PREVENTION AND REPRESSION OF CORRUPTION IN NON-LAW ENFORCEMENT AGENCIES

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I. INTRODUCTION

My previous paper dealt with how law enforcement agencies, including the agency which I represent, the FBI, attempt to prevent and repress internal corruption. The focus in this paper will be on how our law enforcement agencies can deal with corruption in the non-law enforcement agencies of government. Phrasing the focus in that way involves an initial definitional decision, which is that we will not discuss corruption which takes place exclusively within the private sector. Some countries do penalize the corruption of a purchasing agent of a business corporation or of a bank loan officer with the same substantive statutory provisions applied to penalize the corruption of a government purchasing agent or a cabinet minister with the power to issue government grants. It can be argued that in many ways the economic and social harms of private and public corruption are similar. In my opinion, however, the preventive and repressive mechanisms available to deal with public corruption are much different from those needed to combat private corruption, so the arbitrary decision has been made to limit this discussion to public corruption.

To avoid violating copyright laws, should they be applicable, I also wish to make it clear that the basis for this paper is a publication which I prepared for the United Nations Centre for Social Development and Humanitarian Affairs and its Crime Prevention and Criminal Justice Branch, which was published as Numbers 41 and 42 in the UN International Review of Criminal Policy entitled Practical Measures Against Corruption.

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II. LEGISLATION

The UN publication began with the observation that a prerequisite of any campaign to effectively combat corruption is an adequate body of penal law prohibiting those forms of official misconduct most harmful to honest government and to the citizenry. A number of commonly penalized corruption offenses were described in some detail because that publication was written for a general audience. Since this audience is composed of experienced criminal justice practitioners, we need not spend a great deal of time discussing what penal statutes are desirable to combat corruption, other than to mention a few common problems. Obviously, a theft statute, or some comparable legislation, must be broad enough to include intellectual property, computer crime and information, and other government assets worth being stolen or misappropriated.

Common law systems which have not modernized the traditional offenses of bribery and extortion generate troublesome questions about who introduced the corrupt suggestion, which determines whether a payment is a bribe or an extortion. All of these offenses become problematic when the public official acts for improper motives, but not for a *quid pro quo* or any material advantage.

The problem of a public official favoring family, friends, clan or political party members rather than taking action or distributing benefits impartially, to the extent that it is addressed in penal legislation, is usually regulated by statutes defining abuses of position or conflicts of interest. Because of the powerful political and social interests involved, what is prohibited as an abuse of position or a conflict of interest tends to be narrowly defined by legislatures and courts. In many countries it is assumed that elected officials, and politically appointed executive officials, will favor their own constituents and supporters, rather than be scrupulously impartial. Penal prohibitions sometimes only prohibit action on behalf of a family member or when the official has some direct financial interest in the matter, and do not reach other forms of favoritism and cronyism, which are left to be dealt with by the political process.

In my experience, it is rare to find a total failure to penalize anti-corruption offenses, but it is common to encounter a lack of operability because anti-corruption statutes are antiquated or practically unenforceable. For example, a theft statute today which applies only to tangible objects without penalizing unauthorized taking of information is not worthless, but it is certainly inadequate unless supplemented by a specific law protecting intangible information. A common deficiency, sometimes intentional, is a grand sounding law with no means to collect the evidence necessary for enforcement.

Bribery is a covert, consensual activity which will not be spontaneously revealed and as to which there is normally no complainant and no means to identify witnesses. If a legislature penalizes the crime itself, or increases the penalty for bribery in response to some highly publicized scandal, the community is likely to be favorably impressed. The public, however, and particularly the news media, should also examine whether those same legislators have rejected all feasible means of collecting the evidence necessary to prove corruption offenses. Penal anti-corruption statutes can easily be emasculated by failing to authorize electronic surveillance for the crime of bribery, or to provide an immunity procedure to compel one party to the bribe transaction to provide evidence against the recipient, or to fund an anti-corruption unit to investigate such crimes.

Indeed, the most commonly overlooked element of penal legislation is how it can be enforced in practice. For example, the most cost-effective way of enforcing a penal statute against consensual criminal activity, like bribery, may be to utilize undercover agents and so-called “sting” operations to make such crimes visible and punishable. To make an undercover approach feasible, it is necessary to anticipate technical defenses, to plan ahead and to penalize an offer or agreement to perform an official act, even if that act could never be performed in reality because it is only part of an undercover scenario.

