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TERRORISM IN ITALY:
AN UPDATE REPORT, 1983-1985

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OF THE

SUBCOMMITTEE ON SECURITY AND
TERRORISM

FOR THE USE OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE



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LETTER OF TRANSMITTAL

U.S. SENATE,
SUBCOMMITTEE ON SECURITY AND TERRORISM,
Washington, DC, July 17, 1985.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
Washington, DC

DEAR MR. CHAIRMAN: In July of 1984, I forwarded to you a report entitled "Terrorism and Security: The Italian Experience." This report contained a thorough examination of the terrorist phenomenon in Italy and the security measures developed in response at both the government and private levels from 1968 through 1982. The author of this superb, well-received work was Dr. Vittorfranco S. Pisano, an internationally recognized authority in the field of terrorism.

Because of the growing importance of the area of terrorism and counterterrorism, I asked Dr. Daniel J. Boorstin, the Librarian of the Library of Congress, to agree to fund the study, and I also asked Dr. Pisano to prepare an update of his report. Both were kind enough to agree. It is with great pleasure that I transmit to you the results entitled "Terrorism in Italy: An Update Report, 1983-1985."

Sincerely,

JEREMIAH DENTON,
Chairman, Subcommittee on
Security and Terrorism.

FOREWORD

Since the beginning of 1983, domestic and transnational groups have continued to engage in serious acts of terrorism and subversion in Italy. Such acts include direct attacks against the United States and NATO.

U.S. diplomat Leamon R. Hunt, Director-General of the Multinational Force and Observers (MFO), was murdered in Rome by the Red Brigades, possibly in cooperation with Middle Eastern extremists. The Italian editor of NATO News, Mr. Leonetto de Leon, suffered the bombing of his Rome residence by the Communists Struggling Against Imperialism and Armaments. The Italian Government has evidence that the domestic pacifist movement, whose slant is strongly anti-Western, has been infiltrated by terrorist elements. Remnants of Front Line, another Italian Terrorist group of Communist inspiration, entertains logistical/operational links with Direct Action and the Lebanese Armed Revolutionary Faction, two Paris-based terrorist formations known for their anti-American violent activism. All Red Brigades tracts and communiques of these years contain anti-NATO and anti-U.S. exhortations. The U.S. Embassy in Rome was the objective of a projected car-bomb attack by Lebanese terrorists. In addition, during the recent wave of anti-NATO "Euroterrorist" attacks throughout Western Europe, the language of the Red Brigades was adopted in the responsibility claims of non-Italian formations.

In the light of the specifically anti-American nature of ongoing terrorist activity in Italy and in consideration of the continuing influence of the Italian terrorist model, Senator Denton, chairman of the Subcommittee on Security and Terrorism, has asked that the Committee print this update to an earlier report, "Terrorism and Security: The Italian Experience," which covered the period 1968-1982. The original report and this update have been prepared by Dr. Vittorfranco S. Pisano, an internationally recognized expert on Italian terrorism. I believe this update report will be a useful resource in the Committee's efforts to study the problems of international terrorism as it impacts on our Nation.

STROM THURMOND,
Chairman, Committee on the Judiciary.

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TERRORISM IN ITALY: AN UPDATE REPORT, 1983-85

INTRODUCTION

The emergence, growth, and incipient decline of the Italian terrorist phenomenon between 1968 and 1982 were discussed in detail in an earlier report titled *Terrorism and Security: The Italian Experience*.¹ This supplementary report is intended to serve as an update and to provide an analysis of subsequent developments.

Reduced terrorist activity in 1983, 1984, and the first semester of 1985 confirms certain trends already discernible in the later stages of the period addressed in the previous study. There has in fact been a steady decline in the aggregate number of annual terrorist attacks and, to a degree, in the overall quality of terrorist operations.

Official statistics indicate that 421 terrorist incidents—including 2 murders and 16 woundings—were recorded in 1983, 339—including 6 murders and 11 woundings—in 1984, and 32—including 4 murders and 2 woundings—in January-April of 1985. Not included in these statistics are a few additional incidents of apparent terrorist nature but still under investigation. Among the latter, particularly serious was a train bombing perpetrated on December 23, 1984, which caused 15 deaths and 131 injuries.

Other trends of this period reflect continued dissidence within the terrorist fold as well as repeated failure on the part of all terrorist formations to operate as a force capable of uprooting or simply paralyzing democratic institutions. Moreover, these groups did not even fully recover from the unprecedented setbacks suffered throughout 1982 because of systematic law enforcement operations, timely intelligence collection, and the confessions of repentant or disassociated terrorists.

On the other hand, several indicators attest to the fact that terrorism continues to serve as a tool in the hands of organizations and groups—domestic and foreign—entertaining broader subversive designs. Despite the proven inadequacy of the “armed struggle” to bring about the collapse of the present system of government or to alter the country’s international political alignment, terrorist warfare is attracting a new generation of recruits. Likewise, seasoned veterans at large and in the prisons continue to believe in the validity of their battle. According to the Government, there are at large 295 identified terrorists of the left and 68 of the

¹ *Terrorism and Security: The Italian Experience*, Report of the Subcommittee on Security and Terrorism of the Committee on the Judiciary, U.S. Senate, 98th Cong., 2d sess., November 1984, Washington, DC.

right.² At the same time, the prison population includes approximately 1,250 terrorists of the left and 350 of the right.³

Other terrorists and extremists are combining political objectives with common crimes, including drug and arms trafficking. And, limitedly to elements of the leftist milieu, there has been a return to sophisticated situational analyses in terrorist resolutions and tracts.

Potentially more worrisome are still other developments. There is evidence of ongoing efforts to establish or reconstitute a broad support base through the exploitation of economic and social tensions and through the infiltration of ideological groups. While this applies primarily to the terrorist left, similar efforts are being made by elements of the terrorist right as well. A noteworthy target of this strategy is the pacifist movement. There is also evidence of an increasing process of internationalization, particularly with respect to leftist objectives and operations. Finally, the presence in Italy of transnational formations with specific anti-Western designs raises additional disquieting questions.

RED BRIGADES (BRIGATE ROSSE—BR)

Within the Communist or Marxist-Leninist ideological component of the Italian terrorist spectrum, the BR are the oldest surviving organization. Despite their reduced operational rhythm during the last 3 years, the BR still constitute the foremost terrorist menace. Before addressing their current operational/logistical structure and estimated personnel strength, it is worth focusing upon their recent actions.

The BR can be credited with three major operations, all of which were carried out in Rome at the rate of one per year.

THE GIUGNI CASE

On May 3, 1983, as he was heading for his office building at approximately 7:30 p.m., Gino Giugni, professor of labor law at the University of Rome, was called by name by a young couple on a motor-scooter. Giugni instinctively turned and was fired upon by the girl on the rear seat of the scooter. Three out of seven 9mm-long pistol rounds hit and wounded the victim. The couple on the scooter immediately fled.

Shortly after the shooting, a caller announced to the Roman daily *Il Messaggero*: "We have executed the pig Gino Giugni, a representative of the capitalist bourgeoisie. War on the social pact!" The caller concluded his message by identifying himself as a spokesman of the Communist Combatant Party, that is, the "militarist" faction of the BR. Giugni, who is hailed as the principal drafter of pro-labor legislation enacted in 1970 and referred to as the "Workers' Statute," had also contributed to the drafting of the recent economic agreement of January 22, 1983, on the cost of labor, which the BR consider exploitative of the proletariat.

² As reported by the President of the Council of Ministers to the Parliament on Feb. 7, 1985. See *Corriere della Sera*, Feb. 8, 1985, p. 2 (Milan).

³ Atti Parlamentari, Camera dei Deputati, IX Legislatura, *Relazione sulla Politica Informativa e della Sicurezza*, semestre 23 Maggio-22 Novembre 1984, presentata alla Presidenza l'11 Febbraio 1985, Nota Integrativa, 21 Marzo 1985, Roma, p. 45.

The BR telephone message is indicative of their intention to kill rather than wound. It has therefore been deduced that the young age, inexperience, and apparent nervousness of the assailants luckily turned this action into an abortive murder attempt. The following day Bruno Seghetti, one of the "unbent" BR members then on trial in Turin for other indictments, read a "proclamation" in court confirming the responsibility of the BR. He branded Giugni as "a man for all seasons" and defined the cost-of-labor agreement as "the most serious attack against the Workers' Statute, which Giugni himself had assisted in enacting." A written communique, which traditionally constitutes the formal and final BR responsibility claim, was subsequently issued in Rome. Also in keeping with standard BR procedure, it included a "resume" of the victim's career and reiterated the "reasons" behind the attack.

In addition to the BR's clear intent to enter the arena of capital-labor relations and affix thereto their typical revolutionary mark, the attack on Professor Giugni was planned to coincide with the electoral campaign leading to the parliamentary elections of June 1983.

THE HUNT CASE

On February 15, 1984, at approximately 6:30 p.m., a FIAT 128 with two males aboard blocked the chauffeur-driven armored sedan in which U.S. diplomat Leamon R. Hunt was returning to his Rome residence. One of the men got out of the vehicle and fired two or more bursts from a Soviet Kalashnikov assault rifle against the rear window of Hunt's sedan. One sole bullet hit and mortally wounded Hunt, whereas his driver was unhurt. The attackers fled the scene in a back-up vehicle driven by a third member of the commando group.

Hunt's demise took place in the hospital 2 hours later. He had been posted in Rome at the beginning of 1983 as Director General of the Multinational Force and Observers (MFO)—generally referred to as the Sinai peacekeeping force—with administrative headquarters in the Italian capital, pursuant to an agreement signed by Italy on June 12, 1982.

One hour after the incident, a caller telephoned a Milan private radio station, "Radio Popolare," claiming responsibility on behalf of the same BR faction that had wounded Professor Giugni. The telephone message stated: "The imperialist forces out of Lebanon! No to the missiles in Comiso! Italy out of NATO!" A second verbal claim was made the following morning in a Genoa court room, where other die-hard red brigadists were standing trial. The written paternity claim was produced 1 day later in Rome. This communique accused the Italian Government of spending on defense to the detriment of socioeconomic needs.

All too clearly, in this case the BR were addressing both domestic and international issues. Significantly, preparations were underway at the Sicilian installation of Comiso to host 112 Cruise missiles as part of NATO's modernized European theater nuclear force.

THE TARANTELLI CASE

On March 27, 1985, shortly before noon, Ezio Tarantelli, economist and professor at the University of Rome, was about to drive away from the University when two men approached his sedan on foot and one of them opened fire with a Scorpion submachinegun. Fifteen rounds hit the intended victim, who died instantly. Before fleeing, the killers attached to the windshield of Tarantelli's car BR Pamphlet No. 20, which is currently still subject to investigative secrecy in accordance with the rules of criminal procedure, as is the subsequent written responsibility claim. However, press accounts report that both documents attack the Government, the Employers Association (Confindustria), and the Italian Confederation of Free Labor Unions (CISL), because of their role in limiting the cost-of-living index clause over which a popular referendum was pending at the time of the assassination. Tarantelli himself was an economic advisor of CISL. Just as in the previous two cases, Tarantelli was targeted by the Combatant Communist Party or militarist faction of the BR.

The overall sophistication of these terrorist actions, which reflect an operational crescendo, is comparable to that repeatedly demonstrated by the BR in the course of analogous operations during the period 1977-1981.

The attacks on Giugni, Hunt, and Tarantelli were accompanied by secondary actions at violent and nonviolent levels. In some cases, however, conclusive evidence of BR paternity is limited. The following is a selective survey of what might be termed complementary BR activity during the same period.

BEHAVIOR IN COURT

On March 16, 1983, which marked the fifth anniversary of the BR abduction of the late Christian Democratic President and former Premier Aldo Moro, red brigadist Lauro Azzolini, on trial in Milan for other crimes, addressed the chief judge of the court and shouted: "Your Honor, we wish to remind you that today is March 16th and for us it is a great feast!" During the same hearing, red brigadist Flavio Amico yelled at the court: "I will be offended if I am not sentenced to life imprisonment just like the comrades in Genoa and in Rome." Still another defendant, Biancamelia Sivieri, defiantly told the chief judge: "Your Honor, I cannot look at you in the face, because you make me vomit."⁵ The following day, in a lighter vein, Azzolini attempted to recite before the same court a poem titled "Samson" and composed on a roll of toilet paper. During another trial in Turin on May 16, 1983, the prosecutor requested the chief judge to order the separation of male and female BR defendants in consideration of the fact that two of them were committing "obscene acts" in court.

ABORTIVE OPERATIONS AND BARGAINING

On May 18, 1983, at approximately 4 p.m., a State Police patrol foiled an armed robbery directed against a Rome post office. One

⁵ Statements reported in *La Repubblica*, Mar. 17, 1983, p. 11 (Rome).

red brigadist was immediately apprehended, another one fled, and the third barricaded himself in the postal facility with hostages. He finally surrendered more than 4 hours later, after being allowed to speak to an imprisoned fellow militant. The following day, the fugitive member of the commando—a young woman—turned herself in with the assistance of an attorney specialized in terrorist cases. The fact that the commando was part of the less organized “movementist”—as opposed to the militarist—faction of the BR may have had some bearing on the general outcome of this operation.

PRONOUNCEMENTS ON THE REVOLUTIONARY RECORD

On June 30, 1983, during the trial of the Turin BR “column,” defendant Francesco Piccioni of the militarist faction denied all responsibility for the trial-unrelated June murder of State Attorney Bruno Caccia, which had been followed by telephone claims in Turin and in Rome by self-styled BR spokesmen. Piccioni coldly told the Turin Court:

As militants of the BR and communist combatants we have amply demonstrated on very many occasions that we have no problems in claiming responsibility for actions carried out by our organization or in expressing our support for the practices of the revolutionary movement . . . Regrettably, we had nothing to do with the murder of the Chief Prosecutor of Turin.

