

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

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

"It is not too much to say that [the restriction on the use of Secret Service agents] has been of benefit only to the criminal classes... The chief argument ... was that the Congressmen did not themselves wish to be investigated by Secret Service men. Very little of such investigation has been done in the past; but it is true that the work of the Secret Service agents was partly responsible for the indictment and conviction of a Senator and a Congressman for land frauds in Oregon. I do not believe that it is in the public

interest to protect criminals in any branch of the public service, and exactly as we have again and again ... prosecuted and convicted such criminals who were in the executive branch ..., so ... we should give ample means to prosecute them if found in the legislative branch. But if this is not considered desirable a special exception could be made in the law prohibiting the use of the Secret Service force in investigating members of Congress...."

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

In the nearly three quarters of a century since the creation of the Bureau of Investigation, federal law enforcement has compiled an impressive record of effective investigations and enforcement. It is only during the last decade -- and especially the last six years -- however, that federal resources have been concertedly and effectively employed to fight the most secretive of crimes like public corruption. The key to that effort has largely been the refinement of undercover techniques.

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

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

Undercover Operations Review Committee, and specific written Guidelines on Undercover Operations were issued by the Justice Department just eighteen months ago.

Much of this process was a response to growing public concern -- and the public concern was fully expressed in the United States Congress. In the mid-1970s the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee itself began to urge an enhanced effort against more sophisticated kinds of crime. Harvard's James Q. Wilson -- in an article reprinted in 1981 as part of that Subcommittee's record -- makes the following observations about a 1977 staff report of the House Subcommittee:

"The staff lamented the 'reluctance on the part of FBI personnel, particularly at the supervisory level, to get involved in more complex investigations that may require significant allocation of manpower for long periods of time.' And the report criticized the field offices for not mounting more undercover operations."

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

Through a bipartisan effort over the past three Administrations, however, any inability or unwillingness to conduct undercover investigations has been steadily and decidedly eliminated. Under Attorney General Edward Levi and Deputy Attorney General Harold Tyler, and later under Attorneys General Griffin Bell and Benjamin Civiletti -- and under FBI Directors Clarence Kelly and William Webster -- the FBI has demonstrated its willingness and its ability to conduct the necessary kinds of undercover investigations. The strides have been monumental. For example, following a lengthy undercover investigation, the FBI just yesterday apprehended the leaders of what appears to be a large and

sophisticated Japanese commercial espionage ring attempting to pirate American computer technology. In the last two fiscal years, using less than one percent of its total budget, the FBI's undercover operations have netted illicit funds and property of over \$109 million. In just those two recent years, arrests arising from FBI undercover operations alone have totaled more than 2700 -- and resulted in nearly 1100 convictions.

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

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

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

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

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

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

All undercover operations are now conducted under written guidelines that reflect the experience and insights gained by the FBI and Department of Justice. These guidelines incorporate numerous safeguards beyond those necessary to comply with the law. No invitation to engage in an illegal activity may be offered unless:

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

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

Although these Guidelines had not formally been issued when the Abscam investigations were begun, the legality of the practices employed have been substantially demonstrated in the courts. It is most worthwhile to reflect upon the results of those investigations -- and of the videotape record they presented in court. Twenty-two individuals were indicted -- including six members of Congress, one U.S. Senator, one state senator, three city councilmen, one state official, and one federal employee. In eight separate cases, jury verdicts resulted in the conviction of eighteen persons -- while one defendant pleaded guilty. One person is still awaiting trial -- and two defendants died before being tried. Out of twenty-two persons indicted, no individual was acquitted. To date, 96 jurors have found for the government, and no juror has exonerated any of the defendants. Although several cases

are now on appeal, none of the eight defendants that raised the issue of entrapment has been successful on appeal. Only three of the eighteen defendants that raised due process questions have had any success on that issue even at the district court level. And the only two appellate courts that have thus far ruled on these verdicts have ruled in the government's behalf.

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

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

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

In the case of the Abscam investigations -- and all federal undercover operations -- there is much that should be studied and improvements certainly can be made.

Already, the Undercover Review Committee has been improved and Undercover Guidelines have been formally issued.

Clearly, Congress should itself review the propriety of federal law enforcement efforts -- just as it should seek to improve the effectiveness of those efforts. This Administration welcomes -- and will join in -- such an effort by the Congress. There cannot, however, be different rules of law enforcement for the governed and for those who govern. Although law enforcement techniques can always be improved -- both to protect those under suspicion and to protect the public -- they must not be emasculated, especially in a context that suggests special treatment for the powerful. Although the Abscam investigations were not undertaken or completed during this Administration, we are committed to the use of effective law enforcement techniques of the kind Abscam employed. We will work to make them more effective and to ensure that they -- like all law enforcement procedures -- are fairly employed. We will also resist any effort to weaken effective federal law enforcement efforts aimed at detecting and deterring drug, organized, or white-collar crime -- including public corruption.

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

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