One type of anti-corruption statute which comes into fashion periodically is a financial disclosure law, requiring elected or appointed officials to declare various assets, income and business transactions. Those statutes can function effectively if a monitoring government agency, political opponents, or the news media devote sufficient energy to expose discrepancies between what is reported on the form and what the minister or official really possesses or controls. However, at least in our American government, so many career government officials, some at very low levels, are required to execute disclosure statements that the forms are normally filed with only a cursory review. There may be a designated ethics officer, frequently

located within the General Counsel or Legal Advisor's office in each agency, who checks to see that all the blanks are filled in and that the information looks regular on its face, but there is rarely an effective control on the accuracy of the information being disclosed. Without an effective control entity which actively checks the disclosures against the reporting employee's life style, expenditures and holdings, disclosure can be what doctors call a "placebo," a sugar pill, a harmless but totally ineffective remedy administered to patients for test purposes or to keep them happy, but without any curative effect.

Typically, legislatures enact disclosure requirements, or executives impose them on subordinates, because filling out a form is a low cost initiative which sounds as though some dramatic monitoring mechanism is being established which will prevent and/or reveal corruption. A useful litmus test which can help reveal the sincerity and significance of any disclosure program is to ask what budgetary resources are being provided to control the accuracy of disclosure forms. If those resources consist of file clerks, storage cabinets and perhaps one or two professionals to verify the procedural regularity of the forms, with no investigative resources to test the truthfulness of the disclosures, then do not expect any integrity dividend unless the news media, or political or bureaucratic opponents, target the disclosures of particular officials.

III. ORGANIZATIONAL STRUCTURES

A fundamental question with regard to corruption control relates to the structures necessary to effectively implement anti-corruption measures. Is a specialized anti-corruption unit necessary or can that function be handled within existing structures? With regard to police, prosecutors and magistrates there are both advantages and disadvantages to separate units. Among the disadvantages are rivalries and barriers to communication between a new authority and existing structures, greater administrative costs and personnel rigidities, and a diminution in the prestige and morale of the general jurisdiction organization by the loss of anti-corruption authority and resources. A separate anti-corruption unit is likely to create greater administrative costs and personnel rigidities. It is also likely to provoke or continue controversy over what organizational factors should determine whether specialized units should be set up with respect to drug trafficking, gang violence, art theft, environmental crimes or any other crisis of the moment, and if so what relationship that unit should have to existing structures. Finally, the question of a separate specialty unit frequently raises serious issues relating to reporting relationships and organizational loyalties, all of which can be very disruptive to morale and the *esprit de corps* of an institution.

The advantage of a separate unit are specialization, greater security and control and control of information, and direct accountability. Accountability may well be the greatest of these virtues, as it permits policy makers to measure what success is being achieved with given resources and places anti-corruption responsibility on identifiable persons. This highly visible responsibility and ability to identify and measure results is particularly important because of corruption's nature as a covert criminal activity which may never be detected without aggressive law enforcement efforts. At least in American government, there is a distinct tendency for corrupt situations to continue until someone is made accountable for combating the phenomenon. Whether that

accountability is best achieved by creating separate or even independent police, prosecutorial or magistrates' units, or by fixing the responsibility within existing entities, should normally be determined by local bureaucratic conditions and traditions. Given the organizational inertia which must be overcome to create a separate unit, the natural bureaucratic compromise would be to create a specialized capability subject to existing program management, such as anti-corruption units within the overall criminal investigative division, or perhaps within its fraud section.

An overriding factor, however, is often crucial in determining whether a separate anti-corruption unit will be created, and that is political or public pressure resulting from a highly publicized scandal. Announcing the creation of a new anti-corruption unit is a splendid diversion for a political figure beset by continual bad publicity about a scandal. Viewed from a more positive perspective, such scandals present a rare opportunity for an alert law enforcement executive to secure resources, jurisdiction or political consent for the creation of an anti-corruption capability, at a time when the political powers are unusually motivated to be seen as leading law enforcement efforts to combat corruption.

Normally, management by crisis is a very ineffective technique, but the creation of anti-corruption units in reaction to scandals may be one of the rare exceptions to that rule. One reason is that political motivation to dedicate any resources to combating corruption is frequently lacking until a scandal erupts. Another reason is that while resources may be dedicated to a separate specialized anti-corruption unit primarily for public relations purposes, the existence of that unit achieves the essential value of accountability, although it may implicate other organizational frictions and costs. Creation of a specialized anti-corruption unit overcomes the core problem of diffused responsibility which results when a multi-functional bureau or office is institutionally responsible for combating corruption, together with multiple other competing demands, but that responsibility is not fixed in any one individual with defined resources. When no individual is assigned dedicated resources with which to work corruption cases, a lack of cases may be justified organizationally because no *indicia* of corruption were reported or because higher priority cases of fraud, subversion or other threats were being pursued. Because of its covert, consensual, mutually profitable nature, a corrupt situation or practice may continue for decades without coming to the attention of law enforcement. Only when an aggressive investigator is assigned a quantity of dedicated resources and a defined mission and held personally accountable to produce useful intelligence or evidence on corruption, will an agency be likely to have any kind of reliable appraisal of the extent to which corruption exists.