Standard BR practices in fact corroborate Piccioni’s allegation.

DISENGAGEMENT AND RETALIATION

On the evening of December 14, 1984, the militarist faction attempted to rob a Metro Security Express armored van that was transporting the cash collected by two Roman supermarkets. In the ensuing fire engagement with private security guards, red brigadist Antonio Gustini was killed and his companion Cecilia Massaro was wounded together with two security guards and a bystander. The other members of the BR commando, one of whom had opened fire with a Kalashnikov assault rifle, retreated from the scene. The following month, on January 9, 1985, Ottavio Conte, a young policeman assigned to a SWAT-type unit of the State Police, was murdered in a telephone booth in Torvaianica, a beach resort near Rome. According to a telephone call allegedly issuing from the BR, this action was in retaliation for the death of Gustini. His demise had already been commemorated by “unbent” red brigadists on trial in Rome for other crimes and BR “punitive” actions had also been announced in Court. Yet conclusive evidence of BR responsibility is still lacking, since the modalities of Conte’s murder do not fully coincide with BR patterns.

The same consideration applies to a number of armed robberies that took place in the January 1983–June 1985 timeframe. If they are in fact the work of the BR, their perpetration was aimed at self-financing. It is also possible that some of these robberies are the joint work of disbanded red brigadists and common criminals. On the other hand, there is no knowledge whatsoever of BR-orga-

nized abductions during this period for either demonstrative or self-financing purposes.

A number of tentative conclusions may be drawn from the BR record of these years. Notwithstanding the cleavage between the "militarists," who consider themselves a revolutionary vanguard in the strictest Leninist sense of the term, and the "movementists," who favor greater revolutionary spontaneity and aim at immediate mass participation, BR tactics have not substantially changed. What suffered, instead, is the overall effectiveness of BR strategies.

At the same time, it is clear that the BR have attempted to cure—at least with partial success—the less than adequate compartmentalization of the past, which made it possible for repentant red brigadists to furnish to the police and to the judiciary information of capital importance thus crippling the BR organization at various hierarchical and geographical echelons. Indeed, between 1980 and 1983, these confessions, coupled with other law enforcement operations, had brought about the dismantling of broad strata of the BR structure.

The BR now appear to have achieved strict compartmentalization between the operational and logistical elements of their organization. In fact, post-1983 apprehensions of members of the support structure have not led to a substantive breach of the operational structure, which, in its turn, is now characterized by stricter internal compartmentalization. Moreover, new recruits increasingly tend to be part-time "irregulars" rather than full-time "regulars" as in the past and generally have a clean police record.⁶ While those observations more readily apply to the militarist faction, it should be noted that regardless of approach—militarist or movementist—the BR are fighting the same battle aimed at achieving the same Communist objectives.

Personnel estimates drawn up in Italian judicial circles—prosecutors and investigating judges—indicate that current BR strength includes at least 100 "regulars" and no less than 300 "irregulars."⁷ The former, as in the past, live in full clandestinity, while the latter combine the "armed struggle" with propaganda and other nonviolent revolutionary functions.

The strongest and most efficient unit remains the Rome "column," whose overall numerical composition is believed to include 120 elements.⁸ Significantly, a peripheral section of Rome, comprising several south-side neighborhoods, is generally referred to in the media as "BR-City."⁹ More difficult to assess in detail is the BR presence elsewhere in Italy and its organizational posture. Units of "column" or smaller size are reportedly located in Milan, Turin, Genoa, Naples, and the region of Tuscany. Moreover, considering the large number of red brigadists still at large and the proven acquisition of new recruits, the references in recent BR documents regarding the continuing existence of the "strategic direc-

⁶ Interviews granted to the media by key police officials, prosecutors, and investigating judges reflect a consensus regarding the restructured organization of the BR. See, for example, *Il Giornale Nuovo*, June 26, 1983 (Milan), *La Repubblica*, Feb. 8, 1984 (Rome), *L'Espresso*, Apr. 15, 1984 (Rome).

⁷ See *L'Espresso*, Apr. 7, 1985, p. 9 (Rome).

⁸ *Id.*

⁹ See, for example, *L'Espresso*, Apr. 14, 1985, pp. 24-26 (Rome).

torate" are theoretically credible. Evidence regarding an "external column" in France will be discussed under a subsequent heading.

Moreover, the record reflects that operational bases, logistical depots, and hideouts are available to the BR, together with suitable weaponry for urban guerrilla warfare, such as 38 cal. revolvers, 9 mm-long semiautomatic pistols, Scorpion submachine guns, and Kalashnikov assault rifles. To these material assets should be added the rather fertile, albeit misguided, minds who are capable of drafting detailed sociopolitical analyses such as Pamphlets No. 19 and 20 of March 1984 and March 1985, respectively, and other leaflets and communiques whose style is becoming more readable and always less delirious. As it will be seen below, these documents also unprecedentedly attempt to strike a balance between domestic and international issues.

FRONT LINE (PRIMA LINEA—PL) AND ORGANIZED COMRADES FOR PROLETARIAN LIBERATION (COMPAGNI ORGANIZZATI PER LA LIBERAZIONE PROLETARIA—COLP)

PL used to serve as an umbrella organization for a plurality of minor groups whose aims and dynamics were roughly comparable to those of the movementist faction of the BR. By 1981, PL had practically ceased to exist as a viable terrorist organization, even though some members of its affiliate formations were still at large and part of its apprehended militants remained politically active in the prisons and in the courtrooms. PL's loose structure and the insufficient Leninist revolutionary indoctrination of its members contributed to the organization's comparatively rapid downfall. In April of 1983, during the Bologna trial of high-ranking members of its leadership, PL officially announced its self-dissolution. Subsequently, during judicial proceedings in Turin, former PL leaders stated that their present problem was "how to participate in new movements and how to become the interlocutors of the classist left and of the Italian Communist Party." In essence they were expressing continuing commitment to old ideals through nonviolent means. To be sure, the number of repentant or disassociated PL members is considerable. During the last 2 years, many of them turned to religious and family values and—to the public's surprise—often managed to procreate despite their status as prison inmates.

Of the few surviving PL affiliations or offshoots, the COLP are the only ones that has attracted repeated attention. Although the circumstances leading to their emergency are not altogether clear, the COLP were reportedly formed at the start of this decade, possibly under a different name, by PL members Sergio Segio and Susanna Ronconi. Their initial objective was to free prison inmates still committed to the "armed struggle." By late 1983, additional COLP objectives included the reorganization of PL and the development of new models of "social guerrilla."¹⁰ Known COLP presence in Italy is circumscribed to the north of the country, but, together

¹⁰ For background information, see *II Messaggero*, Feb. 9, 1984, p. 17 (Rome), and *La Repubblica*, Oct. 15, 1983, p. 15 (Rome).

with other former PL militants, they constitute a principal element of the Italo-French terrorist connection.

MINOR COMMUNIST FORMATIONS

Minor formations active during this period—be they satellites of the BR, former affiliations of PL, or groups connected to the extremist and violence-prone extraparliamentary Autonomy—have generally limited themselves to the perpetration of negligible damage to property. The following are notable exceptions.

In the early afternoon hours of January 29, 1983, a terrorist commando group that subsequently claimed responsibility under the name of Armed Proletarian Power (*Potere Proletario Armato*) overpowered assistant warden Germana Stefanini in the lobby of her building and forced her into her apartment, where she was "tried" and "sentenced" under an impromptu red banner. She was then led to an isolated area, forced into the trunk of a stolen car, and "executed" with a pistol. Stefanini's task at Rome's Rebibbia Prison was to check packages addressed to the inmates. Police investigators later determined that the murderers were also after a colleague of the victim who lived in the same building. While being held captive in her apartment, Stefanini had been coerced to call her colleague from the window and invite her for a visit, but the latter excused herself because her son was feverish. Some members of the same commando group, who were in contact with the movementist faction of the BR at the time of Stefanini's murder, later joined the BR and participated in the abortive post office robbery and hostage situation reported above.

On January 2, 1984, bystander Stanislo Ceresio, an employee of the State Railroad Administration, was killed in Portici (Naples), when the automobile of prison guard Giuseppe Monteleone exploded. Responsibility for the car bombing was claimed by the Proletarians for Communism (*Proletari per il Comunismo*), a formation believed to be connected to the BR. Significantly, a training center for prison guards is located in the Municipality of Portici.

A potentially disastrous incident took place in the Rome subway on February 9, 1985. A bag containing incendiary bottles exploded at approximately 11:20 a.m. in an empty car of Line A and seriously damaged it. Had the explosion taken place a few minutes earlier or later, passengers would have been aboard the same subway train. A responsibility claim was issued by the Workers Brigades (*Brigate Operaie*).¹¹ News agency ANSA first received a telephone call and then a leaflet was delivered to the Roman daily *La Repubblica*. The leaflet stated:

This is not an act of violence, but an act of love against the daily exploitation of the labor force from the hinterland to the material places of its exploitation. This is not a protest, but a precise act of war.

¹¹ This group was heretofore unheard of in Rome, but a few terrorist actions had been perpetrated in Como in 1981 under that name.

A number of robberies that occurred during this period are also believed to be the work of minor terrorist formations in need of funds and equipment for their revolutionary purposes. One such example is the abortive armed robbery of a jewelry store in Bologna on December 14, 1984. A suspected female terrorist lost her life in this action.

WORKERS' AUTONOMY (AUTONOMIA OPERAIA—AUTOP) AND THE SUBSTRATA OF COMMUNIST TERRORISM

As opposed to its record of previous years, comparatively low-keyed has also been the role of AUTOP, whole communism-oriented activists are estimated by the Government to number "tens of thousands" and are concentrated in the key regions of Latium, Veneto, Lombardy, and Campania.¹² In keeping with its tradition, AUTOP continues to serve as a reservoir for terrorist recruitment and support and still espouses subversive causes or attempts to subvert ideological groups.

In recent years, AUTOP has been particularly active in demonstrating in favor of an amnesty and other clemency measures vis-a-vis terrorist militants in prison and at large. Its contribution to "pacifist" activism will be addressed below.

The most resounding developments of this period include the escape to France of Professor Antonio (Toni) Negri, AUTOP's foremost ideologue, and the conclusion of the Rome trial against key as well as less important AUTOP militants for crimes committed before 1979.

The Radical Party (Partito Radicale—PR)—a libertarian and left-leaning political party with limited representation in Parliament—decided to run Professor Negri on its slate for the June 1983 parliamentary elections. Negri, who at the time was being tried by the Court of Assizes of Rome, was nevertheless elected in all three districts in which he was a candidate and opted to represent his Milan constituents.¹³ While a certain percentage of the ballots cast in his favor is traceable to the PR's own electorate, Negri's election primarily constitutes a manifestation of AUTOP's political following as well as an indication of the numerical strength of circles close to the terrorist and/or extremist milieu. Negri obtained 13,521 votes in Milan, 26,389 in Rome, and 11,480 in Naples.¹⁴ The total clearly exceeds 50,000 votes. Negri's election to the Chamber of Deputies—the lower house of Italy's bicameral Parliament—made his release from prison mandatory. Before the Chamber of Deputies could strip him of parliamentary immunity (as it ultimately did) in order to return him to prison, Toni Negri fled to bordering France.

The Rome trial of the 71 AUTOP members indicted for various crimes ranging from armed insurrection to subversion, from abduction to murder, and from armed robbery to violations of the gun

¹² Supra note 3, p. 23.

¹³ Under Italian electoral law, a candidate may be included on a party slate in as many as three districts, but, if elected in more than one, the candidate must choose the district he/she wishes to represent.

¹⁴ Camera dei Deputati, IX Legislatura, Servizio Prerogative e Immunita, *Risultati Elettorali del 26 Giugno 1983*. Roma, pp. 44, 180, and 214.

laws continued without Negri's presence on the defendants' bench. The verdict was finally handed down on June 12, 1984: 57 defendants were convicted and 14 were acquitted. The only charge that the court did not uphold was armed insurrection. Negri himself was sentenced in absentia to a 30-year prison term. In its verdict, the court defined Negri as—

An individual who for a decade propagandized everywhere messages of hatred and violence and advocated the necessity to constitute an organization having a twofold program of aggression against the State: the incitement of the masses to [commit unlawful] appropriations, on one hand, and [the launching] of a vanguard attack, on the other.

The verdict also reads:

He was the instigator, the principal, the organizers of those choices that characterized a long season of violence.¹⁵

Despite the prosecution and conviction of its "historic" cadres, AUTOP remains a pole of aggregation for sundry leftist extremists, usually referred to as "autonomists," who would otherwise operate in groups of negligible strength and face virtual isolation.

VESTIGES OF ANARCHISM

At the end of April of 1983, the Italian Anarchist Federation (Federazione Anarchica Italiana—FAI) held its 16th National Congress in Reggio Emilia. It was attended by over 200 delegates from various Italian cities and by several observers primarily from Spain, France, West Germany, and Japan. The principal items on the agenda were "anti-militarism," "the nuclear issue," and "the struggle against repression." As it will be seen below, militant anarchists are an active and occasionally violent component of the pacifist movement. In September of 1984, an "international anarchist convention" was held in Venice to discuss "authoritarian trends and libertarian tensions in contemporary societies." But the most significant development at the symbolic level occurred in March of 1985 when the Municipal Council of Carrara authorized, by a bare majority vote, the erection of a monument to the memory of anarchist Gaetano Bresci, the assassin of King Umberto I at the beginning of the century. This anarchist project had previously been vetoed by the Municipal Council.

