely on inferences from facts developed after the commission of a crime, we can rely on testimony from those who were direct observers before, during and after the attempted commission of a crime. Nor are we limited to the testimony of unsavory criminals and confidence men, whose credibility may be questionable and, in any event, can often be destroyed on cross-examination by able defense counsel. Instead, through undercover techniques, we can muster the testimony of credible law enforcement agents, often augmented by unimpeachable video and oral tapes which graphically reveal the defendant's image and voice engaged in the commission of crime. These techniques aid the truth-finding process by generally avoiding issues of mistaken identity or perjurious efforts by a witness to implicate an innocent person. With the aid of the direct perceptions of government agents and indisputable tapes, we are able to determine whom to indict and whom we should not charge. Similarly, a jury is aided in determining whether the charges have been adequately proven.

Recording the interplay of government agents and unsuspecting, putative defendants is also of considerable assistance to the courts. In many cases where a defendant seeks dismissal of an indictment or suppression of evidence on the ground of governmental misconduct, the court is forced to make difficult comparisons of credibility and accuracy of recollection between government witnesses and the defendant. But when the challenged law enforcement conduct is largely recorded, the court is in a superior position to determine whether the charges of impropriety are justified.

Not only do undercover techniques enhance our ability to investigate and prosecute crimes, but they also serve as a powerful deterrent against the commission of future crimes. Operation Lobster, which the Bureau conducted in conjunction with local law enforcement agencies under the supervision of the Justice Department's New England Organized Crime Strike Force, was an effort to combat truck hijackings plaguing the Northeast Corridor at a rate as high as two to three per day. The operation involved having a Bureau undercover operative pose as a broker of stolen bulk merchandise and run a warehouse where the hijackers could bring their trucks and fence their stolen goods. Video tape and sound recordings were used to monitor and record all business dealings at the warehouse. After approximately 22 months, the investigators believed they had identified all of the major hijackers and proceeded to arrest all those who had fenced stolen loads with us. As a result, we convicted 50 individuals and recovered \$3 million in stolen property. But perhaps even more impressive is the fact that after the arrests were made last March, there was only one reported hijacking in the next six months. While the decrease stemmed in part from the fact that many of the major hijackers are now imprisoned, it is also true that hijackers have been made uncertain whether the fences needed to make their crimes profitable are genuine. They must worry that the fences may be in fact federal lawmen who will at some future date arrest and prosecute them.

The same deterrent value is achieved whenever criminal actors are given reason to fear that the person buying heroin, the businessman being extorted or the persons offering bribes may turn out in fact to be undercover government agents. The resulting risks and uncertainties will lead some to refrain entirely from the contemplated crime and others to be considerably slower and more cautious in dealing with strangers essential to the successful consummation of the criminal endeavor.

2. THE LEGAL REQUIREMENTS FOR UNDERCOVER INVESTIGATIONS ARE WELL-ESTABLISHED.

Recognizing the strong societal interest in undercover investigations, the federal courts have repeatedly sanctioned use of the technique. For example, in *United States v. Russell*, 411 U.S. 423 (1973), the Supreme Court upheld a conviction for manufacturing illicit drugs even though the defendant had been supplied essential chemicals by undercover federal agents. The Court specifically rejected the defendant's claim that the Government was too deeply involved in creating the criminal

activity for which the defendant was convicted. Quoting *Sorrells v. United States*, 287 U.S. 435, 441, decided a half century earlier, the *Russell* Court noted: "that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." * * * Nor will the mere fact of deceit defeat a prosecution, * * * for there are circumstances where the use of deceit is the only practicable law enforcement technique available." 423 U.S. at 435.

This was what the *Sorrells* Court had recognized as well: "Artifice and stratagem may be employed to catch those engaged in criminal enterprises. * * * The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose would-be violators." 287 U.S. at 441-442.

In its most recent decision in the area of undercover operations, *Hampton v. United States*, 425 U.S. 484 (1976), the Court upheld the validity of an undercover investigation in which, according to the defendant, the Government had sold contraband heroin to the defendant through an informant, bought it back from him through undercover agents and then convicted him for the sale. In the decisive concurring opinion, joined by Mr. Justice Blackmun, Mr. Justice Powell wrote that the practical law enforcement problems posed by narcotics trafficking justified a flexible response in detecting would-be violators, even by supplying a contraband substance.

For the most part, in determining the propriety of undercover operations, the courts have focused on the issue of entrapment. Under this doctrine, the key test is whether the Government implanted the criminal idea in the mind of an otherwise innocent individual and induced him to commit acts he was not predisposed to commit. In entrapment, the focus is not so much on governmental conduct as on the mental state and prior behavior of the defendant caught in a criminal deed. As Chief Justice Warren stated in *Sherman v. United States*, 356 U.S. 369, 372 (1958):

"To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

The decisions of the Supreme Court suggest that if governmental conduct in an undercover operation reaches "a demonstrable level of outrageousness," such conduct could bar a conviction on due process grounds, even where the defense of entrapment is not technically available. But to date, the Supreme Court has noted that neither supplying essential materials for a criminal enterprise, nor supplying the very contraband whose sale was later punished, amounts to any such overreaching. As Mr. Justice Powell stated in *Hampton*, "The cases, if any, in which proof of predisposition is not dispositive will be rare." 425 U.S. at 495 n. 7. Neither the Supreme Court nor other federal courts have established general operational criteria for undercover operations. The courts have not required that there be any threshold showing of probable cause or reason to believe that a specific crime has been or will be committed or that a particular individual is involved before an operation can be commenced. Nor have the courts imposed any rigid rules on investigative agents with respect to their behavior in establishing and running an undercover operation.

Thus, under current case law, undercover operations will be sustained if they are not so outrageous as to offend the conscience and if they do not trap the unwary innocent.

3. THE DEPARTMENT HAS ADOPTED ADDITIONAL SAFEGUARDS AS A MATTER OF POLICY

As a matter of sound administrative policy, the Department observes considerably more restraints than the bare legal requirements in establishing, monitoring and executing its undercover operations. In the elaborate review process which Judge Webster has described, the Bureau and the Criminal Division strive to insure that each undercover operation is carried out in a manner which is fair, unambiguous, productive of successful prosecutions, and which minimizes the impact on or even the involvement with innocent persons.

As a first safeguard, we only initiate investigations, and we only use the undercover technique, when we reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur. If we open a store-front fencing operation, we do so based on reasonable indications that the theft and sale of stolen property is taking place in the area and could be effectively detected and

prosecuted through use of the technique. When a courageous FBI agent named Walter Orrell was sent on a detail to the Bronx in 1976 to pose as the operator of a new garbage collection business and to seek out customers, it was done based on an urgent suspicion that extortionate practices were occurring in the refuse collection industry. That suspicion was confirmed when the part-owner of a rival company came into Mr. Orrell's office and threatened to pitch Mr. Orrell out the window unless he stopped competing, a threat which was tape-recorded and helped convict the extorter.

We impose on ourselves the requirement that there be a well-founded suspicion of criminal activity in a sector or area before commencing an undercover operation, not only because fishing expeditions may be unfair but also for the practical reason that they would be wasteful of our scarce investigative resources. We are simply not in a position to commit precious manhours and resources to an elaborate undercover operation unless we are fairly confident that in the end we will be able to apprehend and convict those engaged in significant criminal conduct.

We do not impose on ourselves any rigid requirement that we know the particular individuals involved in the pattern of criminal conduct before we begin use of the undercover technique. Sometimes we will know the likely identity of a violator before undercover work is used. If a businessman comes to us and says that he has been offered stolen goods or that a licensing inspector has asked for a gratuity, we can use the undercover technique by having the citizen complete the transaction under surveillance. But in the real world, it is hard to intercept many ongoing criminal transactions in that fashion because, as noted, many serious crimes are consensual (such as drug trafficking, loan-sharking, and instances of official corruption), because the victim is afraid to come forward, or because the victim may not even realize he has been injured (such as a company shareholder whose company officers take kickbacks, or a union member whose funds has been embezzled). Even when the identities of particular persons involved in criminal activity are known, they will often only be intermediaries or lower echelon participants.

Effective use of the undercover technique instead often requires that the violator take steps to identify himself during the undercover operation. When we set up a store-front or warehouse operation, sellers we never even knew were in the business have come forward with stolen goods. When we put word out on the street that we will fence stolen truck cargo or stolen government food stamps, the thieves announce themselves and their livelihood by walking in the door. This self-identification can also occur through the intervention of criminal brokers or intermediaries, who gain a living by functioning as catalysts to illegal deals between prospective buyers or illicit goods and services and sellers looking for an additional outlet. One example of such match-making occurred in an investigation in Pontiac, Michigan several years ago, where an undercover agent posed as an individual interested in starting a numbers operation. He soon was approached by a local union official who said that police protection would be required for the operation and who thereafter brought several interested police officers to see the undercover agent. Until that approach, we had not focused the investigation on official corruption nor suspected the particular police officials who were later convicted.

In some areas of law enforcement, it may be harder to structure an operation so that those with corrupt intentions take the initiative in coming forward, whether in person or through the agency of a broker. Where operators in a criminal sector are sophisticated and wary such as drug bankrollers who wait for drug importers to come to them for financing, undercover agents may have to make the first move and approach such possible financiers directly or through a broker. In cases where we do not know the identities of the violators in a perceived pattern of criminal activity and have to make the first move directly or through a broker, or where we are met by the representations of an initiating agent of uncertain reliability, we seek to take every possible precaution against involvement of the innocent.