Another interesting organizational question, which perhaps might have been covered in my first presentation, is the exclusivity of anti-corruption jurisdiction. When a quantity of resources is dedicated exclusively to a corruption matters, it is tempting, as a matter of managerial and logical clarity, to give the entity which has been created to operate those assets a monopoly over development of all relevant corruption investigations. This would mean that a police or investigative agency assigned the competence for drug control would have exclusive jurisdiction to investigate drug trafficking, or that an Inspector General within a ministry distributing agricultural subsidies would be given exclusive jurisdiction to investigate fraudulent subsidy claims and

associated bribery or prohibited transactions. The exclusive assignment of a function has the virtue of being easily understood, and if other agencies or elements are permitted to pursue allegations or instances of corruption there probably will be failures to share necessary information, investigative overlap and other *indicia* of inefficiency. However, the demonstrated susceptibility of human nature to the corrupting influence of power and to the temptations and wrongful opportunities which come with authority argues against the orderly logic of exclusive competence. The Latin maxim of *quis custodiat ipsos custodes* reminds us to always ask who will watch the watchmen. A little redundancy and even competition can be a healthy antidote to corruption, because no one person or entity has the power to protect or license illegal activities. It may be inefficient to allow both headquarters and local police units, or both national and state prosecutorial authorities, or both the police and an Inspector General's Office, to investigate allegations of the same type of corruption. Indeed, an obligation to refer or report all corruption investigations to a primary or central anti-corruption authority may be appropriate, with some flexibility as to the timing of the reporting obligation. Nevertheless, just like multiple engines on a passenger aircraft, redundancy in a high risk situation is generally a worthwhile investment. The legislative and managerial challenge in this area is to allow just enough redundancy, and even rivalry, to deter corruption or to expose it if the primary anti-corruption authority fails to do so, without disproportionately reducing the flow of intelligence and of prosecution opportunities to the primary authority.

IV. PROCEDURAL IMPLEMENTATION OF AN ANTI-CORRUPTION PROGRAM

When an investigating authority, be it a police unit, a prosecutor or an investigating magistrate, is initially faced with an anti-corruption task, certain fundamental management questions may need to be resolved. If the investigator's jurisdiction is previously defined, and the matter arises within that jurisdiction in a routine manner, such as a police report to a prosecutor or investigating magistrate, then little discretion or room for maneuver is left in defining or managing the task. In non-routine cases, however, policy level authorities often feel the need to make new or special arrangements. Sometimes this is not because the existing structures are necessarily deemed inadequate on the merits, but simply because a clamorous scandal tends to dictate a politically decisive, aggressive-appearing response. Creating a new unit or assigning a new leader to an investigating authority may be of absolutely no substantive advantage in terms of improving performance of the unit, but it can have an undeniable short-term publicity and public relations value, which may be the policy-maker's immediate interest. In other situations, the existing investigative authority may need to be replaced or supplemented because of inefficiency, lack of trustworthiness, or simply because a new form or method of corruption is forcing a new response. To use the example mentioned before, if the Inspector General of a ministry distributing agricultural subsidies has failed to prevent or identify illicit bribe payments associated with 25% or 30% of the funds expended, and that degree of corruption is revealed by a parliamentary inquiry, then executives of the national judicial police should begin planning for the eventuality that they or some new entity may be called upon to

assume organizational or individual responsibility for investigating that type of fraud.

A law enforcement executive called upon to assume a new or extraordinary responsibility to deal with a corrupt situation or an anti-corruption program will often find the situation very fluid. Occasionally a timetable will have already been announced for a report or the conclusion of the inquiry, perhaps by a policymaker with little grasp of investigative realities, while other policymakers will realize that investigations often dictate their own timetable. However, even a policymaker who has announced an unrealistic completion date for the inquiry will be happy to transfer not only the investigative responsibility, but also the responsibility for placating news media and public interest, to the newly designated anti-corruption authority or executive. Policymakers may well be unaware of and relatively uninterested in how a corruption inquiry will be conducted or what will need to be done, and may be willing to agree to any reasonable sounding terms or conditions, so long as the terms do not threaten to provoke an adverse media or political reaction.

