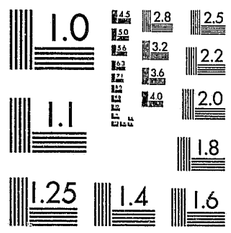

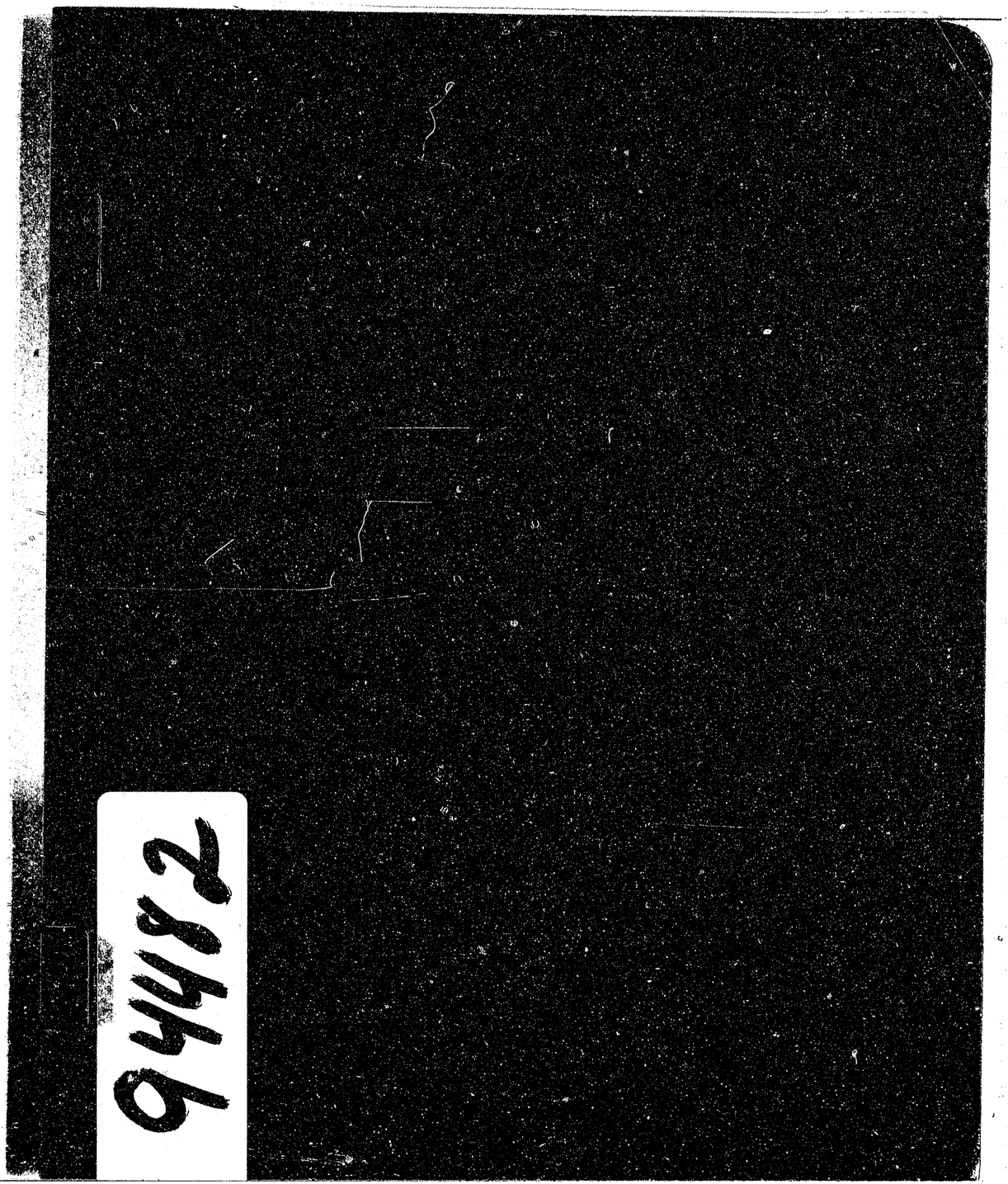

Department of Justice

STATEMENT

OF

D. LOWELL JENSEN
ASSOCIATE ATTORNEY GENERAL

BEFORE

THE

SUBCOMMITTEE ON CRIMINAL LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

UNDERCOVER OPERATIONS - S. 804

ON

MAY 16, 1984

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on S. 804, a bill dealing with undercover operations. As the members of the Subcommittee know, undercover operations have long been an important part of federal law enforcement and are crucial to the investigation of crimes usually committed in clandestine manner or by secretive, organized groups. Major crimes such as drug trafficking, espionage, racketeering, terrorism and public corruption fall into these categories and can often be successfully investigated only by means of undercover operations. Therefore it is vital that the Subcommittee approach any legislation in this area with the view of not imposing unnecessary obstacles to effective law enforcement.

We also recognize that undercover law enforcement operations can pose legal and policy issues of particular sensitivity. The intent of S. 804 is evidently to protect law abiding citizens from the harmful effects of an overreaching undercover operation. While we share that objective, the bill in our judgment attempts to regulate undercover operations in ways that are overly stringent and would as a result jeopardize legitimate and vital undercover operations. Moreover, S. 804 would drastically alter the law of entrapment and tort liability in ways that have been repeatedly and for sound reasons rejected by the courts and that would unjustifiably impede the use of undercover operations without benefit to truly innocent citizens. For these reasons,

and despite the fact that the bill contains some features that we find unobjectionable, the Department of Justice is constrained on balance to strongly oppose S. 804.

PART I. UNDERCOVER OPERATIONS

Section two of the bill adds new sections 3801-3805 to title 18 of the United States Code. I will discuss each new section in turn. Section 3801 would set out statutory authority for undercover operations generally, would provide for Attorney General guidelines governing their initiation and execution, and would provide for reports to the Congress on the guidelines and their interpretation.

