Federal judge warns of FBI 'Gestapo' as court upholds Abscam convictions

by Edward Spannaus, Law Editor

In a decision which eliminates the last judicial opposition to the Justice Department's Abscam frameups, the U.S. Court of Appeals in Philadelphia has reinstated the Abscam convictions of former City Council President George X. Schwartz and City Councilman Harry P. Jannotti. The Feb. 11 ruling was accompanied by an extraordinarily
warned that the FBI's Abscam tactics recall the secret police methods of the Czarist Ochrana and the Nazi Gestapo.

In November 1980, U.S. District Judge John P. Fullam threw out the convictions of Schwartz and Jannotti on the grounds that the defendants had been denied due process of law under the Constitution, that they had been entrapped, and that federal jurisdiction had been artificially created over what would normally be considered state crimes by local government officials. The Philadelphia Federal Appeals Court, known as the Third Circuit Court of Appeals, had, until the Feb. 11 ruling, been the strongest in the country in opposition to Abscam methods of entrapment. It was for this reason that Abscam prosecutor Thomas Puccio improperly moved the Harrison Williams case from New Jersey, part of the Third Circuit, to Brooklyn, New York, part of the Second Circuit.

This pattern was followed when the Schwartz-Jannotti case, on appeal by the Justice Department, came before a regular three-judge panel of the Third Circuit Court of Appeals. Fullam's ruling dismissing the charges was upheld by a 2-to-1 vote of the three judges. However, through a process which is yet to be revealed, the case was then re-argued *en banc,* before all 9 of the active judges on the court. This time, the vote was 7-to-2 *against* Schwartz and Jannotti. Among the seven votes upholding Abscam were those of three judges appointed to the Appeals Court by President Jimmy Carter.

A fourth judge of the 7-person majority is Judge Arlin Adams, a Trustee of the German Marshall Fund which sponsored the December 1981 "Eurosocialism" conference in Washington, D.C. that plotted the destabilization of the incoming Reagan administration.

Judge Ruggiero J. Aldisert, who was originally part of the three-judge panel which heard the case the first time, wrote an unprecedented, strong dissenting opinion, in which he warned that the FBI's methods in Abscam are a threat to the fabric of our republic.

Excerpts from the majority opinion upholding Abscam and from Judge Aldisert's dissent follow [subtitles in original].

Opinion of the Court: Sloviter, Circuit Judge

On September 16, 1980, after a six-day trial, a jury found defendants Harry P. Jannotti and George X. Schwartz guilty of conspiring to obstruct interstate commerce, in violation of the Hobbs Act, §18 U.S.C. 1951 (a), and found Schwartz guilty of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962 (d). . . . On November 26, 1980, the district court entered an order setting aside the verdict of the jury in its entirety, dismissing count III of the indictment, (the Hobbs Act count) for lack of jurisdiction, and granting the motions of defendants for judgment of acquittal. The Government appeals.

In his opinion accompanying the order, the trial judge gave four reasons for entry of the judgment of acquittal and dismissal of Count III of the indictment. . . .

1. The evidence at trial did not establish the actual or potential impact upon interstate commerce necessary to sustain federal jurisdiction under the Hobbs Act;

2. The evidence at trial established entrapment as a matter of law;

3. Governmental overreaching amounted to a violation of due process of law;

4. The circumstances relied upon to establish federal jurisdiction were artificially created. *Id.* at 1205.

Our review of the record and applicable law convinces us that in reaching these conclusions the district court erred in its legal analysis and usurped the function of the jury to decide contested issues of fact. We reverse the district court's order and direct reinstatement of the jury's verdict. . . .

Hobbs Act Conspiracy

. . . The Hobbs Act, by its own terms, encompasses the inchoate offenses of attempt and conspiracy to extort. Convictions for these offenses have been sustained notwithstanding the absence of any evidence of an actual effect on interstate commerce. . . .

In substantive Hobbs Act convictions, the requisite nexus to interstate commerce has been found in the depletion of assets theory, because the payment of an extortion demand may reduce the assets available for the purchase of goods originating in other states. . . .

Had the project actually been planned as represented, defendants' actions would have violated the Hobbs Act even if unforeseen difficulties, such as the overthrow of the "sheik," prevented any further action on the project. The federal interest in protecting interstate commerce is no less under the factual situation presented in this case. The threat posed by defendants' actions is just as great. Since Congress has exercised the full scope of its commerce power in the Hobbs Act, we conclude that there was Hobbs Act jurisdiction.

Entrapment

. . . The district court, without any reference to the record or any analysis of the issue, characterized the amounts offered as "exceedingly generous" and determined that "the very amounts of the bribes were . . . 'a substantial temptation to a first offense.' ". . .

Even if the dollar amount offered were relevant to disprove predisposition, a question which we do not decide, we find nothing in the record to support the district court's conclusion that in today's inflationary times, city councilmen would view sums of $30,000 or $10,000 as so large or generous as to overcome an official's natural reluctance to accept a bribe. . . .

After being carefully and specifically instructed on the significant factual issues in this case, the jury found the defendants guilty, thereby rejecting the entrapment defense. Its verdict represents a finding that, based on the totality of the evidence, including the observations by the jury of the actions, words, voice inflections and mannerisms of the defendants and the F.B.I. agents, the defendants were predisposed to engage in political corruption. . . .

The ultimate factual decisions in an entrapment case must be left to the jury. Where, as here, the jury was uniquely equipped to inquire into the calculus of human interaction, a court should not interfere with its conclusions. We conclude that in determining that defendants were entitled to a judgment of acquittal on the ground of entrapment as a matter of law the district court impermissibly substituted its own determination of the credibility of witnesses, the weight of the evidence and the inferences to be drawn from the evidence for that of the jury. . . .

