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EXECUTIVE SUMMARY OF REPORT ON FBI UNDERCOVER OPERATIONS

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EXECUTIVE SUMMARY

THE SCOPE OF FBI UNDERCOVER OPERATIONS

Prior to 1977, the FBI utilized the undercover technique infrequently and in limited circumstances. Today, the range of criminal activities under investigation by this technique is nearly coextensive with the FBI's jurisdiction and in practice often focuses on conduct which may be beyond that jurisdiction.

FBI undercover operations, involving large expenditures of funds, or "sensitive circumstances" requiring greater Headquarters review, numbered only 54 active cases in 1978, but rose to 92 in 1980 and 1981. The number of such operations then began a decline, with 53 open and active cases reported in 1983. In the operations which are smaller in duration, cost, and do not involve "sensitive circumstances," the number of active operations has more than doubled, from 122 in 1978 to 309 in 1982. In 1983, the figure fell to 263 open cases. However, these figures in fact understate the actual number of undercover investigations, because of definitional terminology adopted by the FBI in its reporting.

Starting in fiscal year 1977, the Department of Justice's appropriation request began to expressly state the funds sought for undercover activities. From $1 million in 1977 the budget has grown steadily to a total of $12,518,000 for fiscal year 1984, thus suggesting that recent operations are longer in duration and/or expenditures. However, these sums include only those items that the Bureau has chosen to segregate out as special costs of the operations, such as informant payments, bribes, lease expenses, etc. The bulk of the expenses—FBI salaries and general overhead—are excluded, and present FBI record-keeping practices do not readily permit retrieval of the actual total costs associated with undercover operations.

THE DANGERS OF UNDERCOVER OPERATIONS

The Subcommittee's review of Bureau files, the testimony of scholars and private individuals caught up in FBI undercover operations, and informal conversations with attorneys, journalists, and others following various FBI investigations have confirmed a pattern of widespread deviation from avowed standards, with substantial harm to individuals and public institutions.

The damage that has been done by FBI undercover operations, illustrated by cases which have received public attention, are representative of the range of problems which such operations can and do produce, and demonstrate why these issues require the continued scrutiny of the Congress, the enactment of legislation and other measures to reduce the probability that these problems will recur.

A. DAMAGE TO PUBLIC INSTITUTIONS

1. Manipulation of the political process

Undercover operations carry the potential for manipulating the political process and tampering with history. A particularly egregious example of the FBI's insensitivity to this issue is seen in Operation Colcor, a 1980–1982 investigation of corruption in Columbus County, North Carolina. As a part of its efforts to establish that state and local politicians were willing to buy votes, the FBI employed undercover agents to propose and influence the outcome of a referendum to permit sale of liquor by the drink in Bolton, North Carolina, a town of about 400 voters. With promises of opening a new restaurant that would produce major revenues for the poor rural community, and cash payments to the local political organizer, the agents succeeded not only in initiating the referendum, but obtaining a favorable vote.

When the FBI's involvement became known, the North Carolina State Board of Elections invalidated the referendum, declaring the Bureau's action unconstitutional interference in the electoral process and seeking a ban on future activities of this sort.

2. Loss of public confidence

A second element of danger is the potential for undermining public confidence in its governing institutions by initiating or conducting an undercover operation in a manner that exaggerates or overly dramatizes the suspected corruption in that institution.

In the Operation Colcor episode described above, for example, the prosecution's evidence in the vote buying trial that followed failed to demonstrate that any voters had even been paid, or even that anything other than somewhat unrefined political organizing had occurred. Yet, this episode, as well as others (including a bribery charge against the Lieutenant Governor that failed in its proof), led to banner headlines, such as "Scandals Staining N.C.'s Good Name."

Neither the results in the Colcor prosecutions nor other evidence has substantiated that broad-sided attack on the integrity of that state's institutions.

In Operation Corkscrew, a 1978–1982 investigation into alleged corruption in the Cleveland Municipal Court, the FBI likewise consciously proceeded in a manner calculated to call attention to the probe and exaggerate the evidence against the targets whose reputations are the most crucial for the effective functioning of the court.

In an early phase of its investigation, the FBI requested authority to seize the records of that court for the period 1975–1978. Although a United States District Judge initially approved the Bureau's request, he subsequently withdrew his authorization after concluding that the seizure "would impugn the entire court." Rather than consider the merit of the court's conclusion, the Bureau merely sought out a more compliant state court judge who issued the warrant. On February 14, 1978, at approximately 9:00 a.m., the court's busiest time, a team of fifty FBI agents, and local police entered the court and seized its records. The Bureau made a bad situation worse by stationing agents and police officers immediately behind the judges while court was in session. The damage to the court's reputation was exacerbated later in the day, when the Acting U.S. Attorney and the Special Agent-in-Charge of the Cleveland Field Office held a press conference regarding their suspicions, and, without evidence to support it, explicitly implicated "more than one judge" of the court.

The Bar Association of Greater Cleveland investigated the incident and issued a report which concluded:

> The effect of the publicity . . . was to cloak the entire court with a mantle of corruption at the time when the investigation appeared to be still in its preliminary stages. . . . Its effect, if not purpose, subjected the entire Court to popular (and widespread) opprobrium when such an attitude was based on a conclusion unsupported by facts as they were then known.

The Bar Association also characterized the decision to have agents and police officers stationed in the courtrooms as ill-conceived and unnecessary.

3. Undermining respect for the law

The third way in which public institutions may be adversely affected by such investigations is that respect for the administration of justice and the principles under which particular institutions operate may be undermined, thus encouraging others to disregard the law and those principles.

The effective functioning of the judiciary system, for example, requires compliance with certain rules of fundamental fairness. The importance of these principles was underscored in a 1979 decision of the Supreme Court of Illinois, wherein the Court held that "the integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored." Yet in Operation Greylord, a recent investigation into case-fixing in the Cook County (Illinois) Circuit Court, the Bureau again displayed shocking insensitivity to the implications of its actions. Agents of the FBI reportedly indiscriminately bugged the chambers of a judge, thereby impinging on the legitimate and necessary confidentiality of conversations occurring therein. They created bogus cases, in which agents posed as defendants, presumably necessitating perjured testimony. Agents impersonated prosecutors and defense attorneys in actual cases, thus jeopardizing the rights of both the public and the defendants in the fair and effective functioning of the criminal justice system. The "integrity of the courtroom" was simply ignored.

B. DAMAGE TO THIRD PARTIES

The second broad area of dangers inherent in undercover operations involves damage to innocent and uninvolved third parties. These damages have spawned lawsuits seeking over $466 million in damages, and occur essentially in three ways.

1. Injury caused by informants

First, these operations often cause financial losses to uninvolved individuals as a result of activities by informants, which are unrelated to the principal criminal investigation but sanctioned or condoned by the authorities to maintain the individual's credibility or avoid "blowing his cover."

Abscam, for example, left a trail of financial ruin in its wake. The principal damage was done by Joseph Meltzer, an informant employed by the FBI in a related case. By misusing his insider's knowledge of the fictitious Abdul enterprises (including the fact that a Chase-Manhattan Bank official would falsely vouch for the Sheik's millions), Meltzer was able to bilk innocent business people of their lifesavings, ruin their future, and impair their health. Those victims who became suspicious of Meltzer testified that they asked the FBI about Meltzer and were, at worst, reassured that he was legitimate or, at best, merely not warned of his double-dealing.

As a result of Abscam, civil claims against the United States in excess of $190 million are now pending which pertains to the civil losses suffered by the above-described businessmen and women. To date, the Department of Justice, representing the FBI, has resisted all efforts to disclose, through discovery or otherwise, anything relating to Mr. Meltzer's relationship to the FBI, or to permit the claims to be adjudicated on the merits.