Initially, we point out that, as a legal matter, subsection 3801(a), which gives the Attorney General specific authority to authorize the conducting of undercover operations by the Department of Justice in accordance with guidelines to be promulgated in accordance with the new statute, is unnecessary. There is no question but that the Attorney General's present authority to direct and supervise the investigation of federal offenses extends to the use of undercover operations and the issuance of governing guidelines. Such guidelines are now in effect for the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) and the Immigration and Naturalization Service (INS).[1] There is thus no need for codification of these authorities of the Attorney General.

[1] The INS guidelines are the most recent to go into effect. They were approved by the Attorney General on March 5, 1984, and were implemented on March 19, 1984.

The subject matters which subsection 3801(b) would require to be included in the guidelines are, for the most part, unobjectionable. However, we do not support proposed subsection (b)(6) which requires that the Undercover Review Committee for each component of the Department have no less than six members including one Assistant Director of the FBI and a representative of the Office of Legal Counsel. The composition of these committees should be left to the discretion of the Attorney General so that their membership can reflect the anticipated nature of the work of each committee. In particular, there is no reason for an official of the high level of an Assistant Director of the FBI to be required so serve on these committees. Indeed, under current FBI guidelines it is an Assistant Director who, based on the recommendation of the Undercover Review Committee, is authorized to make ultimate decisions regarding many proposed undercover operations. Moreover, there is no justification for requiring any official of the FBI to serve on a committee reviewing those operations proposed by agencies such as the DEA or INS.[2]

[2] Membership of an attorney in the Department's Office of Legal Counsel (OLC) is also not necessary and would be wasteful of resources. OLC attorneys typically do not become involved in particular investigations or prosecutions. Current practice is to solicit the views of OLC on unusally difficult or complex legal issues that arise during the work of the committees. This procedure is working well and full time OLC membership is not necessary.