A definitive court decision is still pending with respect to a major terrorist action believed to have been perpetrated in unison by anarchist and rightist elements. The retrial—ordered by the supreme court—of anarchist Pietro Valpreda together with rightist extremists for a 1969 bank bombing in Milan, which caused 16 deaths and 90 injuries, began on December 12, 1984, before a Bari court. However, a recent incident is indicative of persistent tactics entailing anarchist presence in rightist circles. On May 8, 1985, a group of young anarchists posing as sympathizers of the Italian

¹⁵ *La Repubblica*, June 13, 1984, p. 6, and Apr. 17, 1985, p. 12 (Rome).

Social Movement (MSI)—a legal rightist party—worked their way directly under the MSI speakers' stand in Milan's principal square. When approached by alert policemen, who noticed that the anarchists were not applauding, five or six of them attempted to flee and accidentally dropped a concealed "Molotov cocktail." One was arrested and identified by the police as a notorious anarchist activist.

SEPARATISM AND TERRORIST VIOLENCE

Separatism continues to be an issue that occasionally leads to terrorist violence in the island of Sardinia as well as in the South Tyrolean portion of the Trentino-Alto Adige region, which borders with Austria.

SARDINIA

The intertwined elements of banditry, separatist aspirations, and leftist ideology are still present in Sardinian criminal and politically extremist circles. A noteworthy and somewhat emblematic development of the period January 1983–June 1985 is the emergence of the Sardinian Armed Movement (Movimento Armato Sardo—MAS).

MAS first appeared on the Sardinian scene in June of 1983 under the reputed leadership of former shepherd and common criminal Annino Mele, who underwent a process of politicization while on the run from justice and mastered leftist terrorist phraseology to the point of declaring himself a supporter of the "armed struggle." The announced MAS platform is indicative of three objectives: Sardinian independence, sale of military installations on the island to the highest bidder, and an insular economy based principally on tourism. At the same time, MAS called for the punishment of those who destroy or undermine "the morality, proper way of living, and noble traditions" of Sardinian society and warned that it would "restore justice" where abuses are not cured.

By the end of 1983, MAS had claimed responsibility for six murders—some of which preceded the emergence of MAS under that name—and one abduction for ransom. However, the murder victims were witnesses, or relatives of witnesses, who testified in court against common criminals. The proceeds from the abduction, on the other hand, were to be used "to purchase arms." Two additional kidnappings for ransom are believed to be the work of elements connected to MAS. Moreover, in July of 1984, MAS leader Mele abducted journalist Michele Tatti of the daily *Unione Sarda* for a few hours in order to "grant an interview," which turned out to be a monologue on the objectives of the organization and on Sardinian society.

Although the ultimate aims of MAS are viewed by both the judiciary and the police forces as predominantly criminal, MAS or other criminal bands that may adopt the MAS model are in fact influenced by a subversive and terrorism-oriented environment.¹⁶

¹⁶ The background of its reputed leader and the development of MAS are traceable in *La Repubblica*, May 8/9, 1983, p. 13, and July 8, 1983, p. 13 (Rome); *Europeo*, July 30, 1983, pp. 22-24

The potential menace of the MAS syndrome is attested to in the semiannual intelligence report submitted to the Parliament by the Prime Minister in February 1984.¹⁷

Other separatist developments in Sardinia reflect a more pronounced political matrix. On the morning of January 20, 1984, the Carabinieri arrested Salvatore Meloni, who runs a transportation business in Torralba (Orestano). Meloni is also a leading figure of the Sardinian Independentist Party (Partidu Indipendentista Sardu—PARIS). The PARIS acronym means "All Together" in the Sardinian language. PARIS came to light in the early days of January and immediately drew public attention because of its fund-raising campaign. PARIS circular letters delivered to Sardinian residents and nonresidents stated: "We ask one thousand lire [roughly 50 cents in U.S. currency] to support our battle. If we do not receive a reply, it will be o.k. just the same: We will know who our enemies are." PARIS' militants are reportedly former members of the most extreme wing of the Sardinian Action Party (Partito Sardo d'Azione Psd'Az).¹⁸

In a recent interview, Michele Columbu, the best known spokesman of Psd'Az, which is represented in both the Italian Parliament and the European Parliament, indicated that his party's intention is eventually to seek independence from Italy, but through legal means.¹⁹ In the last parliamentary elections—June 1983—the Psd'Az obtained 91,809 ballots and locally took fourth place among the 13 parties that ran candidates out of Sardinia.²⁰

Most recently, on May 18, 1985, a Cagliari court handed down a decision to the effect that between 1979 and 1981 a group of Sardinian extremists had plotted to wage guerrilla warfare on the island in order to bring about the separation of Sardinia from Italy. In addition to Meloni, whose separatist activities predate PARIS, and 15 other conspirators, the court sentenced to prison Bainzu Piliu, professor of chemistry at the University of Cagliari and president of the Sardinian Independentist Front (Fronte Indipendentista Sardo—FIS).

SOUTH TYROL

On September 9, 1984, Northern and Southern Tyroleans dressed in their ethnic costumes marched together in Innsbruck, Austria, to commemorate Tyrolean patriot and historical figure Andreas Hofer. The march/rally/ceremony included slogans and posters calling for the independence of South Tyrol from Italy. While such manifestations are mostly indicative of ethnic/nationalistic aspirations, three groups continue to be regarded as an actual or potential source of separatist violence in Trentino-Alto Adige:

(Milan); *Corriere della Sera*, Aug. 8, 1983, p. 5 (Milan); *La Repubblica*, Aug. 23, 1983, p. 12 (Rome); *L'Espresso*, Sept. 4, 1983, pp. 18-19 (Rome); *La Repubblica*, Jan. 12, 1984, p. 12 (Rome); and *Corriere della Sera*, July 31, 1984, p. 5 (Milan).

¹⁷ Atti Parlamentari, Camera dei Deputati, IX Legislatura, *Relazione sulla Politica Informativa e della Sicurezza*, semestre 23 Maggio-22 Novembre 1983, presentata alla Presidenza il 2 Febbraio 1984, Roma, p. 24.

¹⁸ See *Europeo*, Feb. 4, 1984, p. 24 (Milan).

¹⁹ See *Europeo*, July 7, 1984, pp. 107-108 (Milan).

²⁰ *Supra* note 14, p. 296.

(1) South Tyrolean terrorists of the 1960's who escaped to Austria;

(2) Austrian and German neo-Nazis who finance, organize, and coordinate propaganda and other forms of activism; and

(3) extremist members of the paramilitary Schuetzen (sharpshooters).²¹

Less than 4 months before the Innsbruck manifestation, South Tyrolean separatists Walter Gruber and Peter Paris had blown themselves up in Lena (Bolzano) on May 24, 1984, while handling explosives meant for a terrorist attack.²² Successful dynamite attacks were conducted in November of the same year against power lines and oil pipelines. Ensuing police investigations led to the issuance of 10 arrest warrants against South Tyroleans holding Italian citizenship and against Austrian citizens. Less violent episodes occurred in early 1985, including the hurling of red paint cans against an Italina World War I memorial in Bolzano.

For the time being, the most visible reaction of local Italian ethnics (some of whom resorted in the past to anti-Germanic retaliatory violence) has been the unusually large number of ballots cast in favor of the rightist and highly nationalistic Italian Social Movement (MSI) in the May 1985 municipal elections. In Bolzano, the MSI became the relative majority party with 22.58 percent of the vote.

TERRORISM OF THE RIGHT

This period has been characterized by court-room related developments pertaining to neo-Fascist or neo-Nazi terrorist crimes committed before 1983 by militants belonging to New Order (Ordine Nuovo), Black Order (Ordine Nero), the Armed Revolutionary Nuclei (Nuclei Armati Rivoluzionari—NAR), and less notorious formations. While various proceedings at the trial and appellate levels of jurisdiction resulted in the conviction of extremists responsible for individual murders and other selective acts of aggression, judicial efforts have shed no further light on the indiscriminate massacres of December 1969, May and August 1974, and August 1980, caused by the detonation of explosive devices and attributed to the terrorist right, but whose material perpetrators have yet to be identified.²³

²¹ See *Panorama*, Sept. 24, 1984, pp. 37-38. The connection between South Tyrolean ethnic extremists and neo-Nazi elements across the Brenner Pass is also indicated in the Italian Prime Minister's semiannual intelligence report, submitted in August 1984. See *Atti Parlamentari, Camera dei Deputati, IX Legislature, Relazione sulla Politica Informativa e della Sicurezza, semestre 23 Novembre 1983—22 Maggio 1984*, presentata alla Presidenza il 9 Agosto 1984, Roma, p. 32.

²² According to media reports, both men belonged to the Schuetzen. See *La Repubblica*, Nov. 11, 1984, p. 14 (Rome). Reportedly there are 5,000 Schuetzen organized into 138 companies.

²³ As mentioned in the discussion of anarchist-rightist ties, the retrial for the Milan massacre of December 1969 is now pending before an appellate court in Bari. A Venice court of appeals acquitted four neo-Fascists who had been convicted for the Brescia massacre of May 1974. Also acquitted by a Bologna appellate court were the rightist extremists previously convicted for the August 1974 massacre on the "Italicus" express train. The only development of relevance at the judicial level with respect to the Bologna massacre of August 1980 is the indictment of Gen. Pietro Musumeci, former deputy head of military intelligence (SISMI), and his assistant Pietro Belmonte. They are accused of fabricating false evidence in order to deviate ongoing investigations. The trial is currently being held in Rome. Accusations regarding connivance between the intelligence services and subversive or terrorist elements, particularly of the right, have contin-

Another massacre nearly occurred on August 10, 1983, at 11:43 p.m., when the detonation of an explosive device failed to blow up the railroad tracks in the proximity of Vernio. The intended target was the Milan-Palermo train with 1,000 passengers aboard. Only two machinists were slightly wounded by flying glass. Responsibility for the attack was claimed by telephone callers in the name of Black Order.

Operationally, NAR remains the most menacing rightist formation, though in no way comparable to the Red Brigades at the other end of the Italian terrorist spectrum. Following a period of apparently limited activity, NAR reacquired visibility in early 1985. NAR could be responsible for the arson of a Rome movie theater on January 12, where a meeting of the rightist but lawful Italian Social Movement (MSI) was planned for the following day. The MSI-NAR relationship is one of hostility. However, besides NAR, the leftist Anti-Fascist Territorial Groups (Gruppi Antifascisti Territoriali) also claimed responsibility for this action. Less equivocably, two NAR militants were killed in Alessandria on March 25, when their Turin-licensed car was stopped for a routine document check and the four occupants opened fire on the police. They were transporting weapons, identification cards, documents, police-type equipment, and an air force uniform. On May 1, two presumable NAR members feigned a car breakdown on the Rome-L'Aquila highway. As a patrol car pulled over to offer assistance, the two terrorists fired on the patrolmen killing one—Giovanni Di Leonardo—and disabling the other—Pierluigi Turgioni. The terrorists then fled with the submachineguns and service pistols of the policemen. Investigators are also taking into consideration the possibility that NAR may be responsible for the above-reported attack on State Police SWAT-team member Ottavio Conte, whose murder was claimed by the Red Brigades as well as NAR.

Other rightist terrorists, having no precise organizational affiliation, also made the headlines during the period covered by this update report. On July 3, 1984, Rodolfo Crovace, whose curriculum includes violent rightist extremism and drug trafficking, was killed by the Carabinieri as he resisted arrest with two handguns. In December 1984/January 1985, a cluster of nighttime incendiary attacks took place in Roman secondary schools. The attackers left behind wall inscriptions extolling New Order and NAR. The early months of 1985 have likewise been marred by the emergence of so-called Fasces-bars frequented by motorcycle-riding vandals. Their language and symbols are borrowed from Nordic mythology and Nazi heraldry and their behavior reflects racial intolerance.

Nordic themes and Nazism accompanied by misguided moral fervor constitute the presumable motivation behind a series of bizarre murders whose disquieting implications came to light only in 1983. By February of that year, 8 to 10 murders perpetrated since August of 1972 had been attributed to, or claimed by, a group that operates under the name of Ludwig. The victims were stabbed, burned, or assaulted with a hammer and a hatchet. All of them

ually been made in the press and political circles since the late 1960's; however, those allegations have not been corroborated to date by judicial findings. For statistical details on the above-mentioned four massacres see *supra* note 1, p. 86.

were either social deviants—gypsies, drug addicts, homosexuals, and prostitutes—or “unworthy” clergymen. These targetings took place in the Veneto region or in the municipality of Trento.

In May of 1983, Ludwig extended its sphere of action. It claimed responsibility for the burning of Milan movie theater “Eros” and consequential death of six spectators. Responsibility claims were also issued by Ludwig for the arson of two porno centers in Amsterdam and Munich in December 1983 and January 1984, respectively. The responsibility claims for individual actions or clusters of actions have consistently been written in runes, a Gothic script, and bear a Nazi eagle. In each instance, the message provided details regarding the material perpetration of the crime and ended with the salutation “Gott mit Uns.”

On March 4, 1984, the Carabinieri arrested two young Verona residents and former classmates with a rightist background: Italian national Marco Furlan and German national Wolfgang Abel. They were immediately charged with the attempted arson of a Mantova disco and are currently under investigation for the other Ludwig-related crimes. A book found in Abel’s Munich apartment narrates the preachings of Brother Ludwig, a fanatic follower of St. Francis of Assisi. Certain underlined passages could be the clue behind the Ludwig denomination. Although no further attacks have followed these arrests, written messages ostensibly issued by the Ludwig sect announced future actions. The investigators are reportedly searching for accomplices of the two suspects.