Such precautions involve a careful evaluation of anything we are told by intermediaries about the possible interest of other persons in a criminal transaction, and an attempt to check such claims to the extent practicable. Most important, however, is the second major safeguard followed in every undercover operation, of making clear and unambiguous to all concerned the illegal nature of any opportunity used as a decoy. This provides the strongest possible protection against any unwitting involvement by individuals brought in by intermediaries or who are encountered directly. We attempt to structure our undercover decoy trans-

actions by requiring overt participation on the part of all individuals. If a middleman offers to provide police protection for an undercover numbers parlor, we would seek a face-to-face encounter with the allegedly corrupt policeman at which the illegal nature of the quid-pro-quo would be made utterly clear. This precaution not only elicits the strongest possible evidence of the knowledge and involvement of principal offenders who usually insulate themselves through middlemen, but also provides an important protection against any attempt by a middleman to use the name of an innocent person and against any inadvertent involvement by persons located on the outskirts of an undercover operation. By making clear and unambiguous the corrupt nature of any offer we make, the chance of unwitting or gullible involvement by innocent individuals is strongly guarded against.

A third important safeguard in undercover operations is our modeling of the enterprise on the real world as closely as we can. The opportunities for illegal activity created in the course of an undercover operation should be only about as attractive as those which occur in ordinary life—because the object of a decoy undercover operation is to apprehend only those criminal actors who are likely to have committed or to commit similar criminal conduct on other occasions. Offering too high a price for stolen goods in a fencing operation, or pressing a licensing inspector too vigorously to “work something out” about a licensing violation are inducements we would avoid for fairness reasons. Fairness and practicality have an important coincidence here since overweening inducements or too attractive rewards are also likely to be not believable, potentially alerting criminal actors that something is amiss including the possibility of government involvement.

In view of these safeguards and restrictions in carrying out undercover operations, we believe that most of the concerns raised by recent commentators about undercover operations are easily answered.

Some commentators have suggested that undercover operations are improper when they “create crime.” This objection is probably not meant in a literal sense, since whenever a local policeman walks through a park that night dressed as an elderly lady, in order to serve as a decoy victim for muggers, there is a risk that a “new crime” will be created. When we organized our Bronx garbage collection company as a decoy victim for extortion, again we were making likely the commission of an additional act of criminal extortion.

Rather the objection probably goes to the sense that law enforcement activity should never tempt into criminality persons who otherwise would have led law-abiding lives. The important safeguard observed in our undercover operations of modeling the operation on real-world situations—of making sure that any created illicit opportunities, rewards, and inducements are proportionate to the real-world illicit opportunities, rewards, and inducements an individual would be exposed to—meets the nub of the issue of “creating crime.” For by this safeguard, we assure that the only individuals who take part in a decoy transaction are individuals who are likely to have engaged in similar criminal conduct on previous occasions or to have committed such crimes on future occasions. By observing this principle of proportionality—modeling the real-world—we avoid creating criminals out of law-abiding persons, and that is the most important part of the argument about “creating crime.”

The other intuition underlying the “creating crime” argument is the strong sense that law enforcement activity, including undercover operations, should avoid harming or burdening third parties. Certainly any undercover activity which posed a direct threat to the safety or well-being of third parties would be exceedingly troubling. We are sensitive to this concern and are extremely careful to monitor our operations to prevent third party harm. We commonly close the operation if there appears to be any significant chance of violent activity or severe uncoverable financial loss to individuals.

Another argument made by some commentators is that undercover operations are proper only when the decoy opportunity or solicitation attracts solely those persons guilty of a prior crime. The example usually given is that of a property sting, in which the bogus fence will presumably attract only those people who have engaged in the crimes of theft or receiving stolen goods. Again, I don't think the argument is intended to be taken literally, since a policeman dressed as an elderly lady has no way of knowing whether the mugger he apprehends engaged in any prior crime before the attempted assault, and yet such decoy operations are generally accepted, just as we may not know for sure in making an agreement to buy narcotics from a street peddler whether he already possesses the narcotics.

One might also note in passing that the intuition as to property fencing is not a perfect one; an individual may well condition his commission of a theft on the knowledge there is usable fence nearby and hence those attracted by a fence are not be definition criminals prior to their interactions with the fence.

But the concern underlying the "prior crime" argument is again an important one, and is similar to the "creating crime" argument. We don't wish law enforcement activity of any sort to turn law-abiding people into new criminals. The attraction of a "prior crime" population to a bogus property fence seems consistent with this precept. But the concern is also met by our safeguard policies of keeping all decoy opportunities proportionate to those that exist in the real world and by making sure that the illegal nature of the opportunity is clear and unambiguous. These safeguards assure that the only individuals who take part in decoy transactions are individuals likely to have engaged in similar conduct on other occasions.

The same ethical intuition probably moves those commentators who have argued that a factual predicate of probable cause concerning an individual's involvement in criminal activity should precede any use of undercover techniques. For the reasons explained above concerning the difficulties in detecting and identifying the parties to consensual crimes, we do not believe that a probable cause standard as to individual involvement is remotely practicable—not to mention that probable cause is the articulated standard for arrest and indictment rather than the beginning of an investigation. But the intuition underlying the "probable cause" argument—that the government should not make new criminals out of law-abiding persons nor test people at will with temptations not otherwise occurring in their lives—is again met by our safeguards of having all decoy opportunities and attractions approximate to those existing in the real world and of making clear and unambiguous to all participants in a decoy transaction the corrupt and illegal character of the activity.

4. THE UNDERCOVER TECHNIQUE IS NO MORE INTRUSIVE THAN OTHER INVESTIGATIVE TECHNIQUES

Although undercover projects are designed to pierce deeply into criminal enterprises, the operations are no more intrusive of the interests protected by the Bill of Rights than are other available law enforcement techniques. Compare, for example, a situation in which an individual voluntarily drives a truckload of stolen goods to fence at a videotaped undercover warehouse, with any of the following law enforcement methods: a search under judicial warrant of a home or business which is carried out against the will of the owner; grand jury or trial testimony compelled against friends and associates or even relatives; self-incriminating testimony compelled from an individual after being granted use immunity by a court; a grand jury subpoena for voluminous documents, physical evidence or books and records which may concern an individual's private life; or court-authorized electronic interceptions of private conversations or telephone calls when neither party has consented to the interception. In comparison with these Constitutionally and Congressionally authorized techniques, undercover operations represent no greater intrusion into the zone of interests protected by the Fourth, Fifth, and Sixth Amendments of the Constitution.

The essence of the undercover technique is to make use of a subject's willingness to provide information and evidence voluntarily and intentionally to those who he thinks are his criminal confederates. It is the voluntary provision of information to a confederate who, even if a private person, could well be expected to reveal the information on some future occasion, see *United States v. White*, 401 U.S. 745 (1971), which makes this technique relatively unobtrusive. In addition, the ability of undercover agents to focus the investigation on the precise criminal conduct in question substantially limits the information gathered to that necessary to complete the investigation. The intelligent use of undercover techniques in an investigation can often produce sufficient evidence to prove a criminal case without forcing the Government to use intrusive investigative methods such as search warrants and court-authorized wiretaps.

The quality of evidence obtained by undercover operations adds substantially to the due process of criminal trials. Often video-taped and recorded, the crimes can be essentially recreated before the jury. Convictions are not centered on the testimony of informants or on the powers of memory of untrained witnesses. The certitude of the evidence improves the confidence of the public in the accuracy and fairness of the judicial process.

As noted, the one significant danger of undercover operation is the risk of bringing into the government-monitored criminal activities people who would not otherwise engage in similar activities. As the Director and I have explained, we strive to minimize these risks during the planning and execution of the operation. The Department will not authorize the prosecution of any individual unless we confidently believe that he committed the criminal acts without undue solicitation or is predisposed.

Finally, the defense of entrapment is always available to a defendant at trial where a jury can determine from all of the evidence, including perhaps videotapes of the defendant's conduct, whether in Chief Justice Warren's words, the defendant was "an unwary innocent" or "an unwary criminal."

5. UNDERCOVER INVESTIGATIONS OF POLITICAL FIGURES, WHILE POSING SPECIAL PROBLEMS, SHOULD NOT BE SUBJECT TO DIFFERENT RULES

Lastly, I would like to address the special and delicate problems posed for law enforcement in undercover investigations of public corruption. We are sensitive to the potential for abuse when there is an intrusion by the federal executive branch into the affairs of a co-equal branch of government, whether it be the legislature or the judiciary, as well as into the affairs of a state or local government. It would be intolerable if investigations were motivated by partisan or political considerations or if investigations intruded in any meaningful way in the lawful functioning of any branch of government. These concerns mean that law enforcement officials must act with scrupulous fairness, apolitically and cautiously, in carrying out their investigations.

But these concerns do not mean that we can or should abandon our responsibility to investigate and prosecute public corruption. Whether at the local, state or federal level and whether in the executive, legislative or judicial branches, public integrity has been and shall remain a high priority enforcement area of the Department of Justice.