In another case. Operation "Resfix," a 1980 investigation of a fraudulently procured government loan and liquor license for a Jacksonville, Florida restaurant, the owner/informant, Peter Abbott, used the undercover operation not only to avoid prosecution for his own criminal acts by implicating others, but also to facilitate the establishment of what Abbott's sentencing judge, characterized as a "financial quagmire . . . riddled with deliberate, willful and scheming criminal activities."

The FBI clearly knew or should have known of Abbott's continued life of crime yet they apparently failed to monitor his activities, for while engaged in Resfix, Abbott bilked 187 creditors in excess of $1 million, and defaulted on a half-million dollar, fraudulently obtained SBA loan, thereby adding American taxpayers to his victims. Reviewing this financial carnage, the same judge rhetorically asked, "Is what Peter Abbott did for the community greater than what he did to the community?" The judge went on to say:

> In their zeal to bring criminals to justice, their vision as to what the public interest is may become distorted. . . . [The FBI] owe[s] a higher level of responsibility and duty to the merchants, banks and businessmen of this community.

In contrast to the Court's reaction, the FBI Special Agent-in-Charge stated in an interview that "Yes, we'd use him again."

Another operation that led to major financial losses by innocent third parties as a result of the misconduct of an FBI informant was Operation Frontload. In 1978, the FBI, with the cooperation of elements of the insurance industry, placed an informant in a construction bond business in order to investigate organized crime in HUD-financed construction projects. Although the FBI vouched for

his integrity to the cooperating insurance companies, the informant had a significant criminal history. Again, the inadequately supervised informant used his insider's position improperly, this time to obtain the authority and means to unilaterally write millions of dollars worth of performance bonds, pocketing the premiums himself. After the fraud was discovered, the insurance company disclaimed the bonds. The defrauded policy holders have sought relief in 14 separate suits, seeking over $162 million in damages.

2. Injury caused by agents

A second type of injury to innocent third parties has occurred as a direct result of the actions of the FBI agents. In Operation Speakeasy, a 1978–1979 investigation of organized crime, the FBI tried to run a business without the expertise to do so. The Bureau had asked a Denver businessman to help them in the operation by purchasing a tavern they hoped would become a mob "hang-out." The FBI itself ran that business for nearly a year. When the operation was terminated (unsuccessfully), the businessman found himself saddled with a failing business, mired in debt, and poor prospects. Notwithstanding the assurances from FBI agents which the businessman claims he received, the FBI and Justice Department have refused to indemnify him for his actual losses, which he claims total over $100,000.

In Operation Recoup, a 1981 investigation of stolen car racketering in the South and Midwest, the Bureau apparently used its own agents to set up a bogus used car business, in which wrecked cars were sold to "retaggers" who then replaced the motor vehicle identification tags on stolen automobiles with those of the wrecked vehicle. FBI agents also operated as intermediaries in several sales of stolen and retagged automobiles to used car dealers. Those sales were made with the knowledge that the cars would be subsequently resold to innocent purchasers who would ultimately lose title to them.

As of October 1982 more than 250 cars had been confiscated from innocent purchasers. In addition, of course, the business reputations of the dealers who sold the automobiles have been irreparably injured. Claims in excess of $47 million have been filed against the United States as a result of Operation Recoup, none of which have been settled.

This problem is also illustrated by Operation Whitewash, a 1979 investigation of suspected kickbacks to union officials by Sacramento, California area construction companies. The FBI set up a painting contracting business operated by two undercover agents. While no kickback schemes were detected, the FBI managed to cause substantial financial losses to several legitimate construction companies which the FBI has admitted were never targets of the investigation. In one case, a construction company (Wil-lens) found itself saddled with the FBI-run business ("Top Coat") as its painting subcontractor despite the contractual arrangements it had with the original subcontractor. The construction company found "Top Coat's" work to be "dilatory, sloppy, unworkmanlike, [and] incompetent". Indeed, the mess was at least in part a direct and predictable result of the *modus operandi* of the investigation since the undercover plan called for intentionally violating union regulations

on how painting jobs were to be done. Thus, for example, in an attempt to lure corrupt union officials into seeking kickbacks, the FBI front ("Top Coat") spray-painted houses instead of brush painting them and did so in a manner that made the inadequacy of the method obvious. Not surprisingly, since the undercover agents had no training or experience as painters, the remainder of their work was equally unacceptable.

Rather than attempt to mitigate the damage, the undercover agents simply made things worse. When a Wil-lens official threatened to get "Top Coat" off the job, he was threatened with physical harm and financial ruin. When he persisted, the FBI, as subcontractor, filed a meritless mechanic's lien against the construction company's projects thereby aggravating its losses substantially.

3. Generation of crime

The third type of risk to innocent third parties stems from the fact that many undercover operations "create" crime or criminal opportunities in order to ensnare criminals. The problem is that in so doing, the operation has the effect of encouraging criminal activity. Even if the operation is effective in the sense that it results in significant arrests and convictions, that is of little consolation to the victims of these crimes, who otherwise may never have become victims. The myriad ways in which undercover operations increase crime include:

Generating a market for the purchase or sale of illegal goods and services, generating capital for other illegal activities; generating the idea, motive, skill or resources for a crime; tempting; coercing; intimidating, or persuading a person otherwise not predisposed to commit the offense; stimulating of crimes against undercover officers by people who do not realize they are dealing with police; and retaliatory violence against informers.

In Operation Colcor, for example a target then receiving monthly bribe payments from the FBI told agents of his intention to unleash a "terror compaign" against his business competitor. FBI agents soon learned this included plans to burn down the competitor's warehouses. In fact, $300 of the $10,000 he paid to have the job done was in bills whose serial numbers had been recorded by the FBI. Moreover, by offering to assist in the target's plans, agents may have further spurred the subsequent violence. Thus, not only did the Bureau fail to notify the warehouse owner or take steps to protect his property, but the arson was encouraged and in part financed by the FBI.

If the individuals injured by undercover operations lack the awareness or resources to bring suit, or the Department of Justice, by its policy of stonewalling prevents adjudication on the merits in such cases, the losses are left on the shoulders of innocent victims. Even if lawsuits are filed and are successful, it is rare if ever that the plaintiff will feel fully compensated or vindicated, and the financial loss is merely shifted from the injured individuals to the public at large.

C. INJURY TO TARGETS OF UNDERCOVER INVESTIGATIONS

Targeted individuals, or members of targeted groups, may suffer substantial unfair injury as a result of the undercover investigation. These risks are particularly great where the offense under investigation is vague to begin with, and selection of the individuals to be approached is left to "middlemen." In such situations, the fact that an individual had led a blameless life provides no protection. Indeed, the record provides ample evidence that *anyone* may become a target of such an investigation.

1. Unwarranted prosecution: The appearance versus the reality of guilt

The most devastating damage that can befall a targeted individual is to be prosecuted and convicted for a crime for which he or she is innocent. The potential for a miscarriage of justice is significantly enhanced in the "created crime" undercover operation, because the agents do not merely recount evidence of a crime to the prosecutor, grand jury, and petit jury, but plan and create that evidence, using mechanisms that in themselves tend to suggest guilt.

This potential risk has proven to be more than theoretical. In Operation Corkscrew, for example, six judges of the Cleveland Municipal Court came within weeks of being indicted based on evidence that now is recognized as having misled agents and prosecutors alike. Each judge was recorded in conversations with an undercover agent and a bailiff (then functioning as a "middleman" unaware of the agent's true identity). The purpose of each encounter was to capture, on audio tape, the judge's acknowledgment that he had participated in fixing a particular case. After such episodes the agent's summary, reflected his certainty that this had been accomplished.