The most recent trends of rightist terrorism are schematically described in the last semiannual intelligence report of the Prime Minister, which is a “sanitized” version of broader findings by the Italian intelligence and security services. It points to continuing linkages between rightist extremists and common criminals. It attests to the ideological influence of the dissolved Black Order and National Vanguard (Avanguardia Nazionale) on more recent formations. It specifically notes the “cross-over” of militants from one formation to another or even their simultaneous presence in various rightist formations with discordant platforms. It detects reorganizational efforts on the part of NAR, particularly in Rome and in the Veneto region. It voices concern over the interest that rightist elements are displaying for Islamic extremism and views this development as a potential source of linkage between rightist and leftist groups.²⁴ An earlier semiannual intelligence report indicated unprecedented availability on the part of the terrorist left to cooperate with the terrorist right.²⁵

INFILTRATION OF THE PACIFIST MOVEMENT

The Italian pacifist movement, whose origins are traceable to the “Cold War” years, resurfaced en masse after the Government decided to support NATO’s resolution of December 12, 1979, to modernize the European theater nuclear force (TNF) in response to the deployment of the Soviet SS-20 missile. Subsequent Italian decisions pertaining to defense and foreign policy have likewise met or-

²⁴ Supra note 3, pp. 26-29.

²⁵ Supra note 17, p. 29.

ganized pacifist opposition.²⁶ The exploitability of the pacifist issue for subversive and violent purposes gradually attracted the attention of extremist and terrorist organizations whose long-range political aims are Marxist-Leninist, anarchist, or separatist. In fact, the nature, composition, and dynamics of the Italian pacifist movement facilitate exploitation and infiltration.

Italy's peace movement is made up of two principal components. One is inspired by Marxist/radical ideologies. The other is inspired by Christian/liberal ones. However, within each of these components there are marked differences not only in political platforms, but also in the pacifist approach itself. Each component draws additional support from unaffiliated elements—groups as well as individuals—who believe in the pacifist cause and express their pacifist commitment through the structures and activities organized by the parties and/or entities that are part of those components. Supportive nonaffiliated elements include conscientious objectors, ecologists, antinuclear energy activists, intellectuals, and idealists.

On the Marxist/radical side of the pacifist spectrum, the principal actors are the Italian Communist Party (PCI), remnants of the self-dissolved Democratic Party of Proletarian Unity (PDUP), Proletarian Democracy (DP), the Radical Party (RP), the League for Unilateral Disarmament, and Struggle for Peace. On the Christian/liberal side, the principal actors are the Christian Associations of Italian Workers (ACLI), Pax Christi, the Reconciliation Movement, Christians for Socialism, and Christians for Dissent.

The most significant role in the overall deployment of the pacifist forces is played by the PCI, Italy's second largest party, whose organizational capability and capillary structures constitute the backbone of the pacifist movement. As opposed to PDUP, DP, and PR, all of which advocate unilateral disarmament, the PCI favors East-West negotiations for the reduction and ultimate elimination of nuclear armaments, but simultaneously opposes the deployment of the Cruise and Pershing II missiles in Western Europe, despite current Soviet nuclear superiority in the European theater.²⁷ In

²⁶ TNF modernization entails, inter alia, the deployment of 112 Cruise missiles in Italy. The selection of the Sicilian town of Comiso as the pertinent missile site was made by the Italian Government on Aug. 7, 1981. Initial missile deployment in Comiso began in 1984. Sixteen missiles are reportedly in place at this writing. In accordance with other innovative governmental decisions of this period, Italian military contingents have taken part in the United Nations Interim Forces in Lebanon (UNIFIL) since July 26, 1979; in the multinational peace-keeping force in Lebanon from Aug. 26 to Sept. 12, 1982, and from Sept. 26, 1982, to Feb. 26, 1984; in the Multinational Force and Observers (MFO)—whose administrative headquarters are Rome-based—since Apr. 25, 1982; and in the multinational minesweeping operations in the Red Sea from Aug. 22 to Oct. 7, 1984.

²⁷ The following statement, widely circulated by the PCI during the June 1983 parliamentary elections campaign, reflects its nuanced stance which is ultimately nonsupportive of NATO:

"Do you prefer the rearmament race, with its attendant and ever-increasing danger of war, or the gradual reduction of armaments and the resumption of detente? It is a well known fact that Italian policy has opted for rearmament. Our government, chaired by the Christian Democratic Party and supported by a five-party coalition, was the first one in Europe to say yes to the Euro-missiles and, in 1983, it appropriated 12 thousand billion lire for armaments. But do you really want Italy to become an atomic target? Or are you in agreement with us in wanting: First, the interruption of the works at the Comiso base. Second, even if an agreement is not reached in Geneva within 1983, the continuation of negotiations without installing the missiles. Third, simultaneously with an adequate reduction of the missiles in the USSR, the non-installation of the American missiles in Western Europe. Fourth, the dynamic commitment, with a genuine will toward a freeze of all nuclear armaments in the world, to commence a real reduction. This is because there are neither good bombs nor bad bombs: they are all terrible. On June 26, you can vote for a rearmament policy or for a peace policy. If you want peace, vote PCI. And remember: he who does not vote is silent. And he who is silent consents to rearmament."

essence, the PCI calls for negotiations with the U.S.S.R. from a position of Western weakness.²⁸

Noteworthy because of its unequivocal pro-Soviet alignment is the aforementioned Struggle for Peace (*Lotta per la Pace*). It was founded by retired Air Force General and former PCI Senator Nino Pasti. This organization is an affiliate of the Soviet-run World Peace Council. According to Pasti, Soviet armaments are merely defensive, whereas the objective of NATO is the military elimination of world communism.²⁹

The organizations and groups that make up the Christian/liberal component of the pacifist movement are frequently motivated by spiritual values intermingled with leftist earthy objectives. Their policies generally favor cooperation with Marxist or Marxist-oriented parties and formations in the interest of humanitarian goals.

Clearly, Italian pacifist activism constitutes a movement rather than a tight organization. Since its structures are loose, the movement must rely upon cooperation among groups whose ultimate aims are not homogeneous. While each organization or group preserves at least formal autonomy, it individually lacks, with the exception of the PCI, the potential for mass mobilization.

To counterbalance its organizational weakness, the pacifist movement has adopted a pyramidal structure consisting of a "national coordination" committee, "regional coordination" committees in each of Italy's 20 regions, and hundreds of local committees at the municipal level. Nevertheless, while this loose structure enables the movement to plan and conduct a variety of pacifist demonstrations through joint efforts, it falls short of providing sufficient facilities and funds. This problem is largely solved by relying on the capillary structures of the PCI, its youth organization (FGCI), its affiliated labor union (CGIL), PCI-run and PCI relative-majority municipalities,³⁰ and the Italian Recreational and Cultural Association (ARCI). ARCI's president and the majority of its 1,300,000 members are also PCI members or sympathizers. Moreover, ARCI, which has 14,000 clubs throughout the country and a 20,000-member affiliation known as the Environmental League, is endowed with a suitable budget largely derivable from its multifaceted role in the entertainment field.

Pacifist manifestations in Italy take on various forms of expression, the majority of which are adopted from the experience of the German "Greens" and adroitly adapted to the Italian scene.

The basic and intrinsically dynamic form of pacifist expression is the march (or converging marches) followed by a rally. Alternative techniques include "human chains" to symbolize solidarity and

²⁸ Since the mid-1970's the PCI has officially discarded its preclusions against NATO, albeit in equivocal language. Yet, it generally continues to side with USSR over foreign policy issues. Worthy of note is the position of the rank-and-file vis-a-vis NATO. PCI provincial congresses held in early 1983 reflect that the opposition and "abstention" vote of the rank-and-file regarding Italian participation in NATO reached in many cases the 30-percent and above, for example, 30 percent in Brescia and Turin; 35 percent in Trieste, Massa-Carrara, Imperia, and Brindisi; 38 percent in Caserta and Catanzaro; 40 percent in Prato; 47 percent in Bari; 49 percent in Salerno and Cosenza; 51 percent in Reggio-Calabria; 52 percent in Lucca; 55 percent in Chieti; and 65 percent in Viterbo. Obviously the official party stance does not always take precedence over the traditional values of the rank-and-file.

²⁹ See *L'Espresso*, Oct. 4, 1981, p. 12 (Rome).

³⁰ In 1983, out of approximately 8,000 municipalities, 384 were PCI run and 1,579 had a PCI relative majority.

"die-ins," to dramatize the effects of war. Marches and rallies make extensive use of changed political slogans.

These slogans are a recurrent indicator of the anti-American and anti-Western feelings of many participants. The following examples lose their rhyme effect in the English translation, but are nevertheless to the point: "Reagan, mind your business; go back to the movie screen to play cowboy!"; "Reagan, stick a missile up your rear: a flower will sprout from your mouth!"; "Reagan, you moron, withdraw the neutron bomb!"; "Reagan, pistol and bomb wielder, you will be the only one to shoot!"; "The only nuclear head we like is Reagan's head against the wall!"; "It's enough to chase away the servants of CIA: peace is not Utopia!"; "Red Italy! Reagan in a ditch!"; "From Sicily to Lombardy, one shout: Americans go away!"; and "Italy out of NATO!"

In concomitance with the march rally techniques, pacifist activists frequently organize unofficial referendums as a form of moral suasion. Some of these address armaments in general. Others are concerned with specific local issues such as nuclear energy plants or firing ranges.

The pacifist movement can also count on "de-nuclearized municipalities," including Bologna (Emilia-Romagna), Leghorn (Tuscany), and Vittoria (near Comiso, Sicily). These are nothing other than PCI-run or PCI-relative majority townships, where the local municipal council has the numerical strength to pass resolutions—obviously not binding on the central government in Rome—to the effect that nuclear armaments and munitions are unwanted in the municipality. In addition to the statement of principle inherent in such resolutions and their propaganda value, these municipal governments provide support and logistical structures for pacifist activities, for example, headquarters for the various coordination committees, mailing addresses having an ostensible character of officiality and premises for conferences, exhibits, films, and the like.

Out-door and in-door manifestations are supplemented by writings directly published by the activist groups themselves or elsewhere in the press. The most elaborate effort of this nature is a book put out in 1983 by the Radical Party through its Research Institute for Disarmament, Development, and Peace (IRDISP). Polemically titled "What the Russians Already Know and the Italians Must Not Know," this publication lists—by region, province, and municipality—NATO, U.S., and Italian installations on the peninsula and the islands of Sicily and Sardinia. The argument of its authors is that these military forces and facilities serve only the purpose of rendering Italy a target for multiple devastation, while, on account of their cost, they foreclose the possibility of developing needed civilian structures and services.³¹

Although the pacifist protest is primarily directed against nuclear armaments in Italy—the so called Euromissiles—a number of other issues have been and/or still are the target of pacifist activism. They include Italian participation in the multinational peace-keeping forces in Lebanon (1982–1984) and in the minesweeping operation in the Red Sea (1984), the presence of U.S. military forces

³¹ IRDISP, *Quello che i Russi già Sanno e gli Italiani non Devono Sapere*, Rome, 1983.

in Italy, Italian arms sales on the world market, military-service related accidents, the safety of commercial air travel vis-a-vis military aircraft, conscientious objection, the alleged disproportion of the defense budget, and even the yearly military parade in the center of Rome to celebrate the anniversary of the proclamation of the Republic.

The plurality of issues pacifism addresses, the variety of social groups pacifist issues attract, the latent anti-Western state of mind of the pacifist activists, and the aggregative looseness of the pacifist structure unquestionably make the pacifist movement a fertile ground for extremist and even terrorist infiltration and agitation.

The Prime Minister, on the basis of information provided by the intelligence and security services, first expressed this concern in the semiannual intelligence report submitted to the Parliament on July 5, 1983.³² In the subsequent report, submitted on February 2, 1984, the Prime Minister referred to "increasing pseudo-pacifist and anti-militarist activities with clear anti-NATO connotations."³³ The next report, submitted on August 9, 1984, addressed the "ferment [within] pacifist, anti-militarist, and anti-nuclear movements . . . by extremist groups in connection with mass demonstrations."³⁴ Moreover, that report attests to the presence of "provocateurs." The most recent one, submitted on February 11, 1985, reiterates the same dangers and, in the context of the anti-NATO and anti-Western wave of terrorist attacks perpetrated in Europe during the pertinent semester, the report recalls related Red Brigades goals.³⁵

The schematic information presented in the semiannual intelligence reports is corroborated by other open-source data relative to the degenerative phenomena that occur in the course of pacifist militancy. Such phenomena are most frequently detectable in Comiso, the very fulcrum of pacifist agitation in Italy. Demonstrations in front of the gates of the missile site regularly entail "sit ins" aimed at blocking military and military-related transit in order to disrupt military operations. This form of "passive resistance" and "civil disobedience" has from time to time given way to threats and violence. For example, in August of 1983, a group of "pacifists" paint-sprayed on the security police vehicles the words: "We will kill you all." In November of the same year, a policeman who attempted to prevent the recurrence of such conduct was physically attacked. On other occasions, police car tires were slashed.

Moreover, the pacifist militants have purchased through an alleged public subscription three tracts of land, two of which border with the Comiso missile installation. They are called "The Green Vineyard," "International Meeting Against Cruise—(IMAC)," and "Cobweb" and were reportedly bought for Lit. 37 million, 12 million, and 35 million, respectively.³⁶ IMAC's "staff" includes anar-

³² Atti Parlamentari, Camera dei Deputati, VIII Legislatura, *Relazione sulla Politica Informatica e della Sicurezza*, semestre 23 Novembre-22 Maggio 1983, presentata alla Presidenza il 5 Luglio 1983, Roma, p. 27.