The reasons for this are simple and compelling. In order for the public to have the necessary trust in its government, it is essential that corrupt misuse of public office and authority be effectively prosecuted. Unhealthy disrespect for law is generated when there is a perception of a dual standard, strict enforcement for ordinary people and lackadaisical attitudes or worse for the powerful or prominent. Further, our investigation of sophisticated organized crime, narcotics trafficking, and white collar fraud schemes reveals that official corruption is often indispensable to the success of these criminal ventures. Some investigations in these criminal areas may lead us to evidence or at least allegations of serious public corruption. Whenever the trail of an investigation leads to significant allegations of public corruption, we must and will follow the evidence, no matter where and to whom it may lead.

Often the only effective technique to investigate public corruption will be undercover projects. Because of the consensual nature of bribe transactions and other forms of corruption, it will often be very hard to gain evidence of the transaction, whether the transaction concerns the local police or Chicago electrical inspectors. Even if one of the consensual parties does report the matter, when the public official is a prominent, respected individual, reliance on the testimony of a disreputable briber or an unsavory middleman will frequently be unsatisfactory as proof. The testimony of a credible government agent, or a consensual recording or videotape of a transaction is far more probative and credible evidence.

In public integrity cases involving Congressmen, the recent Supreme Court decision in *United States v. Helstoski*, 99 S. Ct. 2432 (1979) has only compounded the difficulties of proving a corrupt transaction in the absence of undercover techniques. The usual way we would prove an allegation of bribery, outside a Congressional context, is to show that money was transferred more or less contemporaneously with the performance of an official act for which the money was promised. But *Helstoski* holds that under the Speech or Debate Clause references to an already performed legislative act by a member of Congress cannot be introduced in the government's case even in a prosecution for bribery. As the Supreme Court acknowledged, "without doubt the exclusion of such evidence will make prosecutions more difficult." 99 S. Ct. at 2439. In regard to past acts of illegal bribery, that prediction of difficulty is certainly true. For although we can prove that money passed (the quid), *Helstoski* prevents introducing evidence of the official act (the quo).

The only route of proof left open by *Helstoski* is testimony by a bribe-payer about the promise allegedly made by the Congressman. As noted above, an

avowedly corrupt bribe-payer will not enjoy much credibility as a witness. Hence, the use of the undercover technique, making possible testimony from more credible law enforcement agents and evidence collected by consensual surveillance, will take on central importance in any future investigation of alleged criminal abuse of office by a member of the Congress.

The safeguards and techniques which are employed in our undercover operations generally are and shall be utilized in investigations aimed at public corruption. After the careful internal review procedures are satisfied, we will initiate an undercover investigation only where we have a well-founded reason to believe that there is a pattern of criminality. There are only two ways in which any public official will become the subject of an undercover investigation: if he is the object of reliable, specific criminal allegations for which an undercover operation is an appropriate method of investigation; or if, by a process of self-selection, he voluntarily enters an operation. Just as we do not know which individuals will enter our undercover warehouse with a truckload of stolen merchandise, so we do not always know or even suspect which municipal building inspector will show up in our undercover bar to solicit a corrupt payment in return for a license. As in all undercover operations, any decoy transaction in a public integrity case should be structured so that its corrupt character is as clear and unambiguous as possible and should be modeled and proportioned as closely as feasible on the pattern of criminality we understand to exist in the community. We must be fully satisfied that the public official is soliciting and willing to accept an illegal payment in return for dispensing a political favor. If it appears that the individual lacks such intent and has entered the operation on an innocent misunderstanding, perhaps generated by the misrepresentations of a deceitful non-governmental middleman, we would not pursue the individual as a target of the investigation.

On the other hand, if we are satisfied of the individual's criminal intent, then we cannot and will not shirk our responsibility to continue the investigation and to prosecute, if warranted, regardless of how prominent or powerful the official may be. In essence, the same protections which preclude or minimize the possibility that innocent people will be caught up in any type of undercover operation are also used to prevent an honest public official from being implicated in any undercover operation directed against public corruption. There is no valid reason for any standards or procedures in political undercover operation is different from those employed in any other types of undercover investigations.

CONCLUSION

The undercover technique has been used successfully in labor racketeering, white-collar crime, narcotics trafficking, political corruption, and many other kinds of significant crime. We believe that as administered by the Department, in conformity with the legal and cover policy restraints I have described today, undercover techniques represent a minimally intrusive, powerfully effective weapon to detect, combat and deter the most serious forms of crime in our society.

STATEMENT OF DIRECTOR WILLIAM H. WEBSTER, FEDERAL BUREAU OF INVESTIGATION

It's a pleasure to appear before you today to discuss the FBI's undercover activities.

The FBI makes use of the undercover technique in important cases where more conventional investigative techniques give little promise of success. The technique allows us to reach beyond the street to the manipulators, organized crime leaders, and others too guarded or insulated to be observed in criminal activity in public. A brief look at past undercover cases illustrates just how effective its use can be.

Our UNIRAC investigation, standing for Union Racketeering, was aimed at corruption in the Longshoremen's Union in several Atlantic and Gulf Coast ports. The principal violations here included racketeering and extortion: payoffs by shippers and warehousemen to union officials. It was a mutual arrangement and one that had been in existence for some time. Direct investigation of the suspects probably would have resulted in an attempt to cover up existing evidence. However, with the help of a source and undercover Agents in Miami, we were able to get hard evidence—tape recorded conversations of actual illegal transactions. Ultimately, this case led to the indictment of 120 persons. Sixty-nine of these

individuals, including many union officials and business executives (and among these, most recently, Anthony Scotti) have been convicted, and many others await trial. These activities impacted on millions of Americans who have been paying inflated prices on a multitude of items passing over the docks.

In another undercover case, a Weather Underground investigation, the stakes were different. We were dealing with a small insular cell of individuals committed to violent revolutionary acts. Two of our Agents were able to infiltrate the organization and remain in it for four years. As a result, they were able to warn us of the organization's plan to bomb the office of a California State Senator. We made arrests shortly before the group put its plan into operation and effectively prevented the violence from occurring.

In another undercover operation entitled MODSOUN, we targeted the manufacturers and distributors of "pirated" tapes, records, and labels along with organized crime figures with ties to the recording industry in New York City. Working out of a storefront export business operating at the retail sales level, the FBI was able to seize \$100 million of counterfeit tapes and recording equipment at 19 different locations in five East Coast states. To date, four subjects have pled guilty, two others have been indicted, and additional indictments are anticipated.

Other examples of undercover operations include the original anti-fencing Sting operation in Washington a few years ago; another anti-fencing operation in Buffalo, New York, that led to the recovery of a stolen Rembrandt; a joint FBI and ATF operation targeted against an arson-for-profit ring which utilized the RICO statute, eventually resulting in stiff sentences to 14 individuals, \$273,000 in fines, and the forfeiture of over \$450,000 in property; and one very important recent case. We named the case MIPORN to refer to an undercover investigation into the pornography industry in Miami and its ties to organized crime. That investigation began in August of 1977. It involved two undercover Agents who spent two and one-half years working their way into the confidence of allegedly some of the nation's major pornography business figures. Forty-five persons were indicted as a result of that investigation. The same case yielded indictments against another thirteen persons on film pirating charges.

I've given these examples to show the scale and character of criminal investigations to which we are applying the undercover technique. As I indicated, undercover operations are often used to reach those serious violations that otherwise may go undiscovered and unprosecuted. That is particularly true where we are dealing with consensual crimes. Not long ago, we completed an undercover investigation that led to the conviction of eleven individuals involved in a kick-back scheme. Smaller firms that sold materials to a large shipbuilding company were paying off the larger company in order to keep its business. Without the use of the undercover technique, the FBI could not have gotten inside to get persuasive evidence of these transactions. As a matter of fact, twice previously we had unsuccessfully attempted to investigate this scheme using conventional investigative techniques.

Undercover operations are effective. In Fiscal Year 1979, for example, undercover operations led to actual recoveries worth over \$190 million. In addition, we estimate that almost \$1.5 billion worth of potential economic losses were prevented. Arrests arising from these type operations in that fiscal year totalled 1,648 with 1,326 convictions. Our funding for undercover operations during Fiscal Year 1979 was \$3 million, about one-half of one percent of our total budget. For Fiscal 1980, our funding was \$3 million while our request for Fiscal Year 1981 is \$4.8 million, about three-fourths of one percent of the total budget. This increased request for Fiscal Year 1981 is being made in order to continue our operations without being forced to prematurely terminate some operations because of lack of appropriated funding. Last year, 15 operations were terminated for this reason.

These operations, however, often raise sensitive issues which I recognize must be addressed. Therefore, the FBI has adopted specific undercover policies, and an extensive oversight machinery to insure that each undercover operation is carefully planned and conducted.

When an undercover project is proposed by a squad in one of our field offices, our field office managers, the field legal advisor, and the Strike Force or United States Attorney in that region review it and send their reports to Headquarters. We consider the project's goals, the worthiness of its objectives, its costs, whether the tactics proposed might involve entrapment or present other legal problems, and the general propriety of proposed project tactics.