Consequently, a new or specially appointed anti-corruption authority or executive may have the unaccustomed luxury of negotiating or self-defining the scope, resources and configuration of the task or entity. The executive who thinks and plans ahead, and promptly analyzes the anticipated needs of the inquiry to be conducted, may have unprecedented leverage to secure desirable resources and powers. In the midst of a public clamor that effective actions be taken against recently exposed corruption, many bureaucratic concessions may willingly be made simply so that the policy maker bedeviled by media and legislative inquiries and criticism can announce some decisive action. Once a tentative selection of a new or specially appointed anti-corruption authority has progressed to discussions with the candidate about execution of the task, a policymaker experiences a temporary loss of bargaining power *vis-a-vis* the candidate, even if that candidate is an organizational subordinate. Most policymakers would be loath to refuse the resources or powers which were considered necessary to a successful investigation, for fear that blame for eventual failure of the inquiry would be laid at their door. Also to be feared would be the embarrassment and suspicion which would result from a disclosure that the candidate declined the appointment or responsibility because denied adequate resources to do an effective and professional job.

On the other hand, once the media and legislative fixation on a scandal has passed, once a new crisis has claimed the public's attention, there is very little reason to re-evaluate or enlarge the resources or power previously assigned to the anti-corruption unit or investigator, and even a resignation or request for transfer by the unit's leader is unlikely to be as feared as it would have been initially. Therefore, questions of the scope, power and configuration of the anti-corruption unit which require external action and assistance should be resolved at the moment of the authority's creation or unit leader's designation. If special decrees must be issued to create the authority, the leader-designate should insist on the ability to review them to ensure that all necessary provisions are included. Special attention should be paid to potential overlap and conflict with other agencies. Those types of problems are rarely satisfactorily resolved by two independent competing entities without intervention of a superior power at the

ministerial or political level. To resolve bureaucratic problems it is advantageous to seize the momentum of the moment when political interest and sympathetic attention are engaged and motivated by the need to contain a scandal.

A request to investigate an act of alleged bribery in one small aspect of a massive and highly suspicious contract, may deal only with the tip of the iceberg, with a huge mass of other corrupt practices and payment lurking just beneath the surface. The investigator must then make some educated guesses, and take some risky gambles, about the desired scope of the authority's desired mission. Should that mission be narrowly defined to the initial corrupt act of bribery or embezzlement of government program resources, which may be proved without encountering serious political resistance because only low level persons are involved and the existing publicity has made them expendable? Or, recognizing the probable breath and depth of corruption in the program, should a broad mandate be sought? The first, more conservative approach may permit the investigating authority to build a record of success by proving the suspected bribery and identifying the *indicia* of more widespread corruption, leading to an expanded mandate.

However, one must recognize that policymakers may not grant that expanded mandate, requiring consideration of the second, riskier course of insisting on a broad mandate initially. If it is chosen, and the inquiry develops evidence that the initial allegation was indeed representative of systemic corruption at the highest levels, initially supportive policymakers may become less enthusiastic supporters of the inquiry. This lack of enthusiasm may not necessarily be an indicator or result of corruption. Rather it may simply reflect that an anti-corruption authority or executive may be created or appointed as much to abate a public relations problem for a political administration or a policymaker as for the law enforcement goal of prosecution and incarceration. The unpleasant political consequences of a successful corruption investigation, which renews negative publicity, will not necessarily be welcomed by policymakers.

Bluntly stated, the foregoing discussion is intended to convey that an anti-corruption authority or executive should arm itself at its strongest moment, which will almost always be its moment of creation or selection, or at whatever subsequent moment when public attention to its work is at its highest. If requests for foreign evidence, tax or personnel records, or other official documents present thorny legal issues or could be subject to obstructive delays, the moment of greatest bargaining strength should be exploited to gain guarantees of expeditious cooperation. If high-ranking officials are potential witnesses but can be expected to evade testifying or producing records, an order at a sufficiently high level of government should be sought requiring that all public employees will cooperate in the inquiry.