Based on one such conversation, a certain judge was included as a prospective defendant until the entire investigation was finally closed. Indeed, the initial reaction of most individuals reading or hearing this transcript might also be to presume guilt on the part of the judge. A jury might well have been similarly convinced. However, the presumption of guilt is wholly unfounded. Eventually, the bailiff admitted that "this was a complete scam on his part . . . [the judge] never received any of the bribe money and did not participate in the fixing of this case."

To understand why the conversation seems suspicious, one must turn to linguistic analysis to appreciate that these words and circumstances were truly "ambiguous," i.e., not only capable but intended, consciously or subconsciously, of being understood in two or more possible senses.

Where one of the participants to a conversation has a clear agenda (e.g., the agent's intention to obtain confirmation of the "fix"), there is an understandable tendency to assume that the other participant understands and shares this intention and thus accords the proper interpretation to the words utilized by him. Indeed, the mere presence of that individual is often interpreted as acquiescence, and any affirmative words ("Yeah," "okay") uttered by that speaker are viewed as consent, even if the world is more likely only conversational feedback. Likewise, the listener often

tends to confuse who said what and attribute all incriminating statements to the target. The tendency of agents to "coach" targets, to block exculpatory statements, to confuse by using garbled slang, or to make a legitimate offer appear criminal (or vice versa) all interfere in the targets' ability to recognize and reject a criminal offer.

Moreover, agents are in a position to manipulate the setting and play upon the peculiar psychological effects of videotaping in ways that are almost universally damning. The tapes' murky quality, dates and times at the bottom of the pictures, and foul language of the FBI actors, all tend to suggest guilt. In addition, watching video tapes on the screen creates an expectation that the people on them will behave as on television, e.g, stalk out at the mere mention of an improper suggestion. But, in real life, merely changing the subject is a more likely response.

2. The taint of being investigated

Targeted individuals may also suffer significantly even where they are never charged with a criminal violation. In Abscam, for example, as in other political corruption operations, the FBI relied upon the unwitting "middlemen" to decide which politicians were prepared to sell their offices. In almost every Abscam case, the FBI lacked any independent evidence to support the claims of these middlemen, yet, the public perception, fueled by the FBI's own statements, is that before the bribe meeting was set up, the FBI had reason to believe the target was corrupt or corruptible.

The legacy of this perception, even when actively negated, has proven to be most disturbing. For example, Senator Larry Pressler was taken to a meeting with undercover agents by a middleman who later admitted that he has not told the Senator the true purpose of the meeting. Notwithstanding this and Senator Pressler's clear statements at the meeting that he could not promise anything, he felt that his reputation had been tarnished. As Senator Cranston remarked:

> There are those who say where . . . there is smoke there must be fire. So when suddenly Larry Pressler's name appears in the headlines in connection with Abscam, people wonder about Larry Pressler. I know personally from conversations with him over these many months that this has given him a great deal of concern and a great deal of anguish.

A similar price was paid—even by those who did not attend a meeting—simply because they were targeted for a bribe offer based on their groundless selection by "middlemen."

Similarly, as a result of Operation Corkscrew the judges of the Cleveland Municipal Court have suffered enormous damage to their reputations and, in some cases, to their careers. During the pendency of the investigation, judges seeking re-election or elevation to a higher court failed to obtain the endorsement of the local bar association and other groups despite earlier endorsements and the recommendation of the Scanning Committee. Two judges were defeated in their reelection bids, possibly as a result of this cloud; the health of several judges was ruined, as was that of spouses and

other relatives. Less tangible, but no less devastating have been the stigma and doubts that continue to plague these citizens who formerly were considered pillars of their society. Indeed, the taint can affect one's self image. One judge described his reaction to hearing rumors of the FBI's probe of him as follows:

> I felt dirty, soiled. I began to feel the humiliation of sitting on that bench for two years, doing the best job I knew how, while people in court were saying to themselves, "Look at that corrupt old bastard up there." I feel like a crook in the eyes of anyone who doesn't know me.

Unfortunately and ironically, the damage to targeted individuals is exacerbated by the prestige of the FBI and its apparent desire to maintain its reputation, which in turn creates an almost impenetrable obstacle to admitting mistakes, or to publicly exonerating those it has investigated. Whether consciously or not, the Bureau in its statements, including appearances before Congressional committees, plays on this inference of wrongdoing, and fuels the fires of public speculation. First, the Bureau will often suggest in press conferences or public testimony that it does have evidence of wrongdoing, but for some reason is precluded from disclosing it.

Second, the FBI apparently is unwilling to admit that its inability to develop prosecutable cases is anything other than a failure of proof. In Operation Corkscrew, the fact that the FBI was unable to develop viable cases against any judge in four years of intense, overt and covert activity might well be construed as suggestive of innocence. The Bureau, however, in this instance as in others, does not concede that its initial suspicions might be wrong, nor will it apologize or otherwise take any steps to eradicate the taint which its operations leave.

The Justice Department Response: The Safeguards and Guidelines

In response to these Congressional concerns, the FBI and the Department of Justice reassured this Subcommittee and the American people that they were cognizant of and responsive to the dangers inherent in undercover operations, and that specific safeguards beyond those required by law already were in place which would ensure that undercover operations were conducted properly. Testifying before the Subcommittee shortly after Abscam became public, Assistant Attorney General Philip Heymann first articulated the existing safeguards.

> * * * 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.
>
> * * * * * * *
>
> We impose on ourselves the requirement * * * not only because fishing expeditions may be unfair but also for the practical reason that they would be wasteful of our scarce investigative resources.

> 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 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. * * *
>
> A third important safeguard in undercover operations is our modeling of the enterprise on the real world as closely as we can.
>
> * * * 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. 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.

These safeguards, as well as existing procedural practices, were later included in the Guidelines on FBI Undercover Operations issued by Attorney General Benjamin Civiletti on January 5, 1981. The guidelines were described as "not chang[ing] established practices and procedures in any significant way." The three "safeguards" were thus incorporated in the guidelines, although in an expanded and more detailed format, and in some instances, altered language.

The approving and reviewing authority was expanded beyond the FBI by formally establishing the Undercover Operations Review Committee as the "centerpiece" of this system.

This joint FBI-Department of Justice body charged with the task of considering applications for approval, renewal or extension of all significant undercover operations. The Director of the FBI (or a designated Assistant Director) is to approve such operation only upon the recommendation of the field (the relevant Special Agent in Charge and the United States Attorney or Strike Force Chief), FBI Headquarters, and the Committee.

An undercover operation must be submitted to and formally approved by the above hierarchy if it is likely to be lengthy, costly, or involves certain fiscal matters that necessitate special dispensation from statutory requirements; or if it involves any one of the enumerated "sensitive circumstances."

The "sensitive circumstances" are in effect a catalogue of the concerns described above. An operation must be reviewed at the highest levels either by virtue of the nature of the targets (e.g., politicians, foreign governments, news media, or groups under domestic security investigation), the cover to be used (e.g., posing as an attorney, clergyman, or physician), the means used (e.g., commission of a crime or giving of sworn testimony while undercover), or the possibility of unintended adverse consequences (e.g., physical

or financial harm, untrue statements concerning an innocent person). However, other than the admonition to consider these factors, and balance them against the operation's benefits, nothing is proscribed. On the other hand, the Committee is to ensure that the undercover plan will "minimize the incidence of such sensitive circumstances and * * * minimize the risks of harm and intrusion that are created by such circumstances."

At the time of their implementation, Department of Justice officials urged this Subcommittee to reserve judgment on the guidelines and "wait and see how they work in real cases."

This Subcommittee's review of Operation Corkscrew, as well as other FBI undercover cases discussed herein, represents the first comprehensive effort to express that judgment.