Many projects are rejected either by field or FBI Headquarters managers. Those that survive are submitted to an Undercover Activity Review Committee at Headquarters. This committee, comprised of representatives of our Criminal Investigative, Legal Counsel, Administrative, and Technical Services Divisions and of representatives of the Department of Justice, reconsiders the same issues before reaching a decision.

Many difficult questions come before this committee. One proposed operation presented a scenario in which the undercover Agent would pose as a "heavy" or "muscle." The committee considered the possibility that the Agent in this role might be encouraged to commit violent acts. The risks were weighed; the committee believed that violence could be avoided by taking certain steps if the possibility of violence arose. The committee approved the operation on the condition that the undercover Agent be instructed not to participate in any violent acts and that FBI Headquarters be advised of any potentially violent situations. In a second case, the field office proposed to use certain fraudulent documents as part of a proposed cover. The committee determined, however, that the risk that undercover Agents could lose control of the documents and that they might be used by someone who secured access to them to the detriment of an innocent third party was too great. The field office was directed to develop a different approach. In recognition of this particular problem area, a policy has now been adopted requiring that the use of all such documents must be approved by Headquarters.

In addition to this approval review process, special care is taken to ensure that our Agents are sensitive to the limitations and requirements of undercover work. Before an operation is undertaken, FBI supervisors, the Special Agents in Charge in the field, and program managers at FBI Headquarters carefully screen all undercover Agents to be certain that they are suited for their particular missions. We also provide special training for those selected, with emphasis on instruction in legal areas, including the issue of entrapment.

We take precautions to minimize potential problems. With adequate training, the Agents involved are alert to sensitive issue areas. We want them to recognize when lines are about to be crossed, and to know that when in doubt they must seek the advice of their supervisors.

Once the review committee approves a project, the Bureau monitors it, both at Headquarters and in the field. When electronic surveillance or closed circuit videotapes are used, we can examine the propriety of our Agents' conduct, and the quality of the investigation as it progresses. And, of course, the results of the surveillance and the tapes provide an opportunity for the courts to evaluate the Agents' actions should they subsequently be challenged.

Perhaps it is also appropriate to note at this point that the proposed FBI Domestic Charter contemplates the promulgation of guidelines for undercover operations. We are currently working with the Department of Justice on these guidelines and substantial progress has been made.

In the last few weeks, a number of concerns about undercover operations have been raised. When aimed at property crimes or crimes of violence associated with organized crime elements or terrorist groups, for example, few serious questions have been raised about the use of the undercover technique. There has been almost unanimous approval in cases where it has been used to recover stolen property, to identify persons who have committed known crimes or to prevent the commission of planned criminal activities. In fact, Congress itself has recognized the value of this technique by expressly providing for exemptions from certain statutory requirements through a certification process.

In cases involving consensual crime, however, particularly when public officials are involved, we recognize the need for special precautions. The investigation of wrongdoing on the part of a public official is a particularly serious undertaking. Our people are sensitive to the fact that reputations of public officials are delicate and even the hint of an investigation can be harmful.

Sometimes a project may initially target one type of criminal activity only to lead us into another equally as serious. When that occurs, even if it involves government corruption, the operation, after appropriate review and examination, expands its focus. If we were not to follow these leads, we could justifiably be open criticism for not doing our job.

We start our undercover investigations focused on criminality, not against individuals or institutions. By creating a setting in which those who are predisposed to criminal activity find it convenient to deal, we may develop new leads. The same basic criminal standard always applies. Before allowing an investigation to expand, the Undercover Activity Review Committee must be satisfied that

there is a sound basis for doing so. Therefore, it will again weigh all of the factors it would consider when presented with any new proposal.

We are also aware of the problems inherent in operations where our undercover Agents are investigating subjects who are influence peddlers or middlemen claiming to know others already willing to engage in criminal activity. Since these middlemen do not know they are dealing with the FBI, or that they are the subjects of investigation, it is difficult for us to monitor their activities, and, of course, they are not under our control. We must, therefore, carefully evaluate any information they provide to us as to the willingness of a third party to engage in a crime before we proceed further and assure that if such a third party does meet with us he is aware of the criminal nature of the meeting.

The recent unauthorized disclosures to the press on some of our undercover operations are deplorable. These leaks are unfair to the subjects of the investigation whether or not indictments are eventually returned. They are also detrimental to the mission of the FBI and the Department of Justice. Leaks force the premature abandoning of investigations; they tend to undermine strong cases. They may also be dangerous to those conducting investigations.

The FBI and the Department are vigorously investigating these leaks to determine the parties responsible. If, among the many government employees who had access to this sensitive information, we find that any of our employees is involved, he can expect to be severely disciplined at the least.

In summary, we must use the undercover technique with discretion and care. Whether it be the undercover technique or another technique, in every investigative venture there are potential risks. As I have indicated, we have developed policies and procedures designed to minimize these risks. This is not to claim investigative perfection. But whenever mistakes, miscalculations or misunderstandings do occur, you may be sure that the lessons learned will be incorporated in our future planning of operations.

Our experience tells us that the use of the undercover investigative technique is vital in combating the two areas of crime that impact most seriously on society—organized crime and white-collar crime. I am confident that the principles I have discussed today, which we follow, will allow us to continue to meet these crime problems in a manner consistent with the expectations of the American public.

TESTIMONY OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, AND PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. WEBSTER. Thank you, Mr. Chairman.

Thank you very much, Mr. Chairman and Chairman Rodino. It's a pleasure to appear before you today to discuss the FBI's undercover activities.

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indictment of 120 persons. Sixty-nine of these individuals, including many union officials and business executives—and among these, most recently, Anthony Scotto—have been convicted, and many others await trial.

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To date, four subjects have pled guilty; two others have been indicted; and additional indictments are anticipated.

Other examples of undercover operations include the original antifencing Sting operation here in Washington a few years ago; another antifencing operation in Buffalo, N.Y., that led to the recovery of a stolen Rembrandt—and I might add an aggregate of \$500,000 in stolen art treasures—a joint FBI and ATF operation targeted against an arson-for-profit ring which utilized the Rico statute, resulting in stiff sentences to 14 individuals, \$273,000 in fines, and the forfeiture of over \$450,000 in property; and one very important recent case.

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Forty-five persons were indicted as a result of that investigation. The same case yielded indictments against another 13 persons on film pirating charges.

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Our funding for undercover operations during fiscal year 1979 was \$3 million, about $\frac{1}{4}$ of 1 percent of our total budget.

For fiscal 1980, our funding was also \$3 million, while our request for fiscal year 1981 is \$4.8 million, about $\frac{1}{4}$ of 1 percent of the total budget.

This increased request for fiscal year 1981 is being made in order to continue our operations without being forced to prematurely terminate some operations because of lack of appropriated funding. Last year 15 operations were terminated for this reason.

These operations, however, often raise sensitive issues which I recognize must be addressed. Therefore, the FBI has adopted specific undercover policies, and an extensive oversight machinery to insure that each undercover operation is carefully planned and conducted.

When an undercover project is proposed by a squad in one of our field offices, our field office managers, the field legal adviser, and the strike force or U.S. attorney in that region review it and send their reports to headquarters.

We consider the project's goals, the worthiness of its objectives, its costs, whether the tactics proposed might involve entrapment, or present some other legal problems, and the general propriety of proposed project tactics.

Many projects are rejected either by field or FBI headquarters managers. Those that survive are submitted to an Undercover Activity Review Committee at headquarters. This committee, comprised of representatives of our Criminal Investigative, Legal Counsel, Administrative, and Technical Services Divisions, and of three representatives of the Department of Justice, reconsiders the same issues before reaching a decision.

Many difficult questions come before this committee. One proposed operation presented a scenario in which the undercover agent would pose as a heavy or muscle. The committee considered the possibility that the agent in this role might be encouraged to commit violent acts. The risks were weighed; the committee believed that violence could be avoided by taking certain steps if the possibility of violence arose.

The committee approved the operation on the condition that the undercover agent be instructed not to participate in any violent acts, and that FBI headquarters be advised of any potentially violent situations.

In a second case, the field office proposed to use certain fraudulent documents as part of a proposed cover.

The committee determined, however, that the risk that undercover agents could lose control of the documents in that situation and that they might be used by someone who secured access to them to the detriment of an innocent third party was too great.

The field office was directed to develop a different approach. In recognition of this particular problem area, a policy has now been adopted requiring that the use of all such documents must be approved by headquarters.

In addition to this approval review process, special care is taken to insure that our agents are sensitive to the limitations and requirements of undercover work. Before an operation is undertaken, FBI supervisors, the Special Agents in Charge in the field, and program managers at FBI headquarters carefully screen all undercover agents to be certain that they are suited for their particular missions.

We also provide special training for those selected, with emphasis on instruction in legal areas, including the issue of entrapment.

We take precautions to minimize potential problems. With adequate training, the agents involved are alert to sensitive issue areas. We want them to recognize when lines are about to be crossed, and to know that when in doubt, they must seek the advice of their supervisors.

Once the review committee approves a project, the Bureau monitors it, both at headquarters and in the field. When electronic surveillance or closed circuit videotapes are used, we can examine the propriety of our agents' conduct, and the quality of the investigation as it progresses.

And, of course, the results of the surveillance and the tapes provide an opportunity for the courts to evaluate the agents' actions, should they subsequently be challenged.