Of course, many other realities of organizational and supervisory relations and of legal limitations will dictate what powers and resources an anti-corruption authority can secure at the time of appointment. Diplomacy may well dictate that more can be gained by polite requests and patience than by the making of demands and the setting of conditions. However, it would normally be highly desirable to create a written record which would demonstrate that the powers in charge of responding to corruption were put on notice as to what resources and powers were necessary to its exposure and prosecution. Subsequent inquests and attempts to impose accountability, or

political blame, are common consequences of corruption scandals. A written record will protect the personal and professional reputation of the anti-corruption executive, who asked for but was denied adequate tools to do a professional and successful job, and will not enhance the reputation of the policymaker who rejected or ignored those requests.

V. PROFESSIONAL REPUTATION

Law enforcement professionals who have dedicated a lifetime to upholding the values of honesty and integrity naturally value their professional reputation and need to be concerned about protecting their individual reputation and that of the anti-corruption investigation unit to which they belong. The problem of protecting those reputations looms particularly largely in those situations wherein it is highly probable that a corruption inquiry will be inconclusive or unsuccessful, giving rise to media or politically inspired accusations of incompetence or of a cover-up.

Some types of cases, such as efforts to trace suspected international bribery activity, may face almost certain failure, particularly after memories have or can be claimed to have faded, records have disappeared and defenses have been fabricated. An anti-corruption authority must realistically evaluate the probable inability to uncover the true facts due to the consensual nature of bribery, the passage of time, the often subtle ways in which corruption may occur, and the sophistication and resources available to shield the criminals. In such situations any appearance of impropriety on the part of the anti-corruption investigator is proverbially as damaging to public confidence as is impropriety itself.

One's professional duty may require that an inquiry be conducted which will be sensational, even though a realistic prognosis is that a successful outcome is most unlikely. When a high profile inquiry is unproductive, those who are prone to believe in grand conspiracies and those who can profit in a political or journalistic way by alleging a cover-up can be expected to do so. Consequently, the executive directing a high risk corruption inquiry should think defensively, documenting requests for resources and instructions received from political superiors. The inquiry may need to be conducted even more exhaustively than may be cost-effective to preclude or provide a response to allegations of laxity or compromise. In certain communities accusations against investigating authorities of misconduct, abuse of position, and even insubordination and dishonesty are a routine aspect of anti-corruption inquiries. If such a counterattack is foreseeable, it may be wise to seek an understanding with political superiors in advance as to what procedure will be followed in the case such allegations are made, and who will have the competence to investigate the investigators.

VI. TARGET SELECTION STRATEGIES FOR AN ANTI-CORRUPTION UNIT

To effectively counteract corruption, information from a variety of sources should be developed, including citizens, the media, other criminal justice agencies, and perhaps most efficiently, honest members of management or of the work force within an agency whose programs or executives are being corrupted. Yet an anti-corruption agency can be overwhelmed by the sheer number of complaints and the mass of data being received from governmental auditors, dissatisfied citizens, anonymous allegations, news media exposes, and from its own inquiries. Accordingly some coherent principle or plan is called for to

organize an anti-corruption agency's application of its limited resources. Obviously, any management strategy must take into account political and legal realities. If a cabinet minister has appointed an anti-corruption authority to respond to a scandal over bribe payments in the granting of large military contracts, that minister is not likely to support a diversion of anti-corruption resources to investigate agricultural subsidy corruption. If a country's legal system embodies the principle of mandatory prosecution, then an anti-corruption unit must mandatorily open at least a formal inquiry for every allegation which legally qualifies, as notification of a crime. However, even in systems of mandatory rather than discretionary prosecution, choices must be made as to which matters can be sent to the archives without action because of a lack of an identifiable suspect, and which cases merit investment of investigative resources. Various investigative targeting strategies may be considered, including reactive strategies, intelligence-based targeting, and a decoy and integrity testing approach. In American police science the last-mentioned integrity testing approach would be called proactive, to contrast it with reactive.

Beginning with reactive strategies, probably the least effective long-run approach is a practice of responding to the stimulus of a complaint or a news media story based upon the resources available at the moment, without any objective selection criteria or master plan. This approach may lead to frequent reassignment of investigative resources. Such a response allows investigative resources to be applied in an uncontrolled fashion depending on what seems like the most vulnerable or newsworthy target of the moment. This approach, which can be labeled a "default" strategy, risks the absorption of substantial resources in cases which are simple to solve or interesting and exciting to investigate, but which have little programmatic impact. Apprehension and conviction of laborers stealing inventory from a government storage depot may deter some similar thefts among those who learn of the prosecution, but probably not as much as would sound inventory control and security procedures. Meanwhile, the consumption of numerous workdays and expensive overtime pay necessary to secure evidence of such thefts through physical surveillance may preclude pursuit of more tedious documentary inquiries into alleged kickbacks on the purchasing of all government supplies. If the level of inventory leakage due to employee theft is 5%, whereas the typical kickback on the materials being purchased is 10%, the distortion of priorities is evident.