Operation Corkscrew: A Case Study in the Failure of Safeguards and Guidelines

A. The Selection of Operation Corkscrew

In order to fully address the fundamental dangers inherent in undercover operations described above, and to assess whether internal FBI-Department of Justice safeguards are effective in controlling them, the Subcommittee conducted an in-depth review of one such case, code-named Operation Corkscrew. This FBI investigation of alleged case-fixing in the Cleveland Municipal Court was conducted between 1977 and 1982, and proved to be a particularly appropriate subject within which to explore the Subcommittee concerns regarding the efficacy of these safeguards and guidelines.

Like other major FBI undercover investigations, Corkscrew was expensive and time-consuming. It involved one of the "sensitive circumstances" (in this case, investigation of public corruption) that supposedly trigger special scrutiny.

The undercover phase of Corkscrew occurred after the FBI and Department of Justice had enunciated those safeguards which they contended would prevent abuses such as those alleged in Abscam. The Heymann testimony, describing the pre-existing "safeguards," occurred almost simultaneously with the introduction of the full-time undercover agent in Corkscrew. The guidelines were promulgated midway through the undercover phase. However, as noted above, the Justice Department's position has always been that the guidelines merely codified existing practice and procedure.

The fact that there were no prosecutions of the targets enabled the Subcommittee to obtain timely information and to focus its inquiry strictly upon the quality, fairness and effectiveness of the FBI's effort.

Finally, Corkscrew is an appropriate model for judging the efficiency of internal controls because the FBI claims that the basic safeguards described by Assistant Attorney General Heymann were followed.

After exhaustive study of this case, including review of entire FBI investigatory file however, the Subcommittee has come to the inescapable conclusion that the safeguards in practice were little more than rhetoric, offering at best limited constraints upon the investigators, and little or no protection to the public.

B. Facts of the Case

1. Overt Stage: October 1977 to September 1979

In October, 1977, the FBI was contacted by a Cleveland resident, who reported that she had been approached by a Cleveland police officer regarding fixing her husband's vehicular homicide charge.

Equipped by the FBI with a hidden recording device, she met with a police sergeant who allegedly could "help" her, and paid him $1,000. In November, 1977 the sergeant and his go-between (a court bailiff) were charged with bribery under Ohio law, and subsequently convicted. Although federal jurisdiction appeared to be absent for this single instance of bribery, the circumstances suggested that this episode was part of a pattern, thereby prompting the FBI to open an investigation under the Racketeer Influenced and Corrupt Organization (RICO) statute.

At this time, an FBI informant confirmed having fixed other cases pending before the Cleveland Municipal Court. He claimed that cases were fixed through contacts with "corridors," i.e., individuals who interceded on behalf of defendants, using the corridors in the Cleveland courthouse as offices in which to conduct their case-fixing activities.

The Cleveland Police Department had also been using an established informant to investigate case fixing in the Cleveland Municipal Court. This informant was an active corridor himself, fixing traffic and misdemeanor cases in the Cleveland Municipal Court.

In late November 1977, the FBI and a Cleveland Police Department combined their respective investigations into a joint venture which continued through most of the overt stage.

The police informant continued to have his case fixing discussions monitored. Altogether, fixes in thirteen cases were alleged to have been recorded.

This informant dealt only with other "corridors"—neither judges nor other court employees were implicated. The total payments from defendants were small, and the charges were traffic offenses or minor misdemeanors. Reviews of the pertinent case files by the police purportedly provided corroboration of the case fixing activity in the 13 cases. (Subsequent analysis by the Subcommittee, however, casts doubt upon the accuracy of that verification.)

In addition, other persons admitted paying a corridor to fix an assault case; and one source identified a variety of entries on court records which he thought were indicative of case-fixing by judges, although he denied any firsthand knowledge of payoffs to judges.

Based on the foregoing evidence, the Bureau obtained from a state court judge a search warrant to seize thousands of the Municipal Court records for the period 1975–78.

After reviewing the docket books, two thousand "suspicious" files were reviewed, and the defendants, witnesses, police, and others involved in those cases were interviewed. By the time this interview process was completed, in about December, 1978, the number of suspicious cases was reduced to approximately 150, which were described as involving features indicative of the existence of a "fix."

Following the arrival of the newly appointed U.S. Attorney for the Northern District of Ohio, that office conducted a "thorough analysis of the information developed to that point," and concluded

that the evidence was insufficient to support a federal prosecution of systemic corruption. As a result, that office and the Cleveland FBI began plans for an undercover operation.

In early 1979 an FBI undercover agent approached a known "corridor," Albert Hobson, a janitor in the courthouse and requested his assistance to take care of several minor cases. Although these conversations were taped, the undercover agent failed to get Hobson to explain with whom or how he was "dealing" with these cases.

Eventually, Hobson was confronted with the fact that he had been working with FBI undercover agents. Hobson agreed to cooperate, and thereafter was equipped with a recording device. He was told to continue to work with his existing contacts, who turned out to be Cleveland Municipal Court Bailiffs Marvin Harris and Marvin Bray. For nearly a year, through much of 1979 and early 1980, Hobson taped conversations with Bailiffs Harris and Bray, various other corridors, and defense attorneys.

2. The Covert Stage: September 1979 to June 1981

On September 24, 1979, the Cleveland field office submitted a formal proposal for an undercover operation to FBI headquarters. The proposal contemplated that Hobson would introduce the FBI undercover agent to bailiffs and other corridors in order to permit the agent to bribe them and to bribe judges to fix cases. The cases to be "fixed" would be real (although dormant) cases in which the charge was minor, a misdemeanor bench warrant outstanding, (although the police were not actively searching for the subject) and in which the actual defendant did not have a substantial criminal record.

On November 12, 1979, the Undercover Review Committee formally approved the operation.

In February, 1980, Robert Irvin from the Cincinnati FBI field office was selected to be the undercover agent. Hobson introduced Irvin to Bailiff Marvin Bray. Equipped with a hidden body recorder, Irvin began taping meetings with Bray. Irvin posed as a small-time car thief and led Bray to believe that he was interceding on behalf of the accused or his employer because the defendant was "scared" of the judicial process, or because the illicit employer couldn't "afford to have anybody inside blow the whistle on him."

Initially Irvin paid Bray $300 to $500 to fix each of three cases, by "pulling a warrant," i.e. physically removing the file from the capias drawer in the Clerk's office, so as to nullify its effect.

About two weeks after his introduction to Bray, Irvin began his efforts to obtain evidence of judicial involvement. Irvin suggested the need for talking specifically to a judge to confirm the proposed case fix. He claimed that a face-to-face meeting was necessary so that he could pass a lie detector test, administered by his (fictitious) employer, on the subject of whether he (Irvin) has obtained a confirmation of the fix. Bray was told that they could "pull a scam on this guy." Initially, Bray demurred, but eventually Irvin obtained Bray's cooperation in arranging meetings with the judges after he increased the proposed amount of the bribes to between $5,000 and $10,000. After he stressed that he needed only the vaguest of assurances that the case has been fixed and after he

agreed to use an imposter "stand-in" to come to court and pretend to be the defendant.

In the meeting with the judge that followed, the assurance solicited by Irvin from the judge proved to be his asking whether a named individual had been "taken care of," after which Bray interjected that the individual was a mutual friend of someone else. In the course of this conversation (which consisted primarily of an introduction and discussion of Irvin's automobile business and other unrelated matters), no other "assurance" were made, other than Irvin's own reiteration that the individual (again, not identified as a defendant) had been "taken care of."

Immediately following this encounter, Irvin indicated his concern that the judge had not known what was going on. Bray reassured him, explaining that the judge just "didn't want to say nothing about it." Apparently satisfied with the manner in which the scenario had unfolded, Bray agreed to set up further confirmation meetings with judges.