Perhaps it is also appropriate to note at this point that the proposed FBI Domestic Charter contemplates the promulgation of guidelines for undercover operations. We are currently working with the Department of Justice on these guidelines and very substantial progress has been made.

In the last few weeks, a number of concerns about undercover operations have been raised. When aimed at property crimes or crimes of violence associated with organized crime elements or terrorist groups, for example, few serious questions have been raised about the use of the undercover technique.

There has been almost unanimous approval in cases where it has been used to recover stolen property, in cases where it has been used to identify persons who have committed known crimes or to prevent the commission of planned criminal activities.

In fact, Congress itself has recognized the value of this technique by expressly providing for exemptions from certain statutory requirements through a certification process.

In cases involving consensual crime, however, particularly when public officials are involved, we recognize the need for special precautions. The investigation of wrongdoing on the part of a public official is a particularly serious undertaking. Our people are sensitive to the fact that reputations of public officials are delicate and even the hint of an investigation can be harmful.

Sometimes a project may initially target one type of criminal activity only to lead us into another equally as serious. When that occurs, even if it involves Government corruption, the operation, after appropriate review and examination, expands its focus. If we were not to follow these leads, we could justifiably be open to criticism for not doing our job.

We start our undercover investigations focused on criminality, not against individuals or institutions. By creating a setting in which those who are predisposed to criminal activity find it convenient to deal, we may develop new leads. The same basic criminal standard always applies.

Before allowing an investigation to expand, the Undercover Activity Review Committee must be satisfied that there is a sound basis for doing so. Therefore, it will again weigh all of the facts it would consider when presented with any new proposal.

We are also aware of the problems inherent in operations where our undercover agents are investigating subjects who are influence peddlers or middlemen claiming to know others already willing to engage in criminal activity.

Since these middlemen do not know they are dealing with the FBI, or that they are the subjects of investigation, it is difficult for us to monitor their activities and, of course, they are not under our control.

We must, therefore, carefully evaluate any information they provide to us as to the willingness of a third party to engage in a crime before we proceed further, and assure that if such a third party does meet with us, he is aware of the criminal nature of the meeting.

Mr. Chairman, the recent unauthorized disclosures to the press on some of our undercover operations are deplorable. These leaks are unfair to the subjects of the investigation, whether or not the indictments are eventually returned.

They are also detrimental to the mission of the FBI and the Department of Justice. Leaks force the premature abandoning of investigations; they tend to undermine strong cases. They may also be dangerous to those conducting the investigations.

The FBI and the Department are vigorously investigating these leaks to determine the persons responsible. If, among the many Government employees who had access to this sensitive information, we find that any of our employees is involved, he can expect to be severely disciplined, at the least.

In summary, we must use the undercover technique with discretion and care. Whether it be the undercover technique or another technique, in every investigative venture, there are potential risks.

As I have indicated, we have developed policies and procedures designed to minimize these risks. This is not to claim investigative perfection, but whenever mistakes or miscalculations or misunderstandings do occur, you may be sure that the lessons learned will be incorporated in our future planning of operations.

Our experience tells us that the use of the undercover investigative technique is vital in combating the other areas of crime that impact most seriously on society—organized crime and white-collar crime.

I am confident that the principles I have discussed today, which we follow, will allow us to continue to meet these crime problems in a manner consistent with the expectations of the American people.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Webster. Mr. Heymann?

Mr. HEYMAN. Mr. Chairman, members of the committee, I will summarize my testimony since it's been introduced in the record, and let me begin by telling you what the outline of it is.

I am first going to pick up just a little bit on Judge Webster's description of the importance and the unique advantages of undercover operations. Then I am going to summarize the law which is fairly clear. Then I am going to talk about three additional protections that we—that means Judge Webster and the Department of Justice—agree as a matter of policy we should have and do have.

Then I am going to talk about how undercover compares with other investigative techniques in terms of the intrusiveness and invasion of civil rights. And finally I am going to ask the question, is there anything special about investigations that go to political figures, either at the local, State, or Federal level.

It sounds like a lot, but I will try to be at least decently brief.

The undercover technique itself is a very old one. I asked my special assistant to tell me what's the oldest use of it that she could find, and she says it goes back at least to the "Odyssey" and the hero of the "Odyssey," appearing undercover to detect crimes in his household when he returns.

It was being used extensively toward the end of the last century. There are cases out there, mail fraud, pornography. It is not only old and familiar, but it is varied.

It takes such forms as a police officer posing as an old woman, vulnerable to mugging or more severe physical attacks in Central Park in New York; as agents infiltrating a drug-smuggling conspiracy, or merely buying drugs on the street of a major city; a modest business front such as a local tavern, susceptible to extortion or payoff requests by the police; a jewelry fencing operation and art fencing operation. It has varied forms. It is old; it is established. It is just another technique of the sort that searches, compelled testimony, interview, scientific detection, electronic surveillance are. It is just another technique. It is dramatic now because it has been raised in scale and the size of the undercover operation by recent activities.

It is not exclusively used by the FBI. Director Webster mentioned operations carried on with the Bureau of Alcohol, Tobacco and Firearms. The Department of Agriculture has done undercover operations of its own. DEA, of course, does them. Senator Moss in the Senate ran his own undercover operation 4 years ago, and went through New York's Medicaid clinics disguised as a potential customer, deriving information.

From my point of view, they have three or four major advantages as an investigative technique:

One: They enable us to get, as Judge Webster's examples show, into well-organized and secret, ongoing criminal activities; criminal activities that keep going and have a life of their own.

Second of all: Undercover activities are accurate. They generally involve monitoring with either audio or audio and video equipment. They do not put us in the position of relying on the tips or testimony of what are often highly unreliable informants, con men, somebody else out there. We end up with reliable determinations of what happened.

I am going to argue extensively later that compared to other techniques, they are nonintrusive. They don't do what the fourth amendment allows us to do in terms of invading privacy, or what the fifth amendment allows us to do in compelling cooperation. They are nonintrusive.

Finally: They could have a very spectacular deterrent effect. We quote with pleasure, and maybe with too much regularity, Operation Lobster in the Boston area. In that operation we had a warehouse offering to buy hijacked goods, ran it for a number of months, and then arrested the hijackers. Hijacking has practically stopped in the New England area. It has a substantial deterrent effect.

People who would engage in that activity not only worry about the consequences of being caught in the very moment they are engaging in the activity; they have to worry about whether they are dealing with a Federal or State agent.

Many of these, incidentally, are run with the cooperation and in partnership with State and local law enforcement authorities. Operation Lobster is of that sort.

Let me move second to the law.

The law, of course, is familiar to the members of the committee. We are not free to induce a crime by one who is unwilling or not predisposed. We are free to give an opportunity to commit a crime to one who is willing and ready to take advantage of an opportunity.

The Supreme Court, in recent decisions—the *Russell* case, and the *Hampton* case—have affirmed that the Government, State or Federal, can legally go quite far in providing that opportunity.

The test ultimately is whether we have created a specific occasion of criminal activity or have created a whole new type of activity that would otherwise not have taken place.

In every case where the Government is operating as a decoy victim or participant undercover, in every case that the entrapment issue has ever been raised, the particular crime only takes place because the Government agent is buying drugs or he is in the park there to get mugged. In every case, the particular crime is caused by the Government; the issue, though, is whether the type of crime would have taken place without us.

The courts have not required that there be any threshold showing of probable cause or reason to believe that a specific crime has been or will be committed before we can engage in undercover or participate in consensual activities.

The courts have never required that a particular individual be shown to be involved before an operation can be commenced that brings him in.

The courts have not imposed rigid rules on investigative agencies with respect to their behavior in establishing and running an undercover operation.

The courts, in fact, have been quite lenient and open in recognizing that deceptions and stratagems are necessary for the investigation of particular types of crimes.

The Department has, as a matter of policy, adopted three requirements that the courts do not insist upon. I think—and I know Director Webster thinks—that these three requirements are essential. I think, and the Director thinks, that additional proposed requirements are not sensible or reasonable.

The first requirement, the first safeguard that we have imposed, is that we should only initiate an undercover operation, we should only use the undercover technique when we reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur.

Note how that relates to the entrapment defense. The particular type of activity we have to have some reason to believe is taking place out there. That's what plugs us in to the charter, I believe, Mr. Edwards.

If we open a storefront fencing operation, we do so based on some kind of reasonable indication that theft and the sale of stolen property

is taking place in the area, and could be effectively detected and prosecuted through the use of the technique.

When a courageous FBI agent named Walter Orrell was sent on a detail to the Bronx in 1976 to pose as the operator of a new garbage collection business, and to seek out customers, it was done based on an urgent suspicion that extortionate practices were occurring in the refuse collection business.

Sure enough, someone came soon and threatened to beat him up, threatened to throw him out the window. That's the first requirement; that we have a reasonable basis for believing that type of activity is going on, the type of activity the undercover investigation is designed to get at.

We do not impose any rigid requirement that we know the particular individuals involved in the pattern of criminal conduct before we begin use of the undercover technique. This goes to the questions Mr. Seiberling was asking in advance.

Sometimes we can know the individuals who are likely to be involved and check out whether they are involved or not. On other occasions, it plainly makes no sense if we set up a warehouse in Boston to buy hijacked goods, we shouldn't have to know in advance who will come into it and who won't come into it. That shouldn't be necessary, and isn't necessary.