Due Process

. . . We do not, in this case, pass upon the nature of the F.B.I.'s conduct as to any defendant other than the two who are before us on this appeal. As to them, the impropriety of government conduct on which the district court relied in granting the motions for acquittal was limited to the evidence of government instigation and inducement, which, as we have already indicated, did not reach the "demonstrable level of outrageousness" necessary to compel acquittal.

In reversing the district court's judgment of acquittal on the ground of a due process violation, we do not place our imprimatur either of approval or disapproval on the government's conduct. As citizens, we have differing views of the necessity or advisability of the entire ABSCAM project. As judges, however, we rule only on whether the limits which the Constitution places on another branch of government have been exceeded. We find that the government's conduct as to these two defendants did not violate their due process rights, and that therefore the district court's judgment of acquittal on this ground must be reversed.

Dissenting Opinion: Aldisert, Circuit Judge

The division of the court in this extremely important entrapment case reflects fundamental and irreconcilable differences in the values attached to two primary integrants of the American tradition of justice:

> To what extent should federal judges assume the responsibility for protecting American justice traditions, and to what extent should judges delegate this responsibility to the jury?
>
> To what extent should federal judges endorse tactics of the kind used by the Federal Bureau of Investigation in this case?

The majority opinion reads like a paean to the FBI for its conduct in the case; but as an American citizen and as a federal judge, I find that conduct revolting. . . .

We judges come to our robes bearing the stigmata of our respective experiences. I readily confess that

being born to an immigrant father and reared in a Western Pennsylvania community peopled largely by European immigrants and their children placed indelible impressions on me. . . . The religious and political refugees who came to this land . . . had much to fear from the old country's secret police, but one of the greatest abhorrences was the *agent provocateur,* a person employed to pretend sympathy with members of a group and incite them to apprehension and punishment. From my childhood I remember stories told in broken English by gnarled refugees from Russian, the Ukraine, and Poland, recounting in graphic detail the abuses inflicted upon them in peasant villages by the Ochrana, the secret police of the Czar. Lacking the personal drama, but equally authoritative, were academic studies and news accounts of the later operations of the OGPU, the dreaded secret police of the Stalinist era.

The apogee of government artifice, guile, and deceit was reached with the formation of the Gestapo in Nazi Germany. The story of the Holocaust is an account of the *agent provocateur* at his ruthless worst. It is an account of fraudulent representations to determine the identity of Jews, of cajoling incrimination of father by son and son by father, of lies about the purpose of detention and detention camps, "*Arbeit Macht Frei,*" ("Work Will Set You Free"), and of gas chambers disguised as shower rooms. Such spectres cannot be easily exorcised.

The Gestapo were consummate users of the "honey pot," a technique government witness Melvin Weinberg proudly described as the technique the government utilized in this case. The FBI employed the honey pot through a secret agent who, by ostentatiously flashing and giving away wads of money, would attract both the wary and the unwary, the scrupulous and the unscrupulous. Having attracted, the honey pot would serve also to capture those who were willing, that is, disposed, to make the flight to the honey in the first place, as well as those who would have been unwilling, but who made the flight to the pot only because of the strength of the lure. But this trap was particularly selective: the operators of this honey pot personally selected those who could share the sweet stuff. The party was by invitation only; when the guests came to the pot it was not necessary for them to ask for a sample; rather, their mouths were opened for them and the honey poured down their gullets. . . .

To the Department of Justice, its operation was a taste of honey; to me, it emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear. That the FBI has earned high praise for its performance in the traditional discharge of its duties should not immunize the secret police tactics employed in its ABSCAM operation from appropriate and vigorous condemnation.

Entrapment

The majority allow the entrapment question in this case to be resolved by a lay jury. As staunchly as I believe that the jury, reflecting the conscience of the community, should be society's instrument for resolving controverted facts once a minimum legal threshold has been established, I stoutly believe also that the jury, untrained in the law, should never be called upon to design and construct that threshold. This is precisely what the majority have done here. They permit the jury to perform a responsibility which by law and by formal commission belongs to the judges of the Third Article. . . .

The majority and I differ upon where to draw that line and upon the relative competences of judges and juries to protect society from secret police excesses. . . .

I refuse to proceed as if no important social issue were involved in this case which implicates both the wrongdoing of city public officials and the questionable activities of federal police officials. I believe that we are confronting an extremely sensitive intersection between morals and positive law, which demands that the judiciary assume rather than shirk responsibility. . . .

Popular opinion may not care greatly about the fates of those entrapped and convicted by the government and its *agents provocateur,* but federal judges must care about the sword that is plunged into the body of trust between a people and their government. That body can withstand only so many wounds before its life will be no more. . . .

Hobbs Act Jurisdiction

The majority have accepted the government's straw man argument that impossibility is no defense to a crime of conspiracy. . . . I must object to the majority's agreement to join the government in demolishing the straw man.

I can imagine "the persons of the dialogue," in the form of Socrates and Crito:

> Soc.:
> Cr.:
> Soc.:
> Cr.:
> factual impossibility of performing a conspiracy is not defense to a charge of conspiracy which may be brought when there is federal jurisdiction. . . .

I conclude with the district court that the evidence did not establish federal jurisdiction. The Hobbs Act contemplates conspiracies that have at least a realistic probability of affecting interstate commerce. A purely hypothetical effect, a fairy tale conjured by the FBI's answer to the Brothers Grimm, is not "a sufficient threat to [commerce] so as to give rise to federal jurisdiction."