³³ Supra note 17, p. 42.

³⁴ Atti Parlamentari, supra note 21, p. 32.

³⁵ Supra note 3, p. 21.

³⁶ See *Corriere della Sera*, Nov. 14, 1983, p. 2 (Milan).

chist elements. The twofold purpose of these "camps" is to serve as pacifist centers and living quarters for permanent or rotating groups and as staging areas for clandestine penetrations into the missile site. These raids are conducted for sketching purposes—as demonstrated by repeated arrests followed by charges of espionage—or for demonstrative slogan-writing within the installation. The most representative raid occurred during the night between Good Friday and Holy Saturday of 1984, when two women from the "The Cobweb" camp negotiated the protective fence and subsequently spray-painted slogans on the installation's water tower and 23 military vehicles.³⁷ Another significant incident was reported on January 15, 1985. According to the press, a detailed map of the installation was found in a Comiso post office together with a letter addressed to London's *New Statesman*.³⁸

A substantive portion of the agitation in Comiso is coordinated by the Unitary Committee for Disarmament and Peace (CUDIP), headed by Giacomo Cagnes, formerly the Communist mayor of Comiso. The presence in CUDIP of members of Workers' Autonomy (AUTOP), whose preferential relationship with the leftist terrorist fold was discussed above, has been confirmed by Cagnes himself.³⁹

Unlawful tactics in conjunction with pacifist activities are not limited to Comiso. One such tactic is called "fiscal objection" and is practiced in various areas of the country. It is nothing other than the refusal to pay a percentage of the personal income tax equal to the defense-spending percentage of the national budget. This practice falls right in line with AUTOP's rent and utility bills "proletarian reduction." As of November 1983, there were 1,649 cases of "fiscal objection" on record, as opposed to 419 during the previous year. Reportedly, fiscal objectors include three Members of Parliament—Gianluigi Melega and Roberto Ciccimessere of PR and Mario Capanna of DP—as well as Bishop Luigi Bettazzi, president of Pax Christi.⁴⁰ Another initiative in support of conscientious objection is aimed at organizing disobedience and sabotage in the armed forces by draftees. Although conceptualized by Catholic pacifists, it parallels the activities of the Proletarians in Uniform (PID) of the early 1970's, that is, groups of Marxist-Leninist agitators within the military establishment.

Moreover, during pacifist marches and demonstrations, AUTOP participants resort to tactics generally ranging from disturbance of the peace to acts of vandalism. However, AUTOP elements have also set off, within the timeframe of planned pacifist manifestations, detonations of explosive against more or less representative targets. Two incidents of this nature are particularly serious. On September 10, 1983, a group called New Armed Partisans for Communism damaged with five explosive charges a national television transmitter in Trent and caused a blackout. A responsibility leaflet dropped off at the site of the incident states in part:

Against the disinformation of national radio-television,
against those who prepare war and the armaments

³⁷ See *L'Espresso*, Aug. 12, 1984, pp. 7-8 (Rome).

³⁸ See *Corriere della Sera*, Jan. 15, 1985, p. 5 (Milan).

³⁹ See *Panorama*, Nov. 7, 1983, p. 62 (Milan).

⁴⁰ See *Europeo*, Sept. 10, 1983, p. 26 (Milan).

re... against dismissals and unemployment; for the mobilization of the masses, for the proletarian cause, from Trent to Sicily, resistance now and forever.

The second one took place Rome on July 27, 1984, when a group that claimed responsibility under the name of Communists Struggling Against Imperialism and Armaments bombed the residence of Leonetto De Leon, Italian editor of *NATO News*. His wife and son were injured. This heretofore unheard of terrorist formation is believed to be an offshoot of AUTOP.

During the period January 1983-June 1985, there has also been an increased and more dynamic interest in the pacifist issue on the part of the Red Brigades (BR). In *Politics and Revolution (Politica e Rivoluzione)*, a book authored by imprisoned and unbent red brigadists Prospero Gallinari, Bruno Seghetti, Francesco Piccioni, and Andrea Coi, "the movements against war, the deployment of the missiles and nuclear [energy], and even the ecology [movements]" are defined as "an ensemble of proletarian antagonism." The authors propose "liaison between combatant initiative and these mass movements."⁴¹ Moreover, virtually all BR writings of this period include, as a minimum, anti-NATO and anti-"Euromissiles" statements, as most dramatically exemplified by the communique issued after Mr. Hunt's assassination.

Finally, pacifist ferment in Sardinia has had a contagious effect on the island's separatist extremists. In January 1984, the above discussed Sardinian Independentist Party (PARIS) demanded from the U.S. Government a payment of \$5 billion as rear rent for the submarine base at La Maddalena. It remains to be seen whether this demand will be followed by terrorist attacks. As it is, the independentist platform excludes the NATO presence.

Most difficult to assess is the numerical strength of full-time infiltrators within the pacifist movement, as opposed to the thousands of AUTOP extremists and the hundreds of anarchists available for the exploitation of pacifist initiatives. An official indication of the number of full timers dates back to September 1984. At that time, the Prime Minister reported to the parliamentary intelligence oversight committee that 70 suspected terrorists and supporting elements were active in the anti-nuclear, anti-militarist, and pacifist organizations.⁴² The presence of foreign activists and/or agents of foreign governments in the Italian pacifist movement will be addressed under the next heading.

INTERNATIONALIZATION OF ITALIAN TERRORISM AND THE FRENCH CONNECTION

The period January 1983-June 1985 has been marked by increased concern over the internationalization of Italian terrorism, one of whose principal aspects is the so-called French connection. However, the matter of international linkages or even patron state support is not an altogether new development.⁴³ In fact, pre-1983

⁴¹ Quoted in *L'Espresso*, Sept. 16, 1984, p. 8 (Rome).

⁴² See *La Repubblica*, Sept. 11, 1984, p. 7 (Rome).

⁴³ *Supra* note 1, particularly pp. 28-35, 38, and 40-41.

circumstantial and testimonial evidence relative thereto has been corroborated and/or expanded upon in a confidential report prepared by the Executive Committee on the Intelligence and Security Services (CESIS) on March 31, 1983, under the title of "International Implications of Terrorism,"⁴⁴ and subsequently declassified by a parliamentary committee responsible for holding hearings on the abduction and murder of Aldo Moro (1978) and, more generally, on terrorism in Italy.

That report deserves careful examination for a better understanding of significant precedents and their bearing upon the time-frame covered by this update. The following is a summary of the salient portions of the declassified intelligence report.

THE PALESTINIAN CONNECTION

Immediately after Moro's abduction, Mario Moretti of the Red Brigades (BR) was contacted by representatives of Hyperion, "a Paris structure under the cover of a language school which was to coordinate—apparently under the direction of the Soviet KGB, as stated by several repentant terrorists—the operations of various subversive groups in Europe: IRA, ETA, NAPAP, RAF."⁴⁵ Moretti accepted Hyperion's proposal to lend international scope to the BR and was then introduced to a Paris-based representative of the PLO's Marxist minority faction.

As a result of this and subsequent meetings, the BR acquired from the PLO two shipments of weapons. The first was introduced into Italy through a French-Italian mountain pass toward the end of 1978, while the second was made available to the BR in Cyprus and brought to Italy in the summer of 1979. As opposed to the first, which included both East and West European weapons, the second shipment consisted exclusively of West European ones. Some of these weapons were distributed among the various BR "columns" and at least one—a Kalashnikov rifle—was given to, and used by, the Sardinian separatist and BR-connected Red Barbagia (Barbagia Rossa).

Other aspects of the PLO-BR agreements encompassed assistance to the BR abroad, including Paris and Angola, and access to training camps in Lebanon. In return, the BR would store in Italy part of the furnished weapons for future PLO use and would conduct or coordinate, upon request, attacks against Israeli and Jewish targets in Italy on behalf of the PLO. The intelligence report notes that at the beginning of 1982, Soviet-made weapons wrapped in Arabic-language newspapers were discovered in a BR storage facility in Montello near Treviso. Moreover, when red brigadist Bruno Seghetti was captured in May 1980, he was in possession of an English-language note with the Rome address of the Israeli Ambassador and military attaché. Interestingly enough, Seghetti was not familiar with the English language.

⁴⁴ CESIS, "Implicazioni Internazionali del Terrorismo" in Senato della Repubblica—Camera dei Deputati, VIII Legislatura, *Relazioni di Minoranza della Commissione Parlamentare d'inchiesta sulla Strage di Via Fani sul Sequestro e l'Assassinio di Aldo Moro e sul Terrorismo in Italia*, Roma, 1983, Doc. XXII, No. 5, Volume Secondo, pp. 369-396.

⁴⁵ *Id.*, p. 379.

Leftist terrorist formations, other than the BR, also entertained Palestinian contacts through former "autonomist" Maurizio Folini, who, in July-August 1978, brought from Lebanon to Italy a boat-cargo of East-European weapons. Though not originally intended for the Italian terrorist left, these weapons were ceded with Soviet consent. Folini, who was accompanied by a militant of the Communist Revolutionary Committees (Comitati Comunisti Rivoluzionari—CO.CO.RI), enjoyed freedom of movement in Lebanon and Syria because of his Palestinian contacts. Moreover, a number of repentant terrorists believed that he was a KGB agent.

THE EAST EUROPEAN CONNECTION

In addition to the Hyperion-KGB connection referred to above, the report briefly addresses or corroborates more direct linkages between Italian extremists/terrorists and Eastern Europe. These include, *inter alia*, the contacts of Giangiacomo Feltrinelli—the leftist revolutionary ideologue and publisher who accidentally blew himself up in 1972—with the intelligence services of the U.S.S.R. and Czechoslovakia; the presence in Czechoslovakia from 1973 to 1974 of BR fugitives Peili and Franceschini; a list of Italians who underwent political and terrorism training in the U.S.S.R., Czechoslovakia, Cuba, and Albania up to 1978; and a contribution of Lit. 70 million to Workers' Autonomy (AUTOP) in 1979 from Czechoslovakia through the automobile manufacturing firm SKODA.

Still, according to the intelligence report, the testimony of repentant terrorists—Savasta, Cianfanelli, Peci, Rossana Mangiameli, Pietro Mutti, and Gino Aldi—refers to close relations, particularly with respect to the supply of weapons, between the Soviet and Bulgarian intelligence services, on one hand, and minor Italian terrorist formations, on the other, long before 1981—the year that the BR made contact with the Bulgarian intelligence services through a cousin of red brigadist Loris Scricciolo. However, the BR-Bulgarian connection is deemed to have been of short duration because of the public disclosure of revelations concerning the attempt on the life of Pope John Paul II and the abduction of General James L. Dozier.

The report concludes this heading by referring to a document authored by Giovanni Senzani—the reputed leader of the movementist faction of the BR—and seized at the time of his arrest in January 1982. It reflects Senzani's belief that the KGB was "in a position to pilot the activity of the major European and Palestinian terrorist organizations for anti-Western purposes." Moreover, in Senzani's view, the KGB could "manipulate simultaneously groups of the extreme right and of the extreme left" and "had planted its agents in the militarist faction of the BR."⁴⁶ The intelligence report comments that apart from any assessment of Senzani's conclusions, the fact remains that he held a "privileged" position in the clandestine terrorist milieu.

⁴⁶ *Supra* note 44, pp. 385-386.

THE FRENCH CONNECTION

The report once again refers to the aforementioned Hyperion. It lists two of its principal representatives—Swiss-born Francoise Tusher and Italian-born Corrado Simioni (the latter “recruited by the KGB in Paris”⁴⁷)—as promoters of the International Center for Popular Culture with offices at 14 Rue de Nanteuil, Paris, which remained through 1982 the principal point of contact between European and Palestinian terrorist groups and Italian militants of the BR, Front Line (PL), the Communist Combat Units (Unità Combattenti Comuniste—UCC), and AUTOP. Thereafter, it served as a meeting point for Armenian, Palestinian, Irish, and Italian extremists. Another Paris-based support network for Italian terrorist fugitives was the Unitary Collective for the Liberation of Political Prisoners.

According to the report, Gloria Cesari Grunbaum, a Roman-born French citizen by marriage, a former member of the Italian extremist organization Ongoing Struggle (Lotta Continua), a resident of France since 1975, and an active participant in said Unitary Collective, is suspected of providing liaison for Italian terrorists in Italy and France. Grunbaum’s presence was also noted in the International Center for Expanded Space for Freedom (CINEL), a satellite of the Soviet-run World Peace Council and of the Henri Curiel network of Paris. At the time of his arrest, PL member Marco Donat Cattin was in the company of Grunbaum.

The report finally lists the front organizations and clandestine groups with which AUTOP ideologue Toni Negri has been associated in France: CINEL, Hyperion, Autonomous Coordination, NAPAP, and the former Center for Socio-Economic Research and Investigations (CRISE).

Although these precedents covered by the intelligence report are by no means negligible, they are not comparable to the systematic rhythm of domestic activity carried out by Italian terrorist formations of the left from 1968 through 1982. To be sure, the BR in particular had repeatedly addressed international issues in their writings and, with the abduction of General Dozier in 1981, had dynamically stepped into the international arena. Yet, the internationalization of Italian terrorism—or its substantive beginning—appears to be a more recent development.

In discussing the Italian pacifist movement, it was already noted that the themes addressed violently and nonviolently by the BR, AUTOP, the anarchists, and other extremist formations are clearly international in their anti-NATO and anti-Western connotations. Moreover, all major documents—pamphlets and communiques—issued by the BR since 1983 make at least some reference to international matters even when they essentially deal with domestic affairs. A macroscopic example of this tendency is provided by Pamphlet No. 19 of March 1984, which covers in 60 pages Italian economic, social, and political affairs, but ends with the exhortation:

Against warmongering foreign policy: Withdrawal of all troops from the Middle East! No to the missiles in Comiso!