VII. TRIAGE

A more defensible and efficient reactive strategy evaluates externally presented referrals and complaints in order to perform some form of triage, which is a judgment of whether to apply resources to a case depending on its potential value according to conscious criteria articulated in advance and consistently applied. For obvious reasons, inquiries and complaints from the legislative branch or arising from mass media sensationalism may be accorded immediate attention rather than inquiries which are still covert and not in the public domain. Some inquiries can be declined immediately or with minimal action if the offender cannot be identified without disproportionate expenditure of resources. Other inquiries may demand immediate action before crucial evidence is lost, or while the offense is ongoing, such as the investigation of the corrupt FBI agent in New Orleans which I described in my first paper. Wrongdoing falling on the borderline between criminal and

administrative misconduct, such as petty theft and cheating, can be made subject to internal guidelines, if applicable legal principles permit, to permit the employee's prompt discharge from government service and a bar from re-employment, thereby saving criminal investigative and prosecutorial resources for more important cases.

Both of the above targeting strategies, a default strategy or some form of response based upon classifying the urgency, severity and probability of solution, are reactive to outside stimuli. Such reactive strategies may not achieve maximum efficiency, but they have the negative virtue of being non-controversial. When it is apparent that an anti-corruption agency is simply responding to a public controversy or to an official referral, it is much better equipped to defend itself from accusations of partisanship, bias or seeking publicity by targeting public figures. The disadvantages of reactive strategies derive from the consensual and covert nature of corruption. Reactive strategies are likely to reach only the most blatant and unsophisticated forms of corruption, thereby perpetuating the *status quo*, placating public opinion without really threatening high-level corruption. Reactive strategies invite the cynical conclusion that the system is designed to protect the corrupt but powerful elite by sacrificing clumsy, petty thieves to convey the appearance that corruption is being controlled. These anti-democratic consequences of reactive strategies and their obvious inability to ever reach well hidden corrupt practices suggest the need to develop alternative target selection strategies.

VIII. INTELLIGENCE BASED TARGETING

One such alternative strategy may allocate some fixed percentage of resources to be applied in a reactive fashion against targets of opportunity. However, its principal focus is upon the application of a significant percentage of investigative resources to the collection, analysis and generation of criminal intelligence identifying targets with substantial programmatic impact. The majority of resources are then applied to the development of cases targeted as a result of this intelligence gathering and evaluation process, with careful attention being paid to the verification of intelligence sources and methods, and the development of new intelligence as a result of the agency's own investigations. Using intelligence methods to identify cases to be investigated may involve sophisticated, computer matching of multiple databases or simply identifying any public officials at social functions hosted by a local crime or drug boss. Review of passports, immigration control and air travel records, may reveal public officials who should be held to explain the source of funds for their expensive foreign travel. Sources in public accountancy firms may provide their evaluation of the integrity and motivation for the award of certain construction contracts or issuance of city bond issues. Intelligence based targeting may also focus on the integrity risk of a program, rather than on the conduct of an individual, concentrating on vulnerability to abuse, effectiveness of internal and external controls, audit results, degree of discretion granted to program officials, number of complaints, amount of competition in the market regulated, comparative costs, and similar criteria.

IX. DECOYS AND INTEGRITY TESTING

While intelligence-based targeting can never be free from allegations of improper motivation because its selection criteria are

discretionary, at least the means of investigation tend to be fairly routine. Far more controversial is a targeting strategy which employs decoys and integrity testing tactics. The criticisms of these devices are substantial. They arguably express an intolerably cynical view of how the police should operate, which damages public respect for law enforcement. Some societies may categorize such tactics as the impermissible use of an agent provocateur manufacturing imitation crime when none really exists. It can be argued that the weakness of human nature permits law enforcement to target, trap and destroy almost any political, personal or ideological opponent which it chooses.

Notwithstanding these objections, integrity testing devices are employed because law enforcement executives know that hidden corruption can continue indefinitely unless exposed, and that no other technique is as cost-effective in penetrating bribery and other secret abuses of office. Allow me here to introduce a case study about a corruption inquiry which was a very controversial event in the United States of America when it occurred and which still provokes widely different reactions among audiences. This case study involves what was called the ABSCAM investigation in the United States in the 1ate 1970s. This inquiry began with an FBI undercover operation utilizing a cooperating witness with a long criminal record. The cover story was that a business representing Arab royalty sought opportunities to invest some of the fabulous wealth accumulated during the then-recent oil shortage and embargo by the Organization of Petroleum Exporting Countries. The FBI's internal code name for the case, which eventually became know to the public, was ABSCAM, a combination of the notional business front for the investments, called ABDUL Enterprises, and the word “scam” meaning trick.