In subsequent cases that Irvin solicited Bray to fix, the same general pattern was followed: Irvin would give Bray the name and file number of the case, pay him the entire bribe before or after the meeting, but out of the presence of the judge, and Bray would introduce Irvin to a judge alleged by Bray to be "fixing" the particular case, usually describing Irvin as a friend. The amount of the bribe was now set by Bray, and averaged about $3,000 per case (the range was $750 to over $5,000).

In preparation for these confirmation "meetings" with judges, the Cleveland FBI and the U.S. Attorney's office devised a "concise conversation" in which Irvin was supposed to elicit "four crucial areas." These areas were designed to "demonstrate the criminal planning, knowledge, and intent by * * * Bray and * * * [the] judge. * * *" The elements were:

> (1) The name of the defendant.
> (2) A statement by the judge "that the case has been handled, disposed of, taken care of"; alternatively, the judge was to "recite the sentence given."
> (3) Irvin was to state that he would "settle up with Bray, and then Bray will settle up with the judge."
> (4) The judge was to agree to this "settle up."

In practice, none of the tape recorded conversations with judges met all these requirements. Most of the encounters were very brief, and consisted primarily of small talk and pleasantries. There was no statement indicating that the encounter had been prearranged.

After five of these conversations had occurred, Bray introduced Irvin to two other individuals he identified as Judges Gaines and Burke, but who later were discovered to be impostors. Over the next eight months, twelve conversations were held with these two impostors, as well as seven additional conversations with real judges. The encounters with the impostors followed a pattern similar to those with the real judges. No payments were made directly to the judge, and code words were utilized rather than direct mention of money or "fixes". However, in these conversations, unlike those involving real judges, the impostors volunteered that the cases had been "taken care of" in a specified manner, and repeatedly alluded to Bray's role.

In addition to these conversations, the FBI attempted to confirm that each of the discussed cases had actually been "fixed" by obtaining from Bray a copy of a court document (the Judgment Entry Sheet), purportedly signed by the judge, setting forth the agreed-upon disposition. The FBI case agent also claimed to have checked the court records in the Clerk's Office to corroborate that these dispositions in fact had been entered. However, there was reason to believe the Judges' signatures had been forged and the surreptitious check of case files proved to be a failure.

When Bray was confronted with the fact that his contact was an FBI undercover agent, he agreed to cooperate, and was extensively interviewed. At this time, Bray admitted that he had utilized an imposter pretending to be Judge Burke, but he claimed that this woman was a "stand-in," and that Burke was aware of this arrangement.

The FBI then decided to use Bray as a "cooperating source." He was paid, and instructed to tape conversations with Judge Burke that would confirm that she had set up a representative to receive the bribe. Instead, he faked the voice of Judge Burke on the tape. Challenged by the FBI, Bray explained that he would rather deal with another judge. On June 24, 1981, Bray was given $2,500 to pay off that judge. He claimed he had paid him off, and produced a blank tape.

Bray then disappeared for several weeks. When he was located, he admitted keeping the $2,500.

3. The Review Stage: July 1981 to April 1983

In early July, 1981, Bray was administered several polygraph examinations concerning participation in the scheme, and was asked, among other things, whether he had paid bribes to Judges Gaines and Burke. His first responses were considered "indicative of deception," and the second examination was deemed "inconclusive."

On August 5, 1981, notwithstanding Bray's admissions and contradictions, the U.S. Attorney's office in Cleveland, with the concurrence of the Cleveland FBI, FBI Headquarters, and the Public Integrity Section of the Department of Justice, decided to present the cases against the judges to the Grand Jury.

As plans were being finalized for obtaining federal indictments of the judges, the Internal Revenue Service was asked to join the investigation, in order to trace the bribe money by conducting net worth assessments of the targets and Bray. Earlier, Bray had claimed that the judges had been given about 90% of the money. The IRS found, however, that Bray had spent far more than his stated share. Re-interviewed by the IRS and the FBI, Bray again changed his story, now admitting that he kept 90% of the bribe money in most cases, and in some cases, he totally "scammed" the judge, keeping the entire bribe, and facilitating the fix without the judge's knowledge. Finally in November, 1981 he confessed that he had utilized an imposter with respect to Judge Gaines, too, although he again claimed that this ploy was known to the real judge.

Altogether, Bray is reported to have provided "at least four contradictory versions of events . . . since his initial confrontation." When interviewed by the FBI, the imposters admitted posing as judges, but denied any knowledge that the real judges were involved despite FBI inducements to implicate them. Likewise interviews of Bailiffs and one judge failed to corroborate any of Bray's assertions.

Regarding the cases purportedly "fixed" by Bray, in only 5 cases did the subpoenaed records substantiate the dispositions claimed by Bray to have been obtained. Even in these cases, however, this corroboration was not conclusive of illegal case-fixing, since there were other explanations in the record for the judges' entering the requested disposition without the defendants' presence.

In late November, 1981, the FBI presented to the U.S. Attorney summaries of their best cases from both the overt and covert stages of the investigation, which they recommended for further investigation and possible prosecution. Included in this compilation were the cases involving all but one of the taped judges, as well as those involving the impersonated judges.

In early 1982, the U.S. Attorney James Williams concluded that:

> Other than the statements by Bailiff Bray, no direct evidence exists to substantiate the proposition that Bailiff Bray paid any judge of the Cleveland Municipal Court money to achieve the corrupt disposition of a criminal case. * * * it is impossible for this office to conclude that acts of judicial bribery have taken place in the 26 meetings with Bailiff Bray and Special Agent Irvin.

Bray was charged and pleaded guilty to income tax evasion relating to the "bribe" income he kept as a middleman, and theft of government property regarding his conversion of the $2,500 entrusted to him for a bribe during his stint as a "cooperative source." The imposters were tried and convicted in State court.

With respect to the cases that had been presented based on the evidence developed during the overt stage, the U.S. Attorney again declined to prosecute. In February 1982, he announced that:

> * * * no further prosecutions [are] contemplated based on information presently available * * *.

Notwithstanding this, the Cleveland FBI field office thereafter offered to provide the entire investigatory file to the Prosecuting Attorney for Cuyahoga County, James T. Corrigan, in an apparent effort to encourage him to indict and prosecute the remaining subjects, including in particular, several of the real judges who had been taped in what the FBI viewed as incriminating conversations with Irvin and Bray. In March, 1983, after reviewing the file Corrigan declined further prosecutions.

C. Analysis

1. The undercover operation was not supported by a "reasonable suspicion" of judicial case fixing

To determine whether the first safeguard was met in Corkscrew first depends upon what type or pattern of criminal activity the operation was designed to probe. It is clear that at least from the time of submission of the request to the Undercover Review Committee in September 1979, the operation was aimed almost exclusively at judges. Not only were affirmative investigations of nonjudicial personnel dropped, but unsolicited leads and opportunities against such individuals were ignored.

The proposal stated specifically that "[*t*]*he primary targets of this investigation are the judges* themselves currently identified as being case-fixers in the early stages of this investigation." The Undercover Operations Review Committee itself characterized the case in its initial approval, as "involv[ing] payoffs to judges to fix misdemeanor cases."

The evidence presented to the Committee was summarized in a manner which left the impression that from the start the evidence was unequivocal in pointing to the involvement of the judges. In the opinion of the Subcommittee, however, there was no factual basis to warrant an undercover operation directed toward *judicial* case fixing. Rather, although the FBI and the Cleveland police had reason to believe there was corruption in the Municipal Court, their direct and circumstantial evidence pointed to the conclusion that the known corrupt transactions had been obtained by the intervention of a low level court employee or an officer of the court (deputy clerk, bailiff, police officer, attorney), often using an intermediary (a corridor or politician), and usually in exchange for money, but not involving judges. This is apparent both from the nature of the suspected "fixes" and the nature of that court system.