⁴⁷ Supra note 44, p. 387.

Italy out of NATO! Get rid of the Craxi [Italy's Prime Minister] government, servant of the bosses and of imperialism!

In Pamphlet No. 20 of the following year, the BR attribute to themselves a leading role in the European "anti-imperialist struggle."⁴⁸

Likewise, international references appear in all three communiqués issued by the BR as responsibility claims after the attacks on Giugni, Hunt, and Tarantelli. But the action against Hunt is the most indicative of the internationalization process at various levels. The victim was substantially unrelated to either Italy or NATO. Moreover, the communique addressed a broad range of foreign issues, including Western "imperialism" in the Third World. Finally, the murder was accompanied by a second responsibility claim in Beirut, issuing from the Lebanese Armed Revolutionary Brigades. Whether a "solidarity" claim or a "principal's" claim, it reflects unity of intent.

The absence of Italian participation in so-called "Euroterrorist" actions during the wave of ostensibly coordinated anti-NATO and anti-Western attacks recorded in key West European countries from October 1984 to March 1985⁴⁹ is not per se an indication that international objectives have been discarded by the Italian terrorist left. According to qualified observers, BR attention was largely taken up during that period by an internal debate encompassing the militarist/movementist issue and other policy matters.⁵⁰ Other considerations are equally pertinent. In their responsibility claims for "Euroterrorist" attacks, the Belgian Communist Combat Cells (CCC) quoted BR writings. One day before the opening of the trial of members of the BR Veneto "column" that started on March 6, 1985, a significant "delivery" took place in Venice: the original French-German text and its Italian translation of the Direct Action and Red Army Faction joint communique of January 15, 1985, a passage of which reads: "Today it is possible and even necessary to set up the International Proletarian Warfare Organization and its politico-military arm: West European Guerrilla." Also in March 1985, BR Pamphlet No. 20 extolled the "anti-imperialist struggle" in the terms noted above. And, not least, already in late 1984, Italian terrorists of the left had joined their Basque, Corsican, Irish, German, French, and Belgian comrades in the Basque country to study "a unified offensive against imperialism and militarism."⁵¹

In the context of the internationalization of the Italian terrorist phenomenon, the French connection is particularly meaningful as it reflects not only subversive/terrorist international solidarity, but also the pooling of forces and/or resources. Involved in the French

⁴⁸ As mentioned earlier on in the text, pamphlet No. 20 of March 1985 is still subject to investigative secrecy; however, at least some passages have been acquired by the press. See, for example, *La Repubblica*, Mar. 28, 1985, p. 4 (Rome).

⁴⁹ For an overview and analysis of these incidents, see Vittorio S. Pisano, "Euroterrorism and NATO," *Update Report, Clandestine Tactics and Technology*, International Association of Chiefs of Police, Gaithersburg, Md., vol. 11, 1985.

⁵⁰ See interview with Investigating Judge Rosario Priore in *L'Espresso*, Feb. 17, 1985, pp. 8-9 (Rome).

⁵¹ *Panorama*, Feb. 10, 1985, p. 65 (Milan).

connection are the Organized Comrades for Proletarian Liberation (COLP), PL-related elements, the BR, and AUTOP.

COLP/PL

Initial evidence of operational cooperation between Direct Action (Action Directe—AD) and PL emerged in March of 1980 when PL members Enrico Bianco, Oriana Marchionni, Franco Pinna, and Pierluigi Amadori were arrested near Toulon on charges of participation in an armed "proletarian expropriation" organized by AD. Joint operations of this nature grew in intensity since 1983. Gloria Argano of COLP has been indicted for her role in the murder of two policemen in Paris on May 31, 1983, during their shoot-out with AD militants. Argano is further suspected of involvement in two robberies perpetrated by AD in Paris in July of the same year. Also involved in one of these two robberies was COLP member Vincenzo Spanò. On October 14, 1983, still another COLP member, Ciro Rizzato, was killed in Paris during a robbery conducted under the AD banner. AD subsequently named one of its "combat units" after Rizzato. On February 22, 1984, Spanò was arrested in a Parisian AD hideout, where the police seized 22 firearms and 32 kilograms of explosives.

BR

A document confiscated in a BR safe house in January 1982 refers for the first time to an "external column, whose task is to protect fugitives and recruit new militants." The document further states that successful counterterrorist operations in Italy paradoxically reinforced the "external column." This information was provided by a Roman investigating judge in response to a question regarding the French connection. The magistrate also pointed out that red brigadist Giorgio Frau, who kept a list of public figures, including BR victim Ezio Tarantelli, was arrested in Paris.⁵² According to another Roman investigating judge, a BR "liaison office" operated in Paris since the days of Moretti's initial travels to France in 1978 through Senzani's capture in 1982. In order of succession, the BR representatives to Paris were Moretti, Anna Laura Braghetti, Riccardo Dura, Maurizio Jannelli, Alvaro Lojaco, Fulvia Miglietta, and Senzani.⁵³

On November 7, 1983, French journalist Jean-Louis Baudet was arrested in Paris and subsequently convicted in July 1984 for possession of weapons and classified documents. According to repentant red brigadists, Baudet had furnished to Senzani several weapons, including rocket launchers, and had traveled to Rome to provide instruction on their employment. His girl friend, Catherine Legagneur, told the Italian investigating judges that she had also supplied to Palestinians and to BR members false documents. On his part, Baudet claims that he was working for the French Government and his task was to keep leftist groups from carrying out terrorist attacks against the Socialist Government headed by Mitterrand.

⁵² Interview with Judge Ferdinando Imposimato in *Panorama*, Apr. 7, 1985, pp. 36-38 (Milan).

⁵³ Supra note 50.

Several BR documents seized by the Italian police in 1984 attest to continued BR planning in France and even to internal organizational debates held in that country. Moreover, the apprehension of Barbara Balzarani, an "historic" leader of the BR convicted of several murders, and her clean-police-record companion Gianni Pelosi performed by the Carabinieri in Ostia (Rome) on June 19, 1985, has reportedly been made possible by investigations conducted in France. This counterterrorist development, which is obviously most recent, may possibly shed additional light on the French connection. What appears to be certain at this point is that the BR fugitives whose traces are lost in France resurface in Italy for operational purposes.

AUTOP

It was reported in the *Introduction* that 117 identified terrorist fugitives are located in France. These are official statistics. Press accounts, on the other hand, concur on a larger figure: 200. Presumably, a notable percentage of these are "autonomists" who committed terrorism-related crimes. Major AUTOP members enjoying asylum in Paris are Toni Negri, Oreste Scalzone, and Gian Franco Pacino, all three convicted in Italy to prison sentences ranging from 28 to 36 years. Negri and Scalzone in particular enjoy access to a number of academic and cultural circles in which and through which they continue to propagandize views that are, to say the least, unconventional.

In the context of international links, some observations are in order with respect to the pacifist movement as well. "The Cobweb," one of the above-discussed pacifist camps set up in Comiso, is made up exclusively of women and the majority of them is of English or German nationality. Expulsions from Italy of foreigners responsible for blocking the entrances of the missile site and conducting clandestine penetrations therein have been frequent. More disquietingly, a number of German pacifist militants in the area was found in possession of suspiciously recent visas to East European countries.

Worst yet, Libyan leader Qaddafi has made it clear, through his Sicilian agent of influence Michele Papa, that funding is available for pacifist demonstrations worth patronizing. The pro-Western mayor of Comiso, an unwilling recipient of the Libyan offer, angrily disclosed this practice in the course of an interview.⁵⁴ Other sources report that Libyan funding has been channelled to select pacifist groups through certain firms that do business with Libya. Significantly, Giacomo Cagnes, head of the above-referred Unitary Committee for Peace and Disarmament of Comiso (CUDIP), has alleged that the Comiso-based missiles are pointed at Libya, the Middle East, and the Persian Gulf. Cagnes proposes closer relations with the "liberation movements" of the entire southern Mediterranean as "the new central commitment of Italian pacifism."⁵⁵

Rather limited, by comparison, are the international links and objectives of the rightist terrorist formations. As in the past, Ital-

⁵⁴ See interview with Salvatore Catalano in *Europeo*, Oct. 15, 1983, p. 21 (Milan).

⁵⁵ *Supra* note 37, p. 8.

ian rightist extremists enjoy safehaven and other points of contact in Latin America, France, and England.

TRANSITIONAL TERRORISM IN ITALY

Several transnational terrorist actions recorded during this period reflect that Italian territory continues to serve as an alternate battle ground for foreign feuds. Terrorist attacks of this nature were conducted primarily against citizens or property of Libya, Jordan, Syria, and the United Arab Emirates. While these actions are generally related to the internal affairs of those countries, to regional disputes involving those countries, or to the Palestinian issue, still other transnational terrorist operations—consummated or planned—are an unequivocal indication of anti-Western designs. Even more disconcerting from an Italian security standpoint are the repeated threats made against Italy by Third World elements, whose record includes political violence in their countries and abroad.

LIBYA

As opposed to the pre-1983 timeframe, which was characterized by terrorist actions against expatriates who refused to return to Libya or to cooperate with Qaddafi's regime, analogous actions have since been carried out against representatives of the Libyan Government in Rome. On January 21, 1984, shortly after 3 p.m., Libyan Ambassador Ammar El Taggazy was attacked from behind by two masked men as he approached the garage of the condominium in which he resided. He was beaten and fired upon with two pistols. The following day a caller telephoned the London office of Associated Press to claim responsibility on behalf of the Libyan opposition group Al Forkan (Vulcan). The Ambassador did not recover and died in a Rome hospital on February 10, 1984. Almost 1 year later, in the early morning hours of January 13, 1985, Libyan press attache Magkjun Farg was murdered near his residence by a lone gunman, who discarded his silencer-equipped Walther 7.65 mm semiautomatic pistol. Before dying, Farg returned the assailant's fire with a 38 cal. revolver and wounded him, presumably, slightly. Al Forkan once again claimed responsibility in accordance with the previous modalities.

Conversely, two more terrorist attacks perpetrated during the same period have been attributed to emissaries of the Libyan regime. On September 20, 1984, Libyan political refugee Mohammed Khomsi was found strangled in a Rome hotel. A telephone responsibility claim received by the news agency ANSA from the Organization of Mauritanian Nationalists (ONAM) is not deemed credible by the investigators. On March 1, 1985, Mordechai Fadlum, a Libyan Jew and expatriate, was murdered in his Rome jewelry store shortly before closing time with a silencer-equipped Beretta 7.65 mm semiautomatic pistol, which the attacker discarded before fleeing. Although the store safe was open, nothing was removed. Witnesses described the last store visitor as Arabic-looking and provided an identikit.

JORDAN

On October 26, 1983, at approximately 1:40 p.m., as Jordanian Ambassador Taysir Alaedin Toukan was being driven by his chauffeur from the Embassy to his Rome residence, a gunman posted behind a billboard took advantage of the rush-hour traffic that temporarily halted the Ambassador's car and opened fire with a Polish WZ-63 submachinegun. Both the Ambassador and his driver were seriously wounded. The gunman was backed up by two accomplices who fired upon the Ambassador's body guard after they dismounted from the escort vehicle to chase the attacker. The assault weapon was abandoned in a nearby street. Among less credible responsibility claims, one was issued by the Abu Nidal group, a renegade faction of Al Fatah.

Responsibility for another anti-Jordanian attack in Rome was claimed by Black September on March 22, 1985. A three-man commando group broke into the local office of the Jordanian Airlines, hurled three grenades, wounded two employees, and fled. Two weeks later, on April 3, 1985, at approximately 9:40 a.m., a Black September militant aimed a disposable anti-tank weapon against the offices of the Jordanian Embassy in Rome from the underlying square (Piazza Verdi). He missed the intended target by one floor and hit the apartment below. Fortunately, no injuries resulted from this incident. The terrorist, Palestinian Ahamed Mimour, was captured by a courageous doorman. Mimour was also carrying a pistol, but it jammed when tried to shoot the doorman, Illuminato Tavella. In addition to Mimour's admission, there was also a telephone responsibility claim from a Black September spokesman.

SYRIA

Serious damage was caused to a Syrian Airlines Boeing 727 on July 13, 1983, when an incendiary device was smuggled aboard by unknown terrorists. The fire took place before takeoff and consequently there were no injuries. Only a few days thereafter, another device of the same type was found in a toilet of Rome's International Airport "Leonardo Da Vinci." Investigators believe it was meant for the same plane. In the evening of April 1, 1985, a bomb intended for the Rome office of the Syrian Airlines slightly wounded three bystanders on the other side of the street.

UNITED ARAB EMIRATES

The Arab Revolutionary Brigades, a group believed close to Abu Nidal, claimed responsibility in Paris for the attack against Mohamed Al Sowaidi, Vice Consul of the United Arab Emirates in Rome. This action was perpetrated by Jordanian national Mohammad Othman on October 26, 1984. He seriously wounded the diplomat and killed his Iranian girl friend Noushine Montassari, a student at the University of Rome. The gunman took advantage of a traffic light that caused the vehicle they were riding in to stop. He was immediately apprehended. The responsibility claim warned the "United Arab Emirates and other states of the Gulf against pursuing their policy linked to the Americans and to the Zionist movement and hostile to Arabs and Palestinians."