What substitutes, if you think about it hard, for probable cause in that type of situation, what substitutes for knowing who's likely to be sucked into an undercover operation is the fact that the operation is self-selective. People don't come to our warehouse in Boston unless they have selected themselves to take part in that hijacking fencing scheme.

That requires, however, a second step, which is a second safeguard, and it brings up questions that the chairman has raised.

I am not saying that we have always done each of these things perfectly. I am saying that I think we know what the right direction here is to go.

The second safeguard requirement is that we have to be very clear about what the nature of the illegal transaction is, that we are inviting people to participate in. If people are going to self-select, and if the self-selection is going to be a substitute for knowing anything about them they ought to know what they are self-selecting themselves for.

If it's going to be a corrupt transaction, they ought to know that. If it's going to be a mugging in Central Park, they ought to know that.

One example of self-selection is an investigation we conducted in Pontiac, Mich. several years ago where an undercover agent posed as an individual interested in starting a numbers operation. He soon was approached by a local union official who said that police protection would be required for the operation, and who thereafter brought several interested police officers to see the undercover agent.

Of course, we had no basis for investigating the police before that. Until that approach, we had not focused the investigation on official corruption, or suspected that particular police officials were corrupt.

Still, it was proper when through other contacts they were brought to us.

The third major safeguard—the first is that we know there is some activity out there. The second is that we make our own activities

unequivocal in terms of what we expect the person who might get sucked into the operation to do.

The third is that we make, we model the transaction, the undercover operation, whether it be a mugging in the park or a drug deal or a corruption sting or a hijacking sting, as much as possible after reality, to the best of our ability. That we don't offer inducements or promises or attractiveness that the real world doesn't offer.

That, of course, makes sense, because the crooks won't believe us if we don't model our transactions after reality; but it is also a guarantee of fairness, because it means that anybody who is brought in, is brought in with the same type of temptation that we know is floating out there.

We know that because we will not start an operation unless we have reason to believe that a particular type of activity is going on out there. Then we unequivocally model our activity, our temptations, on the real world.

From there on, it is a combination of self-selection and what we learn about individuals.

Let me move to the last two points very quickly.

INVESTIGATION

I personally believe that the undercover technique compares very favorably in terms of the mandate of this committee with other investigative techniques. In terms of civil liberties and constitutional rights, I think the undercover technique compares favorably not only with electronic surveillance, but with searches, with compelled grand jury testimony, with plea bargaining for evidence, with any of the number of regular investigative techniques we use in the law enforcement business.

Compare, for example, a situation in which an individual voluntarily drives a truckload of stolen goods to a fence at a videotape undercover warehouse—that's how we arranged it in Operation Lobster—with any of the following law enforcement methods:

A search under a judicial warrant of a home or business which is carried out against the will of the owners. Searching the house of people we think are hijackers. Much more intrusive; reaches the family, reaches people who have nothing to do with the crime. Not true when the man drives into our warehouse.

Grand jury or trial testimony compelled against friends and associates, or even relatives, bringing in the best friend of someone we think is a hijacker and requiring that person to testify—girlfriend, boyfriend.

We have a rule that we self-impose that we won't go for immediate family members because it's too harsh. It's legal, but we don't do it. But, friends, yes; girlfriends, boyfriends, yes.

No compulsion, no pressure, no tearing people apart by loyalty, and no putting someone in a position where they have to testify at risk of having their legs broken, for having testified.

Instead, a truckdriver driving a load of goods into a warehouse where his only complaint is that he was deceived into thinking it was a crooked operation, and it's really us.

A grand jury subpoena for voluminous documents, physical evidence, or books and records; again compelling people, disrupting their lives.

We have to do it. We do do it. Investigations penetrate secrecy; not necessary when a truckdriver drives into our warehouse.

Court-authorized electronic interceptions of private conversations, intrusions of the sort that we don't have to do with undercover operations.

My point is very simple. I think in terms of civil rights and civil liberties, as well as in terms of effectiveness, undercover is a very desirable form of operation.

I haven't even mentioned the fact that it's nice if you only convict the guilty and don't convict the innocent. A criminal investigation undercover increases the already high probabilities that that is what will result.

Let me close just by saying a word about this, about a question that may be somewhere in the background. Is there anything different when the investigation goes to public corruption, when it goes into bribery of electrical inspectors, which we have done in Chicago? Or bribery of a State legislator, which was done in Baltimore? Or it goes to a corrupt policeman in Pontiac, Mich.? Or to Federal officials, such as an INS official? Or to Members of Congress?

Well, the answer is yes, there is something different, and the answer is no, in the long run, we shouldn't treat them very differently.

It would, of course, be intolerable if investigations were motivated by partisan or political considerations. It would simply be extremely destructive, the most destructive thing you could have of democracy in the country.

That means that every investigation that goes into the political area, State, local, Federal, has to be guaranteed not to be targeting any individual on the basis of his or her voting stance, political party, anything else.

What we do target on, what we can target on, is either prior information, which was true in the Baltimore State legislator case, or self-selection, which was true in the case of the Pontiac, Mich. police officer. Never in terms of whom we want, because we don't want anybody.

As a matter of fact, there is a sense—and I want to mention it, in which Judge Webster and I would sit and breathe a sigh of relief in an investigation when we failed to get somebody. We don't want anybody. We just want to be sure that we don't duck or step back.

At the same time, while we have to be careful that we are not distorting the political process, picking on people for political reasons or engaging in undercover operations that might result in a legislative act, in the changed behavior of a local city council or the State legislature or the Federal Congress, we have to continue to take extremely seriously the problem of public corruption.

It is a high priority with us. There are two reasons for it:

One is the same respect for institutions that we threaten when we bring one of these investigations, when they result in cases, will be far more seriously threatened if all of us didn't make a major effort to make dangerous, unpopular, unwise, any form of public corruption at any level.

The second is many forms of illegal transactions can't take place without at least local or State or Federal administrative public corruption. If we want to stop them, we have to be interested in stepping the corruption, too.

Now, the thing that makes political cases most difficult to conduct, the reason why we have to treat them a little bit differently, is the reputation of elected politicians and maybe of appointed, too, are their lives. It's my life, my reputation; and it's your life, your reputations.

But in any investigation, those reputations are on the line. The reason why we can't deny undercover whenever it goes to a question of public corruption is twofold:

One: That reputations of political figures, elected or appointed, are on the line, whether we use undercover or not. They are on the line whenever we start receiving information from crooks who are often wrong and sometimes right.

The other reason is because there is practically no other way to investigate charges of bribery and bribery is a uniquely political crime. We could not investigate systematic bribery among electrical inspectors in Chicago without going out there and offering bribes.

The reason is quite simple: Bribery takes place in a one-on-one situation, and it generally takes place between a somewhat disreputable briber and a somewhat reputable official, executive or legislative, local, State, or Federal.

We have to be a participant in the transaction, having heard that such transactions were going on, having made our participation as like those transactions as possible, and as unequivocal as possible, if we are going to investigate public corruption.

Thank you for giving me so much time, Mr. Chairman.

Mr. Edwards. Thank you, Mr. Heymann.

We will be operating in the question-and-answer period strictly according to the 5-minute rule.

The Chair recognizes the gentleman from New Jersey, Chairman Rodino.

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

Mr. Webster and Mr. Heymann, I want to commend you for your statements, and I believe that you have given us the kind of information which is going to be useful.

However, I do not believe that in this one hearing we are going to be able to dispose of some of the questions that at least I have, and I'm sure many other members have, which cause us the concerns that I think were very eloquently expressed by Mr. Seiberling.

I might start off by saying that all of us applaud your efforts in attempting to get at white-collar crime, which I think all too frequently has been ignored and has been, I think, one of the greater burdens we have had on society. I think it has gone undetected probably because it hasn't been addressed as it should have been. We applaud your efforts in that area and in the public corruption area particularly because of the indifference of the public to public officials, and the mistrust, and the climate after Watergate. All of us are aware and applaud your efforts in that direction.

Again, though, what does bother me is that there would be carefully crafted guidelines in these areas in order to prevent intrusions into civil liberties. Those of us may differ as to what those civil liberties are, and we may recite Supreme Court cases on how there's latitude, but I think we've got to be very careful here. I think that is fundamental to our democracy.

And, Director, in your statement, and again when you were being interviewed on television by Mr. Carl Rowan, in answer to his statement that he thought that what troubles people is they don't know whether you're going out luring people, you said:

I don't believe we are luring people. We are creating a setting in which those who are predisposed to criminal activity find it convenient.

Now, you have set out, and Mr. Heymann has set out, some of the requirements in some of the undercover operations. But who decides this predisposition? Is this predisposition not a state of mind? Is this predisposition not something that someone is going to make a determination about? And based on what?

Now you have stated that there are certain requirements, but it still seems to me that we originally talked about criminal conduct and criminal activity, and all I have heard through the arguments has been that there is reasonable grounds to believe that there is this criminal activity. We know that in some of the Sting operations, the crimes are already committed.

Yet in some of the cases that were reported in the newspapers recently involving public officials, there hadn't been any criminal activity. It seems to me that the setting was such as though we were finding out whether some could be lured who might be predisposed.