There was evidence of "case-fixing," but in the absence of knowledge of the workings of the court system, and *appropriate* further investigation, the investigation was not structured in a manner which would discriminate between inefficiency in the system and actual corruption. Nor would it enable the investigators to determine which employees were involved, and whether there was a systematic pattern of case-fixing.

What the accumulated evidence did show was an antiquated recordkeeping system that could easily be circumvented or tampered with by any employee with access to these documents. It also revealed an overworked judiciary that relied upon a system of delegation and bending of the rules to get through their enormous caseload.

If the Bureau had analyzed the evidence with the objective of determining *who* in the process held the authority, position, or access to obtain the particular variety of "fix", the autonomy of low-level court employees to achieve these results would have been readily apparent.

Rather than accept this simple explanation, or take the time to investigate it, the Bureau presumed that a massive, coordinated scheme was operating which necessarily had to involve the knowing participation of those at the top of the courthouse hierarchy—the entire bench.

To reach this conclusion, the investigators ignored the plain import of the facts. First, the magnitude of the corruption had been overestimated. Second, in many of the 150 "suspicious" cases, the evidence involved a strained reading of documentary records or at

taching a sinister significance to the lack of perfection in the court's record keeping system.

The only evidence even suggesting judicial involvement was indirect, highly speculative and pertained to only a few individuals.

As the FBI itself later admitted to the U.S. Attorney, the overt phase of the investigation had revealed "no clear evidence that judges or any other high level court officials were directly involved in bribery in case fixing."

The requirement of a predicate is and must be an ongoing one. Thus even assuming *arguendo* that there was a predicate for some investigation into whether the judges were *also* involved in case fixing, any meaningful ongoing review of the evidence would have lessened rather than strengthened the predicate.

The only evidence developed against the judges during the undercover phase were the claims of Bray that the individual judges conversing with the undercover agent had agreed to be bribed and fix cases.

The record in Corkscrew, however demonstrates an utter failure on the part of the Bureau to do even rudimentary checking of Bray's credibility or to seek confirmation of his assertions, even in the face of mounting evidence of his duplicity.

First, the FBI made no effort to check Bray's criminal record, to heed informant Hobson's warning that "Bray may have been tampering with or rummaging around in some court files or in the judge's personal papers," to note that Bray's lifestyle had became extravagant, or to attempt to see where the bribe money was going. There was also mounting evidence that he was deceiving Irvin. As mentioned earlier, the primary "verification" relied upon by the FBI investigators during the covert phase was the copy of the Judgment Entry Sheet Bray provided to the agent, although there was both direct and circumstantial evidence that this document was phony.

In addition, the "signed" Judgment Entry Sheet provided to the undercover agent by Bray often referred to a different case than the case that Bray had been asked to have fixed.

The tape recorded conversations with the judges should also have put the investigators on notice that Bray's assertions regarding the fixes were questionable. In most of the taped conversations with real judges there is a disclaimer from the judges indicating that he does not recall the case, or does not really understand what is going on.

The conversations with the judges also were obviously not meeting their intended purpose of confirming the bribes. Irvin expressed no dissatisfaction to Bray when he got only an introduction, or no encounter at all, or when the defendant's name and/or the terms of the disposition were brought up only by himself or Bray. Even when the comments made by the judges were inconsistent with having received a bribe, Irvin was only momentarily skeptical, and he was quickly mollified by Bray's reassurance.

The final element of the case that should have put the FBI on notice of Bray's duplicity was his use of the imposters. In context, it is evident that this failure to corroborate the identity of the targets was but an example of a pattern of failing to question *any* of

Bray's assertions, and was neither unique nor the cause of the operation's failure.

Thus, in failing to question any of Bray's assertions, the agents in effect proceeded as if no factual predicate was required. Bray's uncorroborated accusations, coinciding with the Bureau's preconceived notions about the pervasiveness of corruption on the bench, constituted the predicate for pursuing the judges generally and individually.

2. The "illegal nature" of the conduct was not made "clear and unambiguous to all concerned"

Even if Bray was lying about the complicity of the judges, the innocent individual should be protected by the second "safeguard," because the clear illegality of the transaction being discussed would enable the innocent judge to reject it in the presence of the undercover agent.

Reviewing the Corkscrew transcripts with linguistic principles in mind, a consistent pattern emerges. First, the words "fix," "bribe" or other words clearly implying illegality, were never used by anyone during the recorded conversations. While Bray had insisted that the specific amounts of the bribes not be discussed and indicated that the judge might refuse to say anything of substance, the decision to use ambiguous "buzz words" was the choice of the FBI and the U.S. Attorney's office.

Second, the topics introduced by the judges in the conversations that ensued between them and Irvin are polite small-talk. The initiation of a topic in a conversation is an important clue to understanding the intention of the participants. A comparison of the tapes of the imposters reveal a strikingly different pattern. In virtually all of the imposter tapes, the "judge" initiated key topics or information e.g., name of the defendant and disposition.

Third, the distinction and importance as to who actually made a particular statement (and who merely listened to it) was repeatedly lost on the undercover agent (and subsequent reviewers). Bray's statements were either inaccurately attributed to the judge in subsequent summaries or imputed to the judge by virtue of his use of words such as "yeah, alright, okay," which may indicate that the listener is merely attending or being polite, not agreeing.

Fourth, contamination occurred not only within conversations, but between them. If the investigators had any doubt about the complicity of the judges in the first few months of the undercover operation, that doubt apparently dissipated after the phony "Judge Gaines" entered the picture. The investigators in their reports made no distinctions as to the strength of the cases against the particular judges and no real effort to evaluate each conversation separately.

Fifth, the investigators also appear to have presumed that spoken words were always meant to be taken literally. Yet, conversational speakers are normally imprecise, sometimes using inappropriate words, or leaving unclear or confusing statements unchallenged. Similarly the undercover agent's use of a pseudo "street" language compounded the difficulty of inferring the correct meaning of the conversations.

3. The fictitious criminal offer was not "modeled on the real world"

Since there was no evidence that any of these judges accepted any monetary inducements, no matter what the amount, they cannot be said to have been prejudiced by any breach of this requirement. Nevertheless, it is appropriate to pursue the issue of "proportionality" because it is possible that the exorbitant fees offered to Bray induced him to create the fraudulent scheme which implicated the judges.

So far as the amount of the inducements offered in the undercover phase, it is clear that the real world was ignored. The evidence accumulated in the overt phase all suggested that cases could be "fixed" for far less than the amounts paid by Irvin. Other than felony charges (which are not tried in the Municipal Court) the earlier investigation established that the going rate for even the most serious charges was not more than $900, and often no more than a few dollars. Nevertheless, when Irvin entered the case, and attempted to persuade Bray to set up confirmation meetings with judges, he voluntarily offered Bray $5,000 to $10,000 (the final fee was $5,500).

It is also worth noting that the charges pending against the defendants in the cases to be fixed were all minor (often disorderly conduct) and the defendants had no serious criminal record (as was required by the criteria for case selection by the FBI). The peculiarity of paying several thousands of dollars to dispose of charges that normally resulted in minor fines adds to the overall lack of reality in the scheme.

The deal "negotiated" between Bray and Irvin also deviated from reality in another way, perhaps not encompassed in the guideline, but equally important if the intent is to avoid ensnaring innocent people. The fact is that Irvin often got nothing for his money.

The pre-arranged ground rules made deception both possible and highly rewarding. The demeanor and pose adopted by Irvin was one of uncritical trust and acceptance of every far-fetched explanation Bray offered. Bray knew beforehand that so little would be demanded from the judge by way of "confirmation," that he could be reasonably certain that a non-predisposed subject would neither suspect nor report Bray's illegal behavior. Indeed, by telling Bray that he only needed to hear enough in the way of confirmation to permit him to pass a polygraph exam, Irvin was in effect inviting Bray to lie to him. Most importantly, the fact that Bray was paid directly encouraged him to deceive the target, which would permit him to keep all of the "bribe" money.