It was planned that the operation would use the cooperating criminal's underworld associations to purchase stolen artworks and securities, and ultimately to base prosecutions on evidence gathered during the operation. These goals were soon achieved, and in the process, the cooperating witness and later an undercover FBI agent, were introduced to the mayor of a New Jersey city, who offered to arrange the payment of a $100,000 bribe to the Vice-Chairman of the New Jersey State Gambling Commission to influence the issuance of a gambling casino license. As the corrupt mayor and his associates spent time socializing with the undercover FBI agent, they talked about other matters consistent with the undercover scenario involving wealthy Middle Eastern investors. One topic was the desire of the mythical Arab sheik to guarantee that he would be allowed to immigrate to the United States if a revolution occurred in his country. Since immigration is within the competence of our national or federal government, the corrupt mayor offered to introduce the undercover team to friends who were members of the United States Congress and who would accept bribes to ensure that a law was passed to allow the Sheik to reside in the United States.

The corrupt mayor suggested a $100,000 payment to guarantee that one Congressman would introduce legislation to admit the Sheik to the United States, on the grounds that such private bills were usually passed without controversy. The undercover agent refused to pay more than $50,000, arguing that the help of several Congressmen might prove necessary. In one day a Member of our House of Representatives was videotaped personally accepting $50,000 and filling his pockets with the currency after agreeing to introduce the legislation, and a US Senator was recorded promising to help with the legislation in the Senate in exchange for a

20% concealed interest in mining corporations for which he promised to help secure government contracts. As the investigations progressed other Members of Congress took bribes in a brown paper bag, in briefcases, in person and through intermediaries, all in exchange for promising to support legislation to allow the Sheik to immigrate into our country.

When the investigation became public in 1980 the publicity was enormous. Prosecutions and convictions of a United States Senator and six Members of the House of Representatives, and numerous local officials, lawyers and businessmen followed. At the same time, both houses of our Congress conducted hearings to critique the propriety of the investigation. It may be stimulating to discuss some of the issues debated during those Congressional hearings.

A. Were Innocent Persons Entrapped?

There is no juridical difference between the way an American judge and jury decide the guilt of a trafficker who sells drugs to an undercover agent for money and a Congressman who sells a promise to support legislation for money. In both cases the common law legal tradition permits a possible defense of entrapment. The jurors are instructed by the judge that they should absolve the accused if they believe that he had no predisposition, intent or willingness to commit the crime and was entrapped into doing so by government persuasion. Despite strenuous efforts to find any possible vulnerability in the ABSCAM operation, neither the Senate nor the House of Representatives committees claimed that the accused officials were innocents lured into the perpetration of crimes which they had no predisposition to commit. Such a claim would have lacked public credibility because the crucial encounters were all recorded, and almost all were videotaped. The videotapes showed the greed of the accused congressmen, stuffing envelopes in their pockets and grabbing at bags or briefcases full of money, and boasting that in deciding how to vote they listen to money, not words.

B. Is Integrity Testing a Law Enforcement Technique Which Should be Used Against Elected Representatives?

The dangers of allowing the executive branch of government to tempt legislators are obvious. The moral independence of individual legislators and the institutional independence of the legislative branch are at risk when their integrity is tested, as we are all imperfect human beings subject to temptation. Fortunately, the Congressional hearings on the ABSCAM operation established a complete absence of political targeting, and in fact all of the defendants were from the party in power at the time.

Moreover, those same hearings revealed that ABSCAM was not a moral crusade against corruption in Congress. None of the persons responsible for the operation would have disputed the principle that it is the electorate, the voters, and not criminal justice authorities who are primarily responsible for the moral caliber of our elected representatives. The original intent of the operation was to recover stolen property. When a demonstrably corrupt local mayor offered to arrange bribes to Members of our Congress, the offer was accepted because none of the investigative or prosecutorial executives involved could suggest any persuasive reason why we should use the operation to buy illegally possessed artwork and securities but not to buy illegally promised votes. We Americans are an intensely pragmatic people. Public opinion was greatly impressed by the very high percentage of elected officials who came into contact with

ABSCAM who were willing to promise their votes for money. During the Congressional hearings an argument took place over whether 80% or only 63% of the elected representatives accepted illegal payments. The calculation depended on how one counted persons who died before prosecution or were convicted for other offenses. The argument ended when one of our prosecutors reminded the Senatorial committee that either percentage suggested that the operation was amply justified. With the issue phrased in that context, and with public opinion solidly in favor of the numerous prosecutions and convictions, our Congress shifted its focus from whether undercover tactics could be used in investigations of elected representatives to examine what appropriate controls should be in place.