Now it's pretty difficult for me to accept that, because somebody is making a determination as to what the attitude or what the willingness of a person might be who has never been involved in any corrupt activity. You are relying totally on purveyors or informers who themselves are subject to great question as to whether or not they are reliable.

Now who makes that determination about the predisposition? And can you tell me whether your guidelines are going to be able to deal with this with such care and specificity that you won't be involving innocent people. You are going to be responsible for the leaks, too, because you set the whole thing in motion, and unfortunately damaged reputations of the very people whom you do not want to damage.

In any event, I'd like to know, Mr. Webster, just how you answer that.

Mr. WEBSTER. Chairman Rodino, I have already in my statement expressed my disapproval and my dismay at the leaks. It has not yet been determined who is responsible for them, but certainly there is no institutional responsibility for those leaks in terms of purposeful leaking, and I hope very much that we arrive at an early date at a resolution of that question.

I think it is significant that with the number of long-term investigations that we have underway in our undercover capacity, this is the only instance of a wholesale leaking.

We will try to improve that. We will do the very best we can, but other investigations result in leaks. There isn't anything endemic about undercover operations being leak prone, except that they, like other investigations, frequently extend over a substantial period of time.

Chairman Rodino. But, Director, those leaks show, at least from what I have been able to read, that in some of the undercover operations, the so-called predisposition either did not exist, or what you based it on, I don't know.

Mr. WEBSTER. Well, you're asking me, and I know we all have agreed, and I have heard the public statements of Congressmen, and you have read mine, we should not be talking about the specifics of the Abscan investigation. That is going through the grand jury process at the present time.

What is in the papers may or may not be correct, or may or may not be complete. I can tell you that it is not complete.

To simply explore the fact situations of certain individuals who were not indicted, without an overall examination of the entire grand jury process and trial process, and the evidence that comes out in the trial, to me would be an abrogation of your oversight responsibilities, and I know you are not going to do that.

Chairman RODINO. Well, I'm not going to do that. I'm not referring to those cases. I'm referring to some cases that were leaked that you yourself, the Department, has stated that these people were not the target or subject of any investigation.

Mr. WEBSTER. In any type of investigation that involves leaks, whether it's undercover or overt, we are going to be interviewing, reviewing files of individuals, and many of those leads will prove to be of no value, or an absence of criminality. But all of them are based upon allegations, and we have historically had the province of assessing the reliability of those allegations.

Now, in terms of predisposition, predisposition is a term that is applicable to the defense of entrapment. That is offered by someone who admits his guilt, but says he wouldn't have done it except for being overreached and persuaded against his will to do something.

Predisposition is not the criteria for the instigation of a criminal investigation. I said in my statement that we try to create a setting in which those who are predisposed will come, because we are not interested in having a whole bunch of people come in and be screened out.

As a matter of fact, I think it will show when this one investigation comes through how few indeed met that criteria. And, as Mr. Heymann pointed out, not only do we try to go on the basis of the information that we have where criminality is indicated or alleged, but also in the setting itself, we take extra precautions to be sure that anyone who manages to come into that situation not predisposed, is quickly made aware of the situation, so that he is in no doubt as to what he is doing.

And, in fact, the reports that Congressman Seiberling and you made reference to about the Senator, I think, when the facts are known you will have an indication of the procedures that we put in place. Because the effort was to be certain that no one was being trapped. There would be no way in which the defense of entrapment could be successfully raised and, in fact, again, I point out to you we are putting ourselves on those tapes, as well as the individuals under investigation, and those tapes are going to be before the court, and we know that if we misbehave, the record will be there in technicolor or black and white, at least, for all the court and the jury to observe.

Mr. EDWARDS. Your time has expired.

Chairman RODINO. Thank you.

Mr. EDWARDS. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Mr. Heymann, on page 24 of your statement, you said:

* * * if we are satisfied of the individual's criminal intent, then we cannot and will not shirk our responsibility to continue the investigation and to prosecute, if warranted, regardless of how prominent or powerful the individual may be.

Now you told us about the investigation of electrical inspectors in Chicago. Tell me again why you didn't investigate and prosecute Dr. Peter Bourne in the White House.

Mr. HEYMANN: I'm wondering for a minute, Mr. Hyde, whether it's appropriate for me to say anything about that or not.

Mr. HYDE: Well, excuse me, Mr. Rodino is objecting to the question, and Mr. Edwards is agreeing to the objection, and I don't want to embarrass anybody, so I will withdraw the question.

Mr. HEYMANN: There is a simple answer, and the simple answer, to the best of my knowledge, is that no one is prosecuted for similar behavior, and that ought to apply to political figures, too.

Incidentally, it's a principle that isn't always easy for one in my position to maintain. It's easy, as you gentlemen, I think, sense nowadays for someone in my position to say let's go ahead and prosecute a political figure, Administrative, executive or legislative, State or Federal.

It's hard to say let's not prosecute a political figure who may or may not have technically violated the law in a situation where no one else would be prosecuted. That's the category that I believe the Bourne matter is in.

Mr. HYDE: Well, if that's so, that's fine. If that wasn't a violation—

Mr. HEYMANN: It's not a matter of saying it's not a violation. Whether it was or not, it's a matter of saying there are situations where no one else would be prosecuted, and I believe in those situations, even if a political figure has violated the law, he or she should not be prosecuted where no one else would be, simply because they are political figures.

Mr. HYDE: Well, you can understand the sensitivity a Republican could have to a situation like that, having endured the mudbath of Watergate.

Let me ask you another question: Now the media has reported that the Justice Department considers two of the Abscon cases weak. Are you checking to see who made that evaluation and how that leaked?

In other words, if two were weak, then six are strong—is that part of your investigation?

Mr. HEYMANN: The answer to that is no, Mr. Hyde. There are some leaks that seem to me to just simply belong to "silly season," and we have entered silly season. I only feel extremely badly about leaks when they bear on the reputation of particular individuals. When they are simply silly season leaks, I am not worried about them.

Mr. HYDE: I am a great believer in undercover operations, and I would respectfully suggest a sting operation to catch your leakage.

Mr. HEYMANN: It was indeed suggested to me seriously as part of the leak investigation.

Mr. HYDE: There was a fascinating letter in the Wall Street Journal of February 14 by a professor at a theological seminary. He quoted the

Old Testament. He quoted Leviticus, chapter 19, verse 14: "Do not put a stumblingblock before the blind."

And he said this means don't offer a Nazarite, who is prohibited from drinking wine, a glass of wine.

Now those in Congress and public officials have taken an oath freely to be the equivalent of teetotalers when it comes to corrupt money. You don't see anything unjust in tolerating circumstances where a public official is offered corrupt money, do you?

Mr. HEYMANN. I regard the situation, Mr. Hyde, of offering a public official corrupt money with no predicate out there at all, no reason for it, no operation suggesting it to us from the outside world, as right on the line. It is plainly legal, it seems to me.

It seems to me not unfair by the standards of things that we do daily in the criminal business to expect an electrical inspector, a city councilman, a major, a Governor, a Congressman, or an assistant attorney general, to turn down what is plainly a bribe. It is not something that we have to be terribly concerned that people should accept by mistake.

On the other hand, I believe that there should be either a reasonable system of self-selection or some basis for going forward. We are not in the business of testing morality.

Mr. HYDE. I understand that.

May I ask you this, without compromising the present investigation: Can you tell us how the particular Congressmen who were involved were selected? Or were they self-selected?

Mr. HEYMANN. Well, the only thing I can say is what I have said before, and I am sure the Director has said before, and that is to the best of our knowledge, no one in the Federal Government or working for the Federal Government picked any of the individuals.

Mr. HYDE. Is the proposed charter that we are dealing with broad enough to cover an Abscam operation such as we are dealing with?

Mr. HEYMANN. The proposed charter broadly authorizes undercover operations subject to guidelines promulgated by the Attorney General, and it is my view that there is no, and should be no, special category of undercover operations that go to public integrity questions.

Therefore, my answer would be yes.

Mr. HYDE. Thank you. My time is up.

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

Mr. KASTENMEIER. Thank you, Mr. Chairman. I, too, would like to commend the Director of the FBI and Assistant Attorney General Heymann from the Criminal Division for many of the operations which have been successful in bringing people to justice.

That the Director of the FBI, Judge Webster, is being honored tonight by the recording industry probably is largely because of Mod-soun, the operation which stopped record piracy.

I take it, however, that these are relatively new operations, that at least while there is a historical use of undercover agents, that one can point to, the amount of resources dedicated to the more recent operations are a new kind. What we know about in terms of experience is relatively little.

I take it by suggesting, Judge Webster, that you were forced to discontinue 15 operations because you didn't have the resources, it is not criticism of Congress, since I think you came and asked for \$3

million, and were not in fact denied resources in order to pursue those operations: were you?

Mr. WEBSTER. No, that's absolutely correct. That was not intended as a complaint, but simply to indicate that the reason for the increased request for the 1981 budget—

Mr. KASTENMEIER. To gain some perspective, I think the year before, it was \$1 million, and then \$3 million in the present year, and \$4.8 million.

Mr. WEBSTER. I think we've had \$3 million for actually 3 years, 1978, 1979, 1980, \$1 million first, and then three \$3, and then \$4.8 is requested this year.