OTHER TRANSNATIONAL ACTIVITY

During the same period various individuals from Third World countries traveling on false passports and in possession of explosives were arrested at Rome's International Airport. These extremists were mostly traveling on Italian territory to reach other destinations. Moreover, press accounts report that a network of politico-religious fanatics has been organized in Rome under the Iranian Ayatollah Hadi Khosraw-Shahi to carry out anti-Western subversive and possibly terrorist activity. This network reportedly includes various foreign nationals, to wit, Pakistanis, Tunisians, and Turks,⁵⁶ and appears to be modeled after the ones already operating in France.⁵⁷ Furthermore, an attack of still dubious paternity occurred in Rome on December 14, 1984. Two persons on a scooter approached PLO representative Ismail Darwish, fired several pistol shots, and left him dead on the sidewalk.

A potentially devastating attack, reminiscent of the bloodiest terrorist actions perpetrated in the Middle East, was foiled by Swiss-Italian cooperation in late 1984. The intended target was the U.S. Embassy in Rome. On November 18, the Swiss police arrested Lebanese national Hussein Atat, who had arrived at the Zurich airport from Beirut and was waiting for a connecting flight to Rome. Atat was in possession of explosives. The Swiss police authorities alerted their Italian counterparts, who, in turn, apprehended in the Roman beach resort of Ladispoli seven Lebanese nationals enrolled as students either at the University of Rome or in other professional institutes. All seven were in contact with the Palestinian arrested in Switzerland. Two were subsequently released, while the other five—Mahmoud Gebara, Mahmoud Hani Bayoun, Fahs Mohamed Neemtalla, Hussein Abdul Hassan El Sefaqi, and Melhem Khadr Issa—have been charged with the crimes of armed band and attempted massacre.

In the Ladispoli residence of the arrestees the Italian police found a map of the U.S. Embassy in Rome with compromising annotations in the margins. This led the investigators and the state attorney to the conclusion that an explosive-truck attack against the U.S. Embassy was in the offing. The arrestees rejected all charges, but admitted to be members of Islamic Jihad. At this writing, a trial date has not yet been set. Procedurally, it is up to the investigating judge to determine whether trial is warranted on the basis of the findings of the state attorney.

It might be noted that the aforementioned Atat, believed to be a courier of explosives, was released by the Swiss authorities in close concomitance with the release of Swiss diplomat Erich Wehrli, who had been abducted in Beirut. This development forecloses the possibility of Atat's extradition to Italy in connection with the proceedings against the five Lebanese charged in Rome. Because of the potentially damaging consequences at the judicial level, the Italian Minister of Justice has expressed some bitterness vis-a-vis the Swiss decision.⁵⁸

⁵⁶ See *Corriere della Sera*, Sept. 1, 1984, p. 7 (Milan).

⁵⁷ See Vittoriofranco S. Pisano, *France as a Setting for Domestic and International Terrorism*, International Association of Chiefs of Police, Gaithersburg, Md., 1985.

⁵⁸ *Corriere della Sera*, supra note 2.

In the early months of 1985, threats were leveled against Italy by Libya's Qaddafi, on one hand, and the Lebanese Armed Revolutionary Faction (LARF) and Islamic Jihad, on the other. In March, Libyan news agency JANA quoted Qaddafi to the effect that he would support Italian terrorist groups if Italy backs anti-Libyan regime elements and does not release "hundreds of Libyans in prison," a highly inflated reference to the few Libyans arrested in Italy because of their attacks on Libyan expatriates. From February through May, threats of direct attacks against Italian targets were made by the LARF and Islamic Jihad in a fruitless effort to obtain the release of their members arrested in Italy on account of their involvement in transnational terrorist activity.

For the sake of completeness, a few comments are in order limitedly to the judicial and propaganda developments regarding the abortive assassination attempt on the life of Pope John Paul II perpetrated by Turkish national Mehmet Ali Agca in St. Peter's Square on May 13, 1981. In July of the same year, Agca was convicted by the Court of Assizes of Rome, pursuant to the longstanding 1929 agreements between Italy and the state of the Vatican City that vest the Italian courts with jurisdiction over crimes committed on Vatican territory. Supplementary investigations subsequent to Agca's conviction led to a new trial for conspiracy, which began on May 27, 1985, and is consequentially still in progress. In addition to Agca, the defendants are Bulgarian nationals Sergei Antonov, Todor Ayzov, and Jelio Vassilev and Turkish nationals Bekir Celenk, Musa Serdar Celebi, Omer Bagci, and Oral Celenk.

These indictments were made possible by Agca's testimony months after his initial conviction. Although there are some contradictions and inaccuracies in Agca's statements, the Italian judicial authorities, after having investigated all aspects of Agca's belated revelations, concluded that there was sufficient evidence to bring the case to trial. During the hearings held to date, Agca's courtroom behavior has repeatedly been bizarre, for example, he proclaimed himself to be Jesus Christ. This could ultimately impeach his credibility before the court. However, after a lot of "rhetoric," he did confirm in court the "Bulgarian connection." Moreover, a formal psychiatric expertise performed in Turkey and expert opinion offered in Italy lead one to believe that he is not insane. Under the circumstances, Agca's odd behavior could be an attempt to communicate and/or bargain with former principals or associates. Besides, there is no certainty that Agca told the prosecution all he knows.

The trial has been preceded and is being accompanied by various forms of propaganda against the findings of the prosecution as they relate to the "Bulgarian connection." Books and press accounts allege or hypothesize fabrication of evidence and coaching of Mehmet Ali Agca by Western intelligence services, particularly those of Italy and the United States of America.⁵⁹ On his part, An-

⁵⁹ Two significant examples out of many: (1) In May 1985, Italian Communist publisher Napoleone put out a book titled "La Pista" (The Trail). Its author, French attorney Christian Roulette, argues that American intelligence has built up the accusations against Bulgaria. (2) An article in the May 19, 1985, issue of the Roman weekly "L'Espresso" insinuates that Agca, who alleges to have visited Antonov's Rome apartment for conspiratorial purposes, actually de-

tonov's defense counsel, Giuseppe Consolo, made an appeal on NBC television to the American public regarding the alleged innocence of his client.⁶⁰

Recent developments also include ostensible efforts to improve strained Italian-Bulgarian relations. In December of 1982, following the arrest of Sergei Antonov, one of the above-listed defendants, diplomatic relations between Rome and Sofia were temporarily downgraded. Only in the spring of 1984 were they restored to the full ambassadorial level. Moreover, the Italian Government seems to have overlooked that the new Bulgarian Ambassador to Rome, Raiko Marinov Nikolov, had been expelled from France earlier on in his career and had subsequently been denied reentry in that NATO country.⁶¹ Likewise Bulgarian air and naval attaché Ivan Jueorguiev Kotchovski, who should have been expelled from Italy on espionage grounds in November of 1983, was apparently allowed to leave the country because of the "normal expiration of his posting" as claimed by the Bulgarian Embassy. On her part, Bulgaria released from prison and repatriated to Italy in 1984 Gabriella Trevisin and Paolo Farsetti. The couple had been arrested and convicted in Bulgaria on questionable espionage charges in 1982, just as the ramifications of the "Bulgarian connection" were beginning to emerge.

This apparent political accommodation has not affected to date the Italian judicial process, much to the credit of the Italian judiciary. Whatever the outcome of the trial, it should be remembered that said trial is governed by the rules of criminal procedure and evidence—democratic rules not easily applicable to the murky sphere of international clandestine operations.

COUNTERMEASURES AND CONCLUDING OBSERVATIONS

Legislative enactments of this period are not directly related to terrorism. However, Law No. 398 of July 28, 1984, on the reduction of pretrial confinement and provisional release⁶² could have restored to freedom, as early as February 2, 1985, "1300 suspected terrorists, mafiosi, murderers, kidnappers, and drug traffickers."⁶³ Wisely, in January 1985, the Italian Parliament extended to November 30 of the same year pretrial confinement for individuals charged with the commission of intrinsically violent crimes.

Official statistics reflect that counterterrorist operations have continued to bear fruits. In 1983, the State Police (Polizia di Stato) arrested 132 terrorists/extremists of the left and 111 of the right and seized 9 safe houses of the terrorist left. During the same year, the Carabinieri arrested 140 terrorists/extremists of the left and 33 of the right and seized 8 safe houses of the terrorist left and 1 of the terrorist right. In 1984, the State Police arrested 50 terrorists/

scribed it on the basis of another apartment in the same building; that of Belgian priest Andre Felix Morlion. According to the article, Father Morlion "was the shadow informer of the CIA with respect to Vatican affairs and is connected to U.S. rightist circles interested in Italian matters." (P. 18.)

⁶⁰ In commenting on NBC's interview of June 13, 1985, with Consolo, an Italian news agency defined "incomprehensible" Consolo's "appeal to the American people." See *Agenzia Italiana Stampa-AIS*, No. 180, June 29, 1985, p. 2 (Rome).

⁶¹ See, for example, *L'Espresso*, May 13, 1984, p. 11 (Rome).

⁶² *Gazzetta Ufficiale della Repubblica Italiana*, No. 210, Aug. 1, 1984, Rome, pp. 6350-6355.

⁶³ *La Repubblica*, Jan. 13, 1985, p. 1 (Rome).

extremists of the left and 37 of the right and seized 1 safe house of the terrorist left. On their part, the Carabinieri arrested 87 terrorists/extremists of the left and 14 of the right and seized 9 safe houses of the terrorist left and 1 of the terrorist right. Official statistics for 1985—up to May 20—reflect that the carabinieri arrested 33 terrorists/extremists of the left and 3 of the right and seized 2 safe houses of the terrorist left. Statistics regarding 1985 State Police counterterrorist operations are not available at this writing.

Conversely, these statistics constitute an indicator of the residual numerical strength of the politically violent milieu at a time when the overall domestic terrorist menace in Italy has subsided.

Unchanged are the methods developed by the police forces in combating terrorism prior to 1983.⁶⁴ However, the tightening of compartmentalization, particularly in the structure of the Red Brigades (BR), has reduced the potential contribution of new terrorist recruits who did or might repent after capture and has necessitated greater reliance upon documents confiscated in captured safe houses and propaganda material openly issued by the pertinent terrorist formations.

With respect to past counterterrorist operations, two developments at the judicial level deserve attention. After the successful liberation of General Dozier from a BR "people's prison" in January 1982 by members of the State Police Central Operative Nucleus for Security (NOCS), five policemen, including officials and NOCS members, were indicted on charges of torture allegedly committed on red brigadists to force them to reveal information. One of the five, Salvatore Genova, was not brought to trial, since in the interim he had been elected to Parliament. On July 15, 1983, the Tribunal of Padoa held that mistreatment rather than torture had taken place. An appellate decision of March 20, 1984, reduced the essentially symbolic suspended sentence inflicted by the lower court.⁶⁵ On April 30, 1984, the Court of Assizes of Pavia inflicted another suspended sentence on police official Ettore Filippi, who had "covered" crimes against property perpetrated by a police-controlled political extremist so that he could acquire credibility with the BR. In fact, this infiltrator had led to the capture of high-ranking red brigadists Mario Moretti and Enrico Fenzi in 1981. Both court decisions have caused some bitterness in counterterrorist circles, but they reflect, nevertheless, the application of the rule of law.

Beyond the contents of the above-summarized CESIS report, which addresses international linkages, little progress has officially been made in acquiring details on backstage elements of the Italian terrorist phenomenon. Rather disappointing in this respect is the outcome of the appellate trial regarding the Moro affair. The trial ended on March 14, 1985. Despite the revelations of Valerio Morucci, a key disassociated red brigadist and a participant in the Moro abduction, it was not even possible to establish where the

⁶⁴ See supra note 1, pp. 51-56.

⁶⁵ Notwithstanding these court decisions, there are those who still attribute to the police torture practices. See Giorgio Bocca, *Noi Terroristi*, Garzanti, Milano, 1985, pp. 279-283. The book includes several interviews with the terrorists themselves relative to the period 1968-1982. A direct account of the Dozier affair and its aftermath is provided by Salvatore ("Rino") Genova. See Rino Genova, *Missione Antiterrorismo*, Sugarco, Milano, 1985, pp. 97-190.

late Christian Democratic party president was hidden during his captivity.

A noteworthy departure from past practices is the attitude displayed by the executive branch of government on the occasion of the December 23, 1984, train bombing in the Apennines gallery near San Benedetto Val di Sambro that killed 15 passengers and wounded 131. In the past, indiscriminate or "blind" attacks of this nature had immediately been blamed on the extreme right in the belief, assumption, or "political" determination that this *modus operandi* can only be rightist. In reporting to the Parliament, on December 27, 1985, Prime Minister Bettino Craxi stated that "the trials to be investigated . . . are multiple" and warned against the dangers of "one-way" investigations.⁶⁶

On the other hand, this despicable massacre brought once again to the forum a favorite allegation of the Communist left and its fellow travelers: the involvement of the Italian intelligence services in antidemocratic plots and their "subordination" to the United States, directly or through NATO. This time the proponent of said thesis was Socialist Member of Parliament Rino Formica.⁶⁷ Interestingly enough, Formica cited a book authored by one Giuseppe De Lutiis, published by Editori Riuniti, the publishing house of the Italian Communist Party (PCI), and titled "Storia dei Servizi Segreti in Italia" (History of the Secret Services in Italy).⁶⁸ The central theme of the book is that subversive armed bands have consistently constituted a parallel structure of the Italian intelligence services, whose operations are conditioned by agreements with the United States. The book, which is characterized by the repeated and systematic use of the words "perhaps" and "probably" cites almost exclusively Communist or left-oriented sources. Both the Prime Minister and the Defense Minister categorically denied such "subordination," past or present.⁶⁹

Other polemics resulted from the unprecedented pardon of a convicted terrorist, Flora Pirri Ardizzone, in late May of 1985, after she had served 7 years and 2 months in prison. There are those who fear that it constitutes a prelude toward a generalized amnesty at a time when new legislation is being considered to reinsert into society disassociated terrorists. The societal recovery of terrorists is a sensitive problem for which a suitable solution could more readily be found at this time in consideration of the reduced momentum of the Italian terrorist onslaught.