4. The sensitivity of the investigation failed to trigger appropriate caution

While the Guidelines do not set a different threshold standard for the initiation of operations involving "sensitive circumstances," the implication is that approval by the highest authorities in the bureaucracy will not only improve accountability, but will bring to bear a greater sensitivity to the consequences of initiating and continuing an ill-founded operation.

The sensitivity of perceived corruption by important public officials (judges) was seemingly missed by the Cleveland field office. That office submitted the undercover proposal only after being instructed to do so, following their request to Headquarters for additional funding for the expected bribe payments and other special expenses. To the extent FBI Headquarters expressed any view of the significance of this "sensitive circumstance," it was overly narrow. The sensitivity that derived from the nature of the subjects themselves was never noted.

The manner in which the seizure and publicity were handled had a profound and predictable effect upon the future course of the investigation. It had been alleged at the press conference that "more than one judge" was involved. The community was shocked and tantalized by the spectacle of armed law enforcement personnel watching over judges.

Once the decision was made to focus the undercover operation entirely on judges, the need to produce results seemed to overwhelm the FBI's ability to realistically weigh the evidence. In effect, the targets were subjected to a presumption of guilt that became nearly overwhelming.

Rather than triggering appropriate caution and high level review, the sensitive circumstances—the targeting of public figures—seems to have engendered a reckless attitude. Thus, the pursuit of the judges was not limited to obtaining evidence to support their suspicions of case fixing, but extended to any conduct which might incriminate the judges. Even before any judges were recorded in conversations with the agent, for example, the Cleveland field office decided to determine if judges could be implicated in car thefts by "transfer[ing] supposedly stolen cars to [them]." In another episode, the FBI undercover agent questioned a female bailiff at length regarding the sexual proclivities of certain judges.

At yet another point, the Cleveland Field Office actually proposed using a female agent to encourage one judge to enter a favorable disposition in her bogus case in exchange for sexual favors although the Bureau had absolutely no evidence even from Bray, that this judge had conditioned his judicial acts on sexual favors.

This pressure to produce a criminal prosecution, to salvage a major commitment of resources, is apparently felt not only by the field agents and their immediate supervisors, but extends well up the hierarchy of both the Bureau and the Department of Justice and continues long after an investigation is officially closed.

This is well illustrated by the fact that in Corkscrew, after the U.S. Attorney had rejected prosecution for lack of evidence, the Bureau transferred the entire field file to the County Prosecutor in an apparent attempt to persuade him to continue the investigation and bring charges against the judges. As late as March, 1983, over a year after the U.S. Attorney had closed the case; the Bureau resisted this Subcommittee's efforts to obtain information on Corkscrew on the ground that it was still an open matter, and that indictments were expected to be sought by the County Prosecutor.

5. The Undercover Operations Review Committee provided no meaningful control or check on the operation, and neither FBI Headquarters nor the Department of Justice provided any meaningful supervision

There is a need for the type of independent review intended for the Undercover Operations Review Committee to ensure that the risks and sensitivity of undercover operations receive appropriate consideration. However, our review of Operation Corkscrew demonstrates that the Committee, as presently constituted, does not serve that function.

The plan submitted in September, 1979 to Headquarters and the Committee not only was incomplete and misleading, but was formulated before the investigators had concluded that payments would have to be made only to the middleman, and that the confirmation meetings (the criminal offer, in this case) would avoid direct references to money or case-fixing.

These critical changes in the plan were not submitted for approval. In fact, the oblique system for confirming the judges' involvement was not even described to FBI Headquarters until a few months prior to the *end* of the operation, and may never have been revealed to the Committee. Yet, the Committee did not challenge the reliability of the operation's structure, nor the sufficiency of the evidence it was provided. Even in the simplest sense, the Committee failed in its responsibilities: although the initial authorization was for six months only, the Committee did not consider this operation again until a full year later.

The Undercover Operations Review Committee, then, officially regarded as the "centerpiece" of the review and control system, played the most minor and ineffectual supervisory role in Operation Corkscrew. The make-up of the Committee itself perpetuated a narrow, law-enforcement perspective. During the five instances in which it met with respect to Corkscrew, participants on the Committee were limited to FBI personnel and representatives from the Criminal Division of the Department of Justice.

In addition to the Committee, Operation Corkscrew was supervised pursuant to the usual hierarchy utilized by the FBI and the Department of Justice. In a technical sense, the operation was well-managed. Papers flowed between case agent and the S.A.C., between the field and Headquarters. The U.S. Attorney's office appears to have been provided continuous briefings, full access to the evidence, and a major strategy role. There is no evidence of any financial, legal, or procedural misconduct. Clearly, everyone was trying to do a good job.

Nevertheless, the structure failed to provide meaningful review and supervision. The supervisory levels were unable to recognize the misdirected focus of the operation and its evidentiary weakness. As a result, the field agents' critical decisions were never challenged.

Again, inadequate and misleading information provided to FBI Headquarters was partially to blame. However, again there is no indication that Headquarters made any demand for further information. Moreover, Headquarters *did* have sufficient information upon which it could and should have demanded a thorough re-evaluation of the case at key junctures. They were advised, for example, when Bray confessed to utilizing an imposter to portray Judge Burke. Yet, Headquarters acquiesced in the decision to let Bray operate as a "confidential source" with instructions to obtain incriminating evidence against Judge Burke and another judge. Given Bray's known duplicity, this was an irresponsible invitation for Bray to frame those individuals, and which in all probability was thwarted only because of Bray's incompetence in fabricating evidence. Moreover, no instruction was given to confirm the identity of the remaining judge targets until more than half a year later, when Bray admitted the Harris/Gaines impersonation.

When Bray failed to pass two polygraph examinations, and when he confessed to further lies, Headquarters again apparently accepted the field office's view that the remainder of Bray's allegations against judges were true. Accordingly, Headquarters never questioned the decision to encourage the local prosecutor to pursue prosecution of these subjects, even after the U.S. Attorney's office declined prosecution.

The U.S. Attorney's office also provided no real check on the investigator's lack of objectivity. That office was in a position to accurately assess the evidence accumulated in the overt phase, yet it does not appear that they ever questioned the focus on judges of the undercover operation. Once the operation was underway, the overriding philosophy of that office continued to be to let the operation "run its course," to give the Bureau the benefit of the doubt.

Conclusions

The Subcommittee analysis of Operation Corkscrew demonstrates that the FBI failed to comply with each of the safeguards that were held out to Congress and the American people as demonstrating the Bureau's sensitivity to the risks inherent in undercover operations and its ability to manage such operations. A group of respected citizens were singled out for investigation, targeted for criminal offers, and nearly prosectued, without any credible evidence or other indicia that they were involved in criminal activity. Valuable investigative resources were diverted from productive activities; large sums of money were expended; and the lives of individuals were adversely affected.

Similarly, the Subcommittee's review of other recent FBI undercover operations demonstrates that many if not all of the potential dangers inherent in undercover operations are being realized.

In principle, the safeguards and guidelines should afford protection against these dangers, and the sincerity and good faith of the top Department of Justice and FBI officials responsible for their promulgation are not in doubt. Yet, the guidelines and safeguards proven to be ineffective because they have "come to be applied largely ritualistically with acquiescence to whatever is asked for, within broad extremes."

The approval process in practice is conducted without a critical review of the evidence; with no tolerance for internal dissent; and with little or no sensitivity to the concerns which prompted the promulgation of the safeguards and guidelines. While the field may be closest to the evidence, the lesson of Corkscrew is that that

proximity to an investigation may render the investigators and prosecutors blind to its short-comings.