Proposed subsection 3801(c) would require that the Attorney General submit to the Congress every guideline and amendment and every "formal interpretation" of such a guideline at least 30 days before they are promulgated. As I indicated, the guidelines are matters of public record. Accordingly, we have no objection to transmitting to the Congress any new or amended guidelines or to responding to Congressional requests regarding the manner in which we interpret the guidelines. However, the 30 day delay requirement could inhibit our ability to amend or formally interpret the guidelines in response to a rapidly evolving situation. More important, the phrase "formal interpretation" of the guidelines is apparently intended to require a report to the Congress in every instance in which the Department determines that an action would or would not be subject to a provision in guidelines. We strongly oppose such a requirement. It would cause undue delays in investigations, and could prematurely reveal new investigative techniques. Even if procedures could be devised to overcome these problems, such a reporting requirement would discourage our investigative agencies from seeking legal advice and interpretations of guidelines from their own legal counsel and from the Department's Office of Legal Counsel. Moreover, it is a firm policy of the Department not to discuss ongoing investigations and we believe that any requirement for submitting reports to the Congress during the pendency of an investigation would represent an improper interference with the responsibility of the Executive Branch to enforce criminal laws.

The Department of Justice generally supports the goals of proposed section 3802 with certain amendments. This section is designed to overcome limitations and ambiguities concerning the authority of our investigative agencies to enter into contracts and leases, establish proprietaries, use the proceeds generated by proprietaries, and enter into agreements with cooperating individuals in connection with undercover operations. As to the substance of the provisions, we would recommend first that proposed section 3802(c) be amended to allow the use of proceeds not only of proprietaries, but of any undercover operation, to offset necessary and reasonable expenses of the operation. Second, subsection 3802(d) which would allow the deposit of appropriated funds in banks and other private financial institutions should be expanded to allow the deposit of the proceeds of an undercover operation.

We point out that authority of the FBI to deposit appropriated funds and the proceeds of an undercover operation in financial institutions is currently contained in subsection 205(b)(1)(C) of P.L. 98-166, the Department's appropriations act for fiscal year 1984. This provision will expire after September 30th. However, the Department has requested that the FBI be given permanent authority to deposit appropriated funds for undercover operations and the proceeds of such operations in banks and other financial institutions without regard to the provisions of 18 U.S.C. 648 and 31 U.S.C. 3302 which generally forbid such deposits. Language to accomplish this was in the

Department's authorization bill for FY 1985 as introduced (S. 2606 and H.R. 5468). However, as reported out by the Judiciary Committee, S. 2606 would not make such authority permanent but would only continue it for the next fiscal year. As marked up by the House Judiciary Committee, H.R. 5468 would also make this authority only temporary. Nevertheless we believe that the authorization process is the appropriate means by which to pursue this matter. In sum while we agree with the evident intent of S. 804 that such authority should be made permanent, that bill is in our judgment an inappropriate vehicle by which to accomplish this objective.

We are strongly opposed to section 3803. This section would impose statutory limitations on the initiation of undercover operations and the offering of an inducement or opportunity to commit a crime. Basically, our objection to this part of the bill is that it imposes specific, inflexible standards on our investigative agencies that do not take into account the variety of situations arising in actual investigations. Nor can statutory standards be readily adjusted to conform to our evolving experiences with undercover operations. As the Subcommittee knows, we face today a more sophisticated and dangerous breed of criminal than ever before and investigative techniques, including undercover operations, must constantly be refined and adjusted to counteract this threat.

In our view, the proper and most practical method for establishing investigative thresholds is through Attorney General guidelines, which set forth investigative procedures within the larger confines of the law. The advantages of guidelines are that they can be general enough to apply to varied fact situations and flexible enough to permit appropriate responses to specific cases. This allows for the exercise of judgment on the part of our most experienced investigators and prosecutors and consideration of the exigencies of each particular investigation. Likewise, guidelines are subject to constant revision and improvement not possible with a statutory scheme.