Mr. KASTENMEIER. Which I believe suggests a linear upward curve regarding these operations and what is intended, and therefore I think it is important for us to look at them.

In terms of the notoriety and sensationalism that comes out of these operations, and the possible inability to prevent or manage the leaks, I think obviously you have a problem. Evidently the press in the country is going to look for these stories in the future with even greater intensity and interest. Therefore, I wonder whether you have the ability to maintain the secrecy required to protect your operations and to protect those innocently involved.

Mr. WEBSTER. I certainly hope that we do, because they are too important to give up for that reason alone. It is very important to us that the integrity of these investigations be maintained throughout, and including the period of grand jury investigations and trial.

Of course, once there is a grand jury investigation, it is very difficult for those matters to remain unobserved by an alert press and media.

Very often in today's investigative journalism, though, which has come to the fore in the post-Watergate era, we find that investigative journalists are working the same territory that we are working, so that it comes as no great surprise to us to find that they are there and aware of some of the things that we are doing.

We had early reports in the Abscam case in October of last year, or in the fall, from a newspaper who is not mentioned in the current list of those who had the stories at the time we were conducting our overt interviews.

It will be a problem for us, and we are addressing it seriously, but, again, I don't believe this is endemic to undercover operations other than a premature exposure of one can endanger some of our agents.

Mr. KASTENMEIER. Well, actually, while apparently the Attorney General was looking for the source of the leak, someone in a high place, either in the Bureau or in the Justice Department, had to also make a decision to manage that leak by further briefings and official leaking. If we are to look at the most recent operation, all the information could not have all come from the original leak. It had to have been that someone made a judgment at the top to make an arrangement with the press whereby they are briefed, in return for which they were to suppress, presumably, the breaking of a case. Isn't that it?

Mr. WEBSTER. I have no knowledge of that. It is my personal view that the one leak in the New York Times was so complete that there must have been access to Government documents which would not have necessitated any further briefing or clarification.

I might say that on January 30, which predated the weekend in which we brought this operation down, we advised our field offices

that there appeared to be some press awareness of what we were doing, and urged them to intensify their efforts to keep the thing under control. On Sunday, when the New York Times article came through, and the Washington Post article was available to me at my home, I contacted the Attorney General. We discussed the situation, and Monday morning, the Attorney General issued his statement ordering an investigation.

I sent that statement to the field. I also sent a personal statement on holding tight. The following week I sent still another communication to the field, and I have publicly stated my views of the impact of this type of leaking.

We don't know that it was us or some other group or agency or employees. It is a problem. It is a problem that involves questions of ethical restraints by the press, not legislation and not regulation, but decisions——

Mr. KASTENMEIER. Judge Webster, then you are saying that perhaps the Justice Department at a high level made a determination, surely somebody did, to fully inform the press, so that a premature leak wouldn't take place. Is that not the case?

Mr. WEBSTER. Are you talking about before the interviews took place on February 2?

Mr. KASTENMEIER. Yes.

Mr. WEBSTER. I am not aware of that. I have participated with the highest officials in the Department of Justice in the closing down of the operation, the covert phase of the operation, and I am not aware of that. It certainly did not take place within the Bureau.

Mr. HEYMANN. I agree with what Judge Webster said, Mr. Kastenmeier. It's worth pointing out that the Attorney General, Judge Webster, and I, plus a number of other people are by now under oath, having promised to take polygraph tests as to all we know about any of those leaks.

I was told that I was free to take the polygraph test or not, but I was to know that Judge Webster had already agreed to take one. I think it's called coercion.

Mr. EDWARDS. The gentleman from Ohio, Mr. Seiberling.

Mr. SLIBERLING. Thank you, Mr. Chairman.

Mr. Heymann, you pointed out at some length the success of many undercover operations, including fencing and other operations of that sort. But I think if we're going to understand the issue that we are dealing with here, we've got to understand the difference between those types of operations and the one that we are talking about right now.

It seems to me the difference between undercover fencing operations, for example, where the individuals come in to fence the stolen goods, and this operation, or the operations that we are involved in, are considerable.

In the fencing operation, the person who brings in the goods has already been involved in a crime or crimes, that of receiving stolen goods. He is also self-selected by coming in on his own.

Now if you are going to analogize that to what has happened here, if the FBI or its middlemen went to an individual who had not stolen or received stolen goods, and attempted to put some stolen goods into his hand, and let him know that they were stolen, and then told him

where to go to fence them, directed him to the undercover fencing operation, that would not be self-selection in the same sense. That would be FBI-selection of that individual, and indeed it would be the FBI attempting to corrupt that individual by, first of all, getting him to knowingly accept stolen goods, and second, to come and fence them.

Now that's the analogy to this situation, and it's quite different, I think, from the ones that you describe. Am I correct in that?

Mr. HELMANN. I don't think so, Mr. Seiberling.

Mr. SEIBERLING. Well, please explain in what way that isn't a good analogy.

Mr. HELMANN. Let me take it in the steps that I think you take it in, Mr. Seiberling.

First of all, there are obviously many perfectly proper Sting undercover operations where we have no basis for believing the individual has already committed a crime like stealing property. When a policeman goes out in Central Park, dressed like a little old lady and gets mugged, he may get mugged by a new mugger or an experienced mugger. I hope the City of New York will arrest and prosecute in either event.

The same is true even when you think about it in a hijacking sting type operation. It would be nice to pretend that the hijacked goods have already been hijacked at the time that we set up our sting operation, but we run the sting operation—we ran the one in Boston for about 18 months. The fact of the matter is, people are going out and hijacking goods, and then bringing them to us, knowing all the while—

Mr. SEIBERLING. May I ask you, are there any such operations where the FBI first put the stolen goods in the hands of the individual who came in later?

Mr. HELMANN. No. No operation that I know of, including this one.

Mr. SEIBERLING. Yet that's what the FBI did in this case, apparently, in trying to get individuals to accept bribes.

Mr. HELMANN. There is a major difference, Mr. Seiberling, and that is we have no agent going out and making contact, and I am going to drift off in the general, because I don't want to talk about the Abscam investigation. I know of no case where an agent has gone out and tried to persuade a political figure to take a bribe, which would be the equivalent of trying to persuade him to take stolen goods.

Having said that, I am a little bit worried about it, because there is a reported case, affirmed without any difficulty by the courts, something called *United States v. Santoni*, where an agent did offer a State legislator money, having reason to believe that the State legislator had previously solicited money.

The situation that I think—the reason that I think you are picturing a situation, Mr. Seiberling, that doesn't correspond to what we have in mind is that we have Federal agents going out and contacting individuals and not connected in any way with the Federal Government, and with their friends and associates who deal for them, and who are themselves not connected in any way with the Federal Government, conduct these operations.

If we are talking about—if we have an organized crime operation, where a big organized crime figure is in the business of demanding

kickbacks, and if everybody knows that, and if he has friends and associates who go out, who radiate out from him and ask for kickbacks which eventually go to him, our contact with those friends and associates is not forcing kickbacks on the organized crime figure.

It is only if the agent goes there and does a lot of fancy talking, somebody will be responsible for it, if they go and do a lot of fancy talking and inducing. Then you've got a situation like the one you described where stolen goods are put into somebody's hands.

We don't have a situation where we have any agents doing a lot of fancy talking and convincing.

Mr. SEIBERLING. My time has expired.

Mr. EDWARDS. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

I'd like to explore the concept of middlemen. These are these very mysterious characters, and the head of the FBI himself says:

"The middlemen, of course, are not under our control." Yet he has total control of this total operation. Well, who are these middlemen? Are they informants? Are they paid?

The Director also says that the middlemen, of course, do not know that they are dealing with the FBI. Well, where do these middlemen come from, and how accurate is their information?

Mr. WEBSTER. Congressman Drinan, I may have slipped into using the word middleman just as—

Mr. DRINAN. It's crucial in your testimony.

Mr. WEBSTER. Yes. I've used it. I'll stand by it.

Mr. DRINAN. It's very vague, and it makes me alarmed about the whole program, when you shifted the focus from informants to middlemen. Who are these middlemen?

Mr. WEBSTER. I'll be glad to answer that. I'd say the use of the middlemen may create, as it has with you, a different perception than we have of what this person is.

Very simply, the middleman is a subject of investigation, a target of prosecution. In the Abscam case, we started in stolen artwork. That investigation has already yielded over \$1 million in actual recoveries. It took us through a chain, the same people who were bringing us thieves became involved in bringing us influence, people who were willing to sell their office.

Now, whether it's a city or State—and we did, we followed it through. Corruption at the municipal level, and then at the State level, and then finally the same people who were the subject of our investigation.

Mr. DRINAN. These are the middlemen?

Mr. WEBSTER. The middlemen.

Mr. DRINAN. Why are they the middlemen? Between whom are they?

Mr. WEBSTER. They are the influence peddlers, those who make it their business to deal with Congressmen willing to sell their office.

Mr. DRINAN. These are the crooks that you are after originally, and now the whole thing has gotten away from art, and into politicians, so you have taken the middlemen, who are allegedly crooks, known crooks, and you accept their information about Congressmen. Is that what you are saying?

Mr. WEBSTER. I'm saying that in the criminal world many of our informants have been living criminal lives, but that does not take away the reliability of their information.