The desire to support the field agents and the reputation of the law enforcement institution not only diminishes the will to critique, but also produces hostility to differing (and oftentimes accurate) points of view.

The desire to protect the reputation of the Bureau and individual agents also has created a "stonewalling" attitude, which conflicts with the public's right to assess whether or not the letter and spirit of the safeguards and guidelines are being honored. In Corkscrew, for example, the government's posture in a FOIA request and in the criminal trials of the imposters was less than forthcoming.

A desire to avoid embarrassing disclosures may also explain why the numerous and serious criminal offenses committed by the uncontrolled informants in Operations Abscam and Frontload have yet to be investigated or prosecuted.

Evidence of the Bureau's insensivity, if not hostility, to the purpose of the guidelines is also evident in the process of redefinition, both formal and informal, which has occurred in interpreting the guidelines. These institutional actions have the effect of broadening field discretion at the expense of the rules' requirements.

Formal redefinition occurs when the broad principles identified by policy makers, in response to public concerns, are made the subject of detailed operational guidelines by lower level staff. This is illustrated by subtle but nevertheless important differences between the safeguards described by Assistant Attorney General Heymann and the guidelines as finally promulgated.

For example, the requirement that criminal offers be "clear and unambiguous" appears in the guidelines as a duty to be "reasonably clear." When even this diluted standard is breached, the Bureau defends verbal exchanges between agent and subject that merely put the latter on "reasonable notice of unusual, if not improper, activity." The use of subjective terms such as "unusual" and "improper" not only greatly weakens the notice requirement, but it reinforces the tendency of the investigators to judge conduct by reference to their own notions of morality, rather than by reference to criminal statutes or other objective norms.

The same process of redefinition is also reflected in various internal documents interpreting the published guidelines. For example, the term "public official" is defined in a more restrictive manner than the common definition of the term would indicate, thereby intentionally limiting the submission of proposed operations to the Committee. The term "undercover operation", too, has been defined internally much more narrowly than appears in the guidelines.

Similarly, the category "cooperating source," into which Bray, Weinberg, and others were placed, appears to have been created precisely to avoid the rigors of the Attorney General's Guidelines on Informants.

The result of this process of redefinition and word substitution is to avoid compliance with guidelines or other officially promulgated standards in precisely those situations in which they are most needed, e.g., for informants whose credibility or reliability cannot

be demonstrated and who therefore would not meet the requirements.

Because the technique on occasion produces an impressive array of arrests and convictions, it is viewed both by the public and law enforcement community as highly effective. The publicity and prestige accorded successful undercover operations provide powerful incentives for all involved to extend the technique into new areas and to continue to plan and recommend additional operations. These incentives, coupled with the sincere suspicion of the agents that criminal activity is occurring and belief that "they are on the right track," together with the need for vindication, not only compel them to continue the operation, but provide powerful disincentives for supervisors or others to terminate the operation. No one wants to stand in the way of or impede the investigation; no one wants to be characterized as "soft" on law enforcement.

It is precisely because of this enthusiasm for the technique, however, that it is unrealistic to expect the FBI and the Department of Justice to meaningfully regulate the conduct of undercover operations in a manner which will alleviate the dangers outlined in this Report and observed by the Subcommittee.

Recommendations

1. Congress should enact legislation requiring judicial authorization to initiate an undercover operation

To a large extent, the problems observed in Operation Corkscrew as well as the other operations reviewed by the Subcommittee can be traced to the FBI's failure to comply with the predication requirement as announced in the safeguards.

While the Subcommittee does not question the good faith of the individuals involved in undercover operations, either in the field or at supervisory levels, their role as investigators and protectors of the mission of the FBI is incompatible with challengeing their own assumptions and suspicions in the manner of a neutral and detached judicial officer. Unlike the Senate Select Committee, the Subcommittee believes it makes little difference in this regard whether the requirements are set forth as the will of Congress or in internal guidelines. Our review of operations demonstrates that neither the Bureau nor their counterparts in the Criminal Division of the Department of Justice can or will meaningfully enforce threshold requirements. It is for this reason that the Subcommittee has concluded that judicial authorization is required to satisfy the predication requirement in a meaningful way.

The requirement of prior judicial review has a long history and has served the nation well in enforcing both constitutional and statutory standards, which seek a balance between the protection of individual rights and the preservation of effective law enforcement techniques. Specifically, the requirements contained in the law requiring judicial authorization for disclosure and use of intercepted wire or oral communications, and the judicial interpretation of its provisions, demonstrate that such a requirement can be workable in an analogous situation.

While some greater flexibility may be necessary in defining the operations for which authorization is required, and the nature of

the threshold requirement, the Subcommittee believes that the standards and procedures developed with regard to electronic surveillance provide a model upon which to base such legislation.

2. Congress should enact legislation requiring the Undercover Operations Review Committee to continue operating; that representatives of the Civil Division and Civil Rights Division participate on the Committee; and that the Committee submit detailed annual reports to Congress

The Subcommittee believes that, despite its poor results to date, the Undercover Operations Review Committee has an important role to play in the monitoring of undercover operations balancing their costs and benefits, and predicting and preventing their special dangers. As presently constituted, it cannot do this effectively. Only by diversifying its membership and calling upon the extensive expertise of both the Civil and Civil Rights Division, can the committee function as an independent body with the Department of Justice, capable of recognizing problems that heretofore have alluded them.

Finally, reports from the Department of Justice regarding undercover operations must be expanded and compiled with greater objectivity. The goal is not only to provide Congress with sufficient information upon which to base its oversight of the FBI, but also to provide a benchmark with which to evaluate the adequacy of the data supplied to the Department's own internal oversight body, the Undercover Operations Review Committee.

3. Congress should monitor the progress of civil litigation alleging third party injuries resulting from FBI undercover operations to determine whether amendments to the Federal Tort Claims Act, or other legislation, are necessary to redress such injuries

The Subcommittee is deeply concerned with the injuries and harms to innocent third parties. With the exception of those individuals who have come forward and individual cases which have been brought to the Subcommittee's attention, there is no way of determining the full extent of third party injuries. Without such information, there can be no meaningful determination of whether the benefits of such operations outweigh the costs.

Moreover, assuming that there are situations in which an operation may be deemed necessary *notwithstanding* the possibility of third party injuries, it is incumbent on the Department of Justice to assure that such injuries are compensated and claims dealt with fairly. If there are jurisdictional or other obstacles to the fair adjudication of such claims, it is incumbent upon Congress to enact remedial legislation.

4. Congress should impose meaningful restrictions on the use of certain forms of conduct in undercover operations

Neither the implementation of the procedural recommendations, nor civil litigation can deal with problems arising from the use of undesirable or improper conduct in otherwise valid investigations.

Ironically, the promulgation of the undercover guidelines themselves may have validated conduct which only several years ago

would have been unthinkable in federal criminal investigations. Thus, although the Justice Department has disclaimed such intention, the inescapable implication of listing a number of "sensitive circumstances" which are permitted to occur only with the approval of top echelon FBI and Department of Justice officials is that the practices *are* permitted.

There are some forms of conduct which should never be permitted in a democratic society. There is a point at which the end, no matter how important, will not support such conduct. There are other forms of conduct which, though presumptively improper, might under some grave circumstances be warranted.

Accordingly, the Subcommittee recommends that a part of a statutory scheme to regulate the FBI's use of the undercover technique include "do's and don'ts," with meaningful enforcement mechanisms, to give content to the notion that fairness must be balanced against effectiveness, and to provide clear notice to agents as to the scope of permissible behavior. Such a catalogue will require careful and complex balancing of interests, and, therefore, we defer setting forth recommendations until further study provides more specific illumination on these issues.

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