Moreover, an examination of the standards set out in proposed section 3803 shows that several of them are overly restrictive. For example, section 3803(a)(1) requires, as to operations intended to obtain information about an identified individual, a reasonable suspicion that the individual "has engaged, is engaging, or is likely to engage in criminal activity" before an undercover operation may be used to obtain information about him. However, undercover operations, like all investigations, may involve gathering information about witnesses, victims, and others not engaged in criminal activity. The names, addresses, and other data about such persons are often essential to the investigative process. This part of the bill would preclude the use of undercover techniques to obtain this vital investigative information.

Proposed subsection (a)(2) deals with situations in which the undercover operation, such a classic "sting" operation involving fencing stolen goods, is intended to obtain information about a type of criminal activity and similarly requires reasonable suspicion that such activity is taking place before an operation can be mounted. The subsection goes on to provide, however, that if in the course of the operation law enforcement agents wish to offer a specific individual an inducement to commit a criminal act, they may do so only upon a finding -- by the Undercover Operations Review Committee, or in certain circumstances by the head of the field office in charge -- that there is reasonable suspicion that the targeted person has engaged, is engaging, or is likely to engage in criminal activity. These provisions do not take into account the fast-moving nature of many undercover operations. For example, in a "sting" operation involving the setting up by the FBI of a phony business trading in stolen merchandise, how are the agents to handle a situation in which an individual comes in off the street, states his understanding of the fact that the proprietors have stolen goods available, and indicates a willingness to buy some if the price is right? Unless the "head of the field office" is to be present at all times, no opportunity exists to obtain the kind of advance approval that the bill contemplates for the agents to negotiate with the person as to a price, yet if they decline to do so (i.e. to "offer an inducement") the individual may become suspicious and the entire operation may be jeopardized. Clearly, it would

seem necessary to provide that the initial authorization of the operation carry with it an authorization to follow through by offering such inducements as to reasonably foreseeable but previously unidentified individuals, who display interest in participating in criminal activity.

Proposed subsections 3803(a)(3) and (4) severely limit the use of undercover operations in situations where an undercover operative "will infiltrate any political, governmental, religious, or news media organization or entity," or where a person acting in an undercover capacity will enter into a confidential professional relationship such as by posing as a clergyman or physician. The potentially sensitive nature of such operations does require particular care in determining whether the use of an undercover technique is appropriate, but the bill would require a finding of "probable cause" to believe that the operation is necessary to detect or prevent specific criminal acts. This is too high a threshold for the use of an investigative technique and, indeed, in many cases would define those situations in which an undercover operation would be unnecessary because probable cause already exists to arrest the subjects or to conduct a search. Rather than imposing a "probable cause" standard for using an undercover technique in these sensitive areas, a better approach would be to require a high-level decision with respect to such an undercover investigation. This is presently the case under the Department's FBI undercover operations directed at offenses conducted by groups claiming to be religious or politi-

cal organizations. These problems are further complicated by the fact that the bill contains no definitions for the terms "religious" and "political" organization or for what is meant by the term "to infiltrate" such an organization. Many terrorist or violent organizations may claim to be religious or political in nature. The legislation gives no guidance, for example, as to whether the Palestine Liberation Organization (PLO) or the Ku Klux Klan (KKK) would be deemed "political" entities subject to the bill's more rigorous threshold requirements for conducting undercover operations.

Proposed subsection 3803(e) is also problematic in that it may be read to authorize, for the first time, the bringing of motions to suppress evidence based on a violation of the guidelines. Currently, under United States v. Caceres, 440 U.S. 741 (1979), and similar cases, it is generally held that a violation by an agency of its internal guidelines does not create grounds for the suppression of evidence in a criminal prosecution. The Caceres opinion indicates, however, that violations of a statute, or of guidelines mandated by a statute, may well support a suppression motion, in the absence of contrarily stated congressional intent. Id at 747-755. Proposed subsection 3803(e) states that failure to comply with the section "shall not provide a defense in any criminal prosecution or create any civil claim for relief". It is at least doubtful, however, whether a motion to suppress evidence would be deemed either a "defense" or a "civil claim". Thus, unless clarified, the legislation could

have the devastating effect of authorizing the remedy of suppression for a violation, however inadvertent or justified by the particular circumstances the "violation" may have been.