C. What are the Appropriate Controls for Undercover Operations Testing the Integrity of Elected Representatives?

Our House of Representatives proposed a change in federal law to require that all future undercover operations should require judicial authorization, but no such legislation was ever enacted, primarily because our citizens felt that Senators and Representatives should accept the risk of walking into a meeting and being offered a bribe for a vote, since they could and should refuse the offer, and could even go so far as to report it to the proper authorities.

Frankly, our investigative and prosecutorial authorities were much more conservative than the public in their view of what kind of testing was allowable. The Director of the FBI and the prosecutors at the politically appointed policy level of the Department of Justice applied controls to avoid random integrity testing, and to offer bribes only to a selected group of persons to whom there was founded suspicion of a corrupt predisposition to accept an illegal payment. The standard for authorizing a meeting with an elected official was that an intermediary with proven criminal credentials had represented that the intent of the public official in attending the meeting was to seek a bribe. Once a meeting took place, no bribe could be offered until recorded preliminary discussions confirmed the elected representative's awareness that an illegal transaction was to be discussed. These precautions had the desired effect of persuading public opinion and responsible Members of Congress that the defense of entrapment and the internal law enforcement for undercover operations adequately safeguarded legislative independence.

D. Did the ABSCAM Experience Establish a New Regime in Which Investigative Authorities Now Use Integrity Testing at Will Against Elected Officials?

Despite the numerous convictions resulting from ABSCAM, all upheld on appeal, and the reluctance of our Congress to risk voter displeasure by limiting undercover operations or integrity testing techniques, no operation of similar scope has taken place since 1980. When I last researched the issue several years ago, only one additional conviction of a Congressman and one of a federal judge had resulted from decoy or undercover tactics, although it is now used routinely against elected and appointed officials in state and local governments.

If the ABSCAM operation were such a statistical success, if its convictions were affirmed against all legal challenges, and if Congress did not pass legislation limiting law enforcement powers as a result, one may ask why it has not been repeated. My opinion, which is strictly personal and does not reflect any official position or analysis, is that various factors are at work. One

could be called the scorpion factor. For law enforcement authorities, initiating another ABSCAM project would be like a scorpion entering a bottle with a stronger and more poisonous scorpion. If the weaker strikes the stronger, the weaker will suffer serious injury or worse, with no means of escape. The Congressional reaction after ABSCAM teaches that if law enforcement authorities were to again test the integrity of our Congress, multiple convictions might result but restrictive legislation would be almost inevitable.

Other factors also discourage the repetition of an ABSCAM operation. One is recognition of the sensational manner in which the news/entertainment media treat criminal investigations. One of the painful aspects of the ABSCAM investigation was that it was terminated after an innocent Senator was introduced to the undercover agent by an intermediary who misrepresented that the Senator wished to trade his vote for money. No bribe was ever even discussed, because the undercover agent realized that the Senator thought he was there to receive a legitimate campaign contribution. This probably occurred because the criminal intermediaries had exhausted their contacts with corrupt office holders whom they knew were eager for bribes and arranged a speculative meeting in the hope of receiving a percentage if the Senator were offered a bribe and decided to accept it. Whatever the reason for the event, the result was painful and terribly unfair. Because of the mass media coverage when the investigation became overt, the Senator suffered damage to his reputation. Law enforcement executives with a sense of public responsibility cannot pretend to be blind to such realities. The consequence is that the number and scope of undercover operations must be severely restricted to eliminate any involvement with innocent persons whose reputations might be unfairly ruined by such contact.

There may also be a fear that integrity testing is simply too effective a technique. We know the ABSCAM percentage of 63% to 80% is not statistically representative of the Members of Congress willing to promise their votes for money, because strenuous efforts were made to deal only with a preselected, corrupt population. However, our society may not want its law enforcement agencies to determine exactly what percentage of our elected representatives would be willing to take illegal payments under the constant pressure of political fundraising and campaigning. It may be that in ABSCAM we looked into the abyss and were frightened by what we saw, and that our society will not willingly approach the edge of that abyss soon again.