The Department of Justice is also strongly opposed to section 3804 which would vastly expand the civil liability of the United States for tortious conduct with some nexus to an undercover operation. In effect, this section would make the United States strictly liable for wrongful acts bearing even the most tenuous connection to an undercover operation. What is particularly disturbing about this provision is that it would abandon the most basic principles of tort liability and impose liability on the United States irrespective of whether there was any showing that the proximate cause of the injury was a wrongful or negligent act on the part of the government or its employees. For example, the United States would be liable for damages caused by a private individual cooperating in an undercover operation even if he were acting in violation of specific instructions and concealed his conduct from supervising agents.

To the extent that injury to a private person is caused by the government's wrongful or negligent supervision of an undercover operation, a remedy is available under the present provisions of the Tort Claims Act (28 U.S.C. §2671 et seq.). Moreover, the concept of negligence is a flexible one under which the standard of care imposed on the government increases where there is a foreseeable risk of injury to the nature of a particular operation. There is no justification for making the United

States civilly liable for an individual's tortious conduct for which the government bears no responsibility, whether in the context of undercover operations or other government activity.

Proposed section 3805 would require the Attorney General to file an annual report with the Congress concerning all terminated undercover operations and all operations approved more than two years prior to the report date irrespective of whether they have been ended. In principle, the Department has no objection to providing Congress with information on our undercover operations but the scope of the reporting requirements imposed by this section is unreasonable. First, the administrative burden caused by this section is out of all proportion to the benefit to the Congress. For example, the section makes no distinction between routine, everyday operations such as a drug buy and other more significant undercover investigations. Since virtually every drug case is made by the use of some undercover technique and the number of actual drug prosecutions runs annually in the thousands, the requirements of subsections 3805(b)(9) and (10), which require a separate entry for each arrest and indictment, would be staggering.

Second, this section would require information on terminated operations that had not yet resulted in arrest, indictment, or trial, and also information on any ongoing operation if it had been approved more than two years earlier. A major undercover operation may itself last longer than two years,[3] and, resulting

[3] For example, a major RICO and narcotics trafficking case recently considered by the Second Circuit resulted from a six

trials and appeals much longer still. As I mentioned earlier, the Department of Justice is strongly opposed to requirements that we disclose in a public document information about an undercover operation prior to the conclusion of trial or termination of covert activity for the obvious reason that such disclosure would jeopardize investigations and prosecutions as well as the safety of government agents, informants, and cooperating witnesses and victims.

Finally, and perhaps most importantly, section 3805 would require the Attorney General to report on "all undercover operations." From the context, we assume that only Department of Justice operations are meant to fall within this requirement, and not those of other departments and agencies. If so, this limitation should be clarified. Even as so understood, however, It would appear that the FBI's counterintelligence undercover operations would be encompassed by this requirement. Clearly, national security matters should be excluded from any public report. Thus, we strongly urge that, if the Subcommittee decides to process legislation in this area, the term "undercover operation" as used throughout the bill be defined to exclude foreign counterintelligence operations of the FBI.

year investigation of the Bonanno organized crime family, almost all of which was undercover. See United States v. Ruggiero, 726 F.2d 913 (2d Cir. 1984).

PART II. ENTRAPMENT

Section three of the bill would for the first time establish a statutory entrapment defense as a new section 16 in title 18. Although Congress undoubtedly possesses the power to define the entrapment defense,[4] the fact that it has heretofore declined to do so reflects, in our view, a wise decision that the law in this area as developed by the federal courts in hundreds of cases over many years properly balances the interests of law enforcement and privacy. Indeed, this was the judgment of the Senate Judiciary Committee, only a little more than two years ago, when it determined to retain the prevailing court-developed entrapment defense in the context of approving the Criminal Code Reform Act (S. 1630).[5]

By contrast, the defense to be placed in the statute books by S. 804 would abandon the current law of entrapment and would substitute a version of the defense that the Supreme Court has repeatedly repudiated on the ground that it would benefit professional, hard core criminals while providing no greater protection to the average law-abiding citizen. The Supreme Court's decisions rejecting the type of formulation of entrapment proposed in S. 804 involve several cases spanning nearly fifty years and do not reflect the thinking of only a particular group of justices.[6]

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4 See United States v. Russell, 411 U.S. 423 (1973).

5 See S. Rep. No. 97-307, 97th Cong., 1st Sess., pp. 118-130.

6 See Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958); Lopez v. United States, 373 U.S. 427 (1963); Osborn v. United States, 385 U.S. 323 (1966); United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976).

Since we have concluded that the interests of law enforcement would be gravely damaged by enactment of the conflicting version of the defense proposed in S. 804, the Department of Justice strenuously opposes this aspect of the bill.

Under current case law, it is recognized that merely affording a person an opportunity or the means to commit a crime does not constitute entrapment, and the courts have further upheld and noted the necessity of using undercover techniques such as infiltration of organized groups and general "artifice and stratagem" to catch those engaged in criminal enterprises.[7] The key element of the existing entrapment defense surrounds the issue of inducement. The defense of entrapment is met if the facts show that the defendant was an otherwise innocent person whom the government, through the creative activity of its officials, caused to commit the crime. Thus, when the government provides some inducement to an individual to commit an offense, as it frequently must in the course of underover operations, the government must establish that the individual was "predisposed" towards the criminal activity. This in turn involves a subjective inquiry into the defendant's inclination to commit the crime, and permits evidence to be introduced, e. g., demonstrating that the defendant was not an ordinary law-abiding citizen

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7 United States v. Russell, supra; Sorrells v. United States, supra.

suddenly confronted by overwhelming temptations offered by law enforcement officials to commit an offense, but instead was seeking to engage in criminal activities, for which the government agents merely provided the means or opportunity. In other words, the present formulation of the entrapment defense focuses, appropriately, on the guilt or innocence of the defendant and seeks to determine his or her state of mind ("predisposition") at the time the challenged inducements were made.

S. 804 would substitute for this long-standing "subjective" test an "objective" test. Under the bill's proposed defense, the standard for entrapment would be whether the defendant's actions were induced by the government's use of "methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense." In applying this test, the predisposition of the defendant to commit the crime would be irrelevant.

Such a recasting of the entrapment defense would mean, for example, that an established narcotics dealer with several prior convictions could not be convicted of drug smuggling if he convinced a jury that the purchase price offered by an undercover agent would have been sufficient to cause a "normally law-abiding citizen" to commit such an act. But in order to accomplish an undercover drug buy, agents must offer the going price, which may represent a huge profit to the defendant. The fact that a jury of normally law-abiding citizens might find the routine profit on a large scale drug deal so shockingly high as to perhaps have

tempted them to commit the crime should not allow the acquittal of an experienced trafficker. Yet the "objective" test in S. 804 opens the door to this unjust result. As the Supreme Court observed, in rejecting the invitation to adopt an "objective" entrapment test, it does not "seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because governmental undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."[8]

In sum, to legislatively establish the objective test for entrapment would serve no purpose other than to provide a windfall to wrongdoers who would be currently foreclosed from successfully asserting an entrapment defense because of their predisposition to commit the offense. If a "normally law-abiding citizen" is induced by the government to commit an offense, he can now defend the charges by showing lack of predisposition. Adoption of the objective test would benefit experienced criminals and provide no additional protection to the law-abiding citizen.

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8 United States v. Russell, supra, 411 U.S., at 434. To put the matter another way, as stated by Judge Learned Hand in a passage frequently cited with approval by the Supreme Court: "Indeed, it would seem probable that, if there were no reply [by the government to the claim of inducement], it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret." United States v. Sherman, 200 F.2d 880, 882.

As if this were not enough, this section of the bill in addition to adopting the "objective" test, would create three highly objectionable irrebuttable presumptions which the defendant could use to establish a per se entrapment defense.

The first of these presumptions would be triggered if the defendant commits the crime because the government threatens harm to the person or property of any individual. We agree that in such a case conviction generally should be barred. But the provision is extremely broad and could have unforeseen effects. For instance, in the midst of negotiations over a major narcotics sale, an undercover agent may have to "talk tough" or "threaten" an experienced street-wise seller who was attempting to renege on the deal or change its terms, in order for the agent to complete the transaction, maintain his credibility, or protect himself or others from harm. In the world of narcotics trade, such conduct in neither unreasonable nor unusual.

Also, the presumption contains no requirement that the defendant even be aware of the threatened "harm" to another individual. Thus, the presumption could apply where agents threatened prosecution of a low level participant in a drug ring when he attempted to back out on an agreement to proceed with a purchase from the defendant. With the defendant not even aware of, much less influenced by, the pressure applied to the intermediary, there is no reason for him to be able to assert entrapment as a matter of law for a crime in which he willingly

participated. Again, current law is adequate to protect innocent persons. Courts can consider duress as a defense, and can weigh government conduct against predisposition.

The second presumption would establish entrapment as a matter of law if the government "manipulated the personal economic, or vocational situation of the defendant...." This provision is extremely vague and, if broadly construed, could be read to prohibit the offering by an undercover agent of a bribe to a predisposed corrupt official. Moreover, every narcotics purchase represents some manipulation of the "economic situation" of those who participate, no matter how willingly. While we assume that some narrower interpretation was intended for this language, the fact is that this presumption offers numerous loopholes to be exploited by defendants, and the government would be powerless to rebut the presumption regardless of the defendant's criminal record or predisposition to commit the offense, or the reasonableness of the inducement in a particular case.

The third presumption would apply if the government provided goods or services necessary to the commission of the crime that the defendant "could not have obtained" without the government's help. This provision would overturn Supreme Court cases holding that the supplying of contraband or hard to obtain services to predisposed drug traffickers does not constitute entrapment.[9] Thus, this provision would cast doubt on the accepted and

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[9] See United States v. Russell, supra; Hampton v. United States, supra.

reasonable practice of a government agent's supplying limited amounts of contraband to show good faith or establish credibility with targets of an investigation. Moreover, it would seem to preclude a sale by an undercover agent of classified defense information or controlled high technology to a person who had amply demonstrated his desire to make such a purchase. This provision, like the other two presumptions, could bar the use of reasonable undercover techniques and allow acquittal of experienced, predisposed criminals without providing any additional protection to innocent citizens.

In short, Mr. Chairman, I urge the Subcommittee not to alter the entrapment defense as it has been developed by the courts. The proposed change would cause much harm to legitimate and necessary law enforcement operations and would wrongly shift the focus of the trial from an inquiry into the facts of the crime -- that is, was the particular defendant predisposed to commit the offense or did the police implant in his mind the idea of committing it -- to a general inquiry into police investigative techniques and how they might affect a hypothetical citizen.

In conclusion, the Department of Justice is opposed to any change in the law of entrapment for the reasons I have just outlined. We are also opposed to section 3803, which would regulate by statute the initiation of undercover operations and the offering of an inducement to commit a crime, and to section 3804 which would create a new tort liability of the United States for conduct connected with an undercover operation. We support

the substance of section 3802 dealing with certain fiscal aspects of undercover operations provided the suggested minor changes mentioned in my statement and in our earlier report on the bill are made but we believe these provisions are more properly considered in the context of the Department's authorization bill. Finally, we object to many of the provisions of sections 3801 and 3805 requiring, respectively, Justice Department guidelines for the conduct of undercover operations and reports to the Congress.

Mr. Chairman, that concludes my prepared statement and I would be happy to try to answer any questions the Members of the Subcommittee may have.

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