Though not specifically related to the terrorist problem, Law No. 354 of July 26, 1975, which constitutes the basis for the reform of the Italian prison system, calls for the rehabilitation of prisoners as well as former prisoners. Contemplated measures include the identification of specific rehabilitation needs of individual prisoners and rehabilitation programs encompassing education, work, religion, cultural activities, recreation, sports, family relations, and appropriate out-of-prison contacts. This law also provides for the es-

⁶⁶ Senato della Repubblica, IX Legislatura, 219a Seduta Pubblica, *Resoconto Sommario*, Giovedì 27 Dicembre 1984, Roma, p. 8.

⁶⁷ See, in particular, interview with *La Repubblica*, Dec. 29, 1984, p. 3 (Roma).

⁶⁸ Giuseppe De Lutiis, *Storia dei Servizi Segreti in Italia*, Editori Riuniti, Roma, 1984.

⁶⁹ See Atti Parlamentari, Camera dei Deputati, IX Legislatura, *Discussioni*, Seduta del 29 Gennaio 1985, Roma, pp. 11-29 and *Corriere della Sera*, Dec. 21, 1984, p. 1 (Milan).

establishment of social service centers connected to the offices of the judiciary having a supervisory role over prison institutions. Likewise, it calls for the utilization of qualified volunteers interested in the rehabilitation of social deviants.

The scope of the law includes social service assistance to release prisoners during the immediate postimprisonment stage. According to the law, this can also be accomplished with the participation of specialized public and private entities. Of the private ones, many are religious (nearly always Catholic) institutions. Another important provision of the law requires that former prisoners subject to the security measure of "freedom under surveillance" be entrusted to the care of the social service in addition to the obligation of complying with police controls.

Regrettably, the implementation of Law No. 354 of 1975 has been slow and generally unsystematic. Nevertheless, it could provide a working frame of reference not only for the rehabilitation of common criminals, but also of former terrorists.

At present, the institution that appears to have had the greatest success in "bridging the gap" between Italian repentant or disassociated terrorists and society is the Catholic Church, as evidenced by the frequent requests of former terrorists for religious services on the occasion of their marriage and the birth of their children, on one hand, and by instances of whole arsenals being turned over by former terrorists to the ecclesiastical authorities, on the other. In this connection it is important to emphasize that the Catholic Church has maintained a stable presence both in the prisons and in the organizations whose aim is the rehabilitation of social deviants. Significantly, former terrorists have stressed the attractiveness of the Church's social ministry rather than her underlying religious mission.

In the long term, it may also be possible to hypothesize a contributory role in the rehabilitation of terrorists by police officials responsible for supervising former terrorist prisoners subject to "freedom under surveillance," provided that specific training be made available if this additional task is assigned. Moreover, political organizations particularly active in social and humanitarian issues could in certain cases serve as a secondary conduit for the rehabilitation of former terrorists convicts or even terrorists sympathizers who have never been indicted. Nevertheless, this sort of political "cooption" is open to dangers.

The political defeat of Italian terrorism does not foreclose the recurrence of terrorist crimes. In fact, the period January 1983-June 1985 has been marked by terrorists actions perpetrated after the revolutionary battle against democratic institutions had already been lost. Violence-oriented subversive forces still in the field—and their new recruits—do continue to display commitment to their cause.

On the purely domestic side of the spectrum, the most worrisome scenario entails a potential accommodation between the militarist and movementist factions of the BR. Parallel operations by these two groups would ensure, in the long term, the continuation of selective, even if occasional, terrorist attacks, accompanied by active and passive recruitment of various strata of Italian society in con-comitance with the exploitation of socioeconomic tensions and/or

ideological initiatives. Moreover, the leftist terrorist ranks could draw at least occasional reinforcement from rightist extremist circles, if the trends detected by the intelligence and security services prove to be viable.

On the international side of the spectrum, it is now clear that the terrorist left in particular is combining domestic goals with international ones, as manifested by its writings and actions. This development could enhance linkages with transnational formations. The Italian Prime Minister, as recently as January 29, 1985, stated that during the last 12 months the major danger signs come from "international terrorism" to which Italy ". . . is particularly exposed because of her geographical position and her extremely liberal legislation and policy . . . regarding access and sojourn in the territory of the Republic."⁷⁰

While revolutionary fervor and obstinacy cannot be easily stamped out, equally evident is the fact that after nearly 20 years of counterterrorist experience, the Italian security forces and the judiciary have acquired the necessary expertise to cope with changing situations.



⁷⁰ Atti Parlamentari, id., p. 14.

TO MODIFY THE EXCLUSIONARY RULE



HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 237

A BILL TO AMEND TITLE 18 TO LIMIT THE APPLICATION OF THE
EXCLUSIONARY RULE

OCTOBER 2, 1985

Serial No. J-99-57

Printed for the use of the Committee on the Judiciary



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(II)

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TO MODIFY THE EXCLUSIONARY RULE

WEDNESDAY, OCTOBER 2, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Mitch McConnell presiding.

Present: Senators Grassley, Metzenbaum, DeConcini, Biden, Specter, and Simon.

Staff present: Victor Maddox, majority counsel; William S. Miller, majority counsel; Charles Reid, minority counsel.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McCONNELL [presiding]. The hearing will come to order. Good morning, ladies and gentlemen. Chairman Thurmond has asked me to chair today's hearing on S. 237, a bill that would limit the application of the exclusionary rule. There have been other hearings on this issue, so we already have a fairly well developed record on this matter.

Not having been a Member of the Senate when those prior hearings occurred, I am pleased to be here today to accept the testimony of our distinguished witnesses. As all of you know, the exclusionary rule has been the subject of a great deal of controversy since it was announced by the Supreme Court early in this century.

No one can argue with the salutary nature of the rule. The right to be free from unlawful search and seizure is a right that is, in many senses, fundamental to the American constitutional approach to government.

Heavy-handed police conduct is an all too common fact of life in so many parts of the world that we rightly approach with caution any effort to modify the restraints on such conduct that have been developed here.

Yet caution ought not to lead to paralysis. Too many times, we have seen evidence declared "fruit of the poisonous tree," and rejected, with the criminal set free, despite the best of faith on the part of our law enforcement officials. Some of the most sensational cases are well known, but more troublesome are the cases that are known only in the compilations of statistics.

These are the garden variety criminal cases in which the criminals are turned loose, and the hands of our law enforcement agencies tied because of unrealistic restrictions on the use of evidence.

I believe that S. 237 is a reasonable modification to the exclusionary rule. It declares in simple and sensible terms, that evidence

that is otherwise admissible shall be admitted if the police obtained it in good faith. With this change, the object of the rule, police misconduct, would once again become the target of the rule.

[Text of S. 237 follows:]

99TH CONGRESS
1ST SESSION

S. 237

To amend title 18 to limit the application of the exclusionary rule.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 21), 1985

Mr. THURMOND (for himself, Mr. LAXALT, Mr. HATCH, Mr. ABDNOR, Mr. CHILES, Mr. DOMENICI, Mr. LONG, Mr. ZORNISKY, Mr. DENTON, Mr. JOHNSTON, Mr. TRIBLE, Mr. D'AMATO, Mr. EAST, Mr. HELMS, and Mr. BOREN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 to limit the application of the exclusionary rule.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Exclusionary Rule Limi-
4 tation Act of 1985".

5 SEC. 2. (a) Chapter 223 of title 18, United States Code,
6 is amended by adding at the end thereof the following new
7 section:

1 "§ 3505. Limitation of the fourth amendment exclusionary
2 rule

3 "Except as specifically provided by statute, evidence
4 which is obtained as a result of a search or seizure and which
5 is otherwise admissible shall not be excluded in a proceeding
6 in a court of the United States if the search or seizure was
7 undertaken in a reasonable, good faith belief that it was in
8 conformity with the fourth amendment to the Constitution of
9 the United States. A showing that evidence was obtained
10 pursuant to and within the scope of a warrant constitutes
11 prima facie evidence of such a reasonable good faith belief,
12 unless the warrant was obtained through intentional and ma-
13 terial misrepresentation."

14 (b) The table of sections of such chapter is amended by
15 adding at the end thereof the following item:

"3505. Limitation of the fourth amendment exclusionary rule."

○

Senator McCONNELL. Senator Grassley is here, and I would like to call on him to see if he would be interested in making an opening statement. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I do not have an opening statement because I think statements I have made on this subject before speak for themselves, and we thought that we had the hearing process on this legislation over. I hope that this hearing that we have now will relieve any misapprehensions people have over whether or not there has been adequate information gotten in, and consider what that record is and then move to consideration of the bill which is on the agenda. I think that this is a very important piece of legislation, long overdue, and that we need to get on with some sort of a reasonable compromise that everybody can accept.

Senator McCONNELL. Thank you, Senator Grassley. Senator Denton, from Alabama, a distinguished member of our committee is chairing the Subcommittee on Security and Terrorism this morning, and as a result of that will be unable to attend this hearing.

He has asked that I place in the record at this point an opening statement from him. Without objection, that will appear at this point.

[The statements of Senators Thurmond, Denton, Kennedy, and Grassley follow:]

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

The hearing today on S. 237 marks the third time in the last five years that the Committee or its Subcommittee on Criminal Law has held hearings to consider exclusionary rule legislation. We held four days of hearings in 1981 and four days in 1983 on S. 829, the Comprehensive Crime Control Act, which included an exclusionary rule bill. The Committee reported that bill, S. 1764, by a vote of 10-7, and the Senate passed the bill in the 98th Congress by a vote of 63-24. S. 237 is identical to S. 1764.

The wisdom of this legislation was confirmed last year by the Supreme Court in the *Leon* and *Sheppard* cases. The hearing today is for the purpose of reviewing S. 237 in light of those cases, as well as to hear from major proponents and opponents of the legislation. S. 237 would codify a federal exclusionary rule, thus recognizing the appropriate authority of Congress to make this important legal policy decision.

I wish to note that the *Leon* and *Sheppard* cases involved search warrants that were ultimately ruled to be invalid. The Court held that the exclusionary rule should not be applied to bar the use of evidence that was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, even though the warrant proves to be invalid.

S. 237 applies also to warrantless searches, but it does not undercut any Fourth Amendment guarantees. As I read the bill it is entirely consistent with the rule in the *Leon* and *Sheppard* cases. In fact, S. 237 may be even more stringent than the *Leon* rule because it requires both a subjective good faith belief by the officer and an objectively reasonable belief. The *Leon* rule appears to require only the latter. S. 237 in no way affects the Court's ruling on when search warrants are required. Warrantless search situations will still be the exception, not the norm. S. 237 simply states that in all searches in which the officer acts in an objectively reasonable good faith belief that his actions conform to the Fourth Amendment, the evidence should not be excluded on Fourth Amendment grounds.

I believe that this hearing will again demonstrate the need for exclusionary rule legislation and the soundness of the approach we have taken. I look forward to hearing from the fine witnesses today.

PREPARED STATEMENT OF SENATOR JEREMIAH DENTON

Mr. Chairman, I join in strong support of S. 237, a bill to modify the application of the Exclusionary Rule in Federal courts. I commend you for your leadership in introducing this necessary bill.

The bill would amend title 18 of the United States Code to allow otherwise admissible evidence to be used in Federal court proceedings, even if it was obtained through a violation of the fourth amendment to the Constitution, as long as the search or seizure which produced the evidence was "undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment. . . ."

The Supreme Court first held in the case of *Weeks v. United States* (1914) that evidence obtained in violation of the Fourth Amendment was inadmissible in a Federal criminal trial. Since its limited application in *Weeks* to exclude simple evidence of a crime, the exclusionary rule has been expanded to exclude contraband and the actual tools and instrumentalities of a crime. It has been further expanded to exclude evidence that was derived from other illegally seized evidence. Since the exclusionary rule is a judicially mandated rather than a constitutionally required response to fourth amendment violations, its reform through the legislative process is appropriate.

The primary, if not the sole, rationale for the application of the exclusionary rule is to deter fourth amendment violations by law enforcement personnel. The theory is that the exclusion of illegally seized evidence will deter law enforcement personnel from engaging in negligent or intentional practices that result in fourth amendment violations.

The problem arises when the rule is applied to exclude evidence seized in situations that a reasonably well-trained officer would not or could not have recognized as being in violation of the fourth amendment. The rule therefore loses any deterrent value it may have for more egregious violations of the fourth amendment. It simply results in a windfall for the criminal, who walks away unscathed despite the existence of reliable evidence of guilt.

If one considers the exclusion of evidence a "remedy" for one whose fourth amendment rights have been violated, then the problem is that it only rewards those who are actually guilty of a crime. It provides no recourse for innocent victims of police overaggressiveness, negligence, or intentional misconduct.

Mr. Chairman, in deciding when the exclusionary rule should be applied, the Supreme Court has balanced the deterrent effect of the rule against the cost to society that would result from the distortion of the judicial process caused by depriving the prosecution of reliable, probative evidence of guilt. The bill would make clear the congressional determination that whatever minimal deterrent effect that exclusionary rule may have is outweighed by its cost to society in cases where the evidence to be excluded is the product of a search or seizure undertaken in a reasonable and good faith belief that it was in conformity with the fourth amendment.

In the 1984 case of *United States v. Leon*, the Supreme Court upheld the use of evidence seized by officers acting in reasonable reliance on a search warrant, issued by a detached and neutral magistrate, that was later found to be invalid. The Supreme Court recognized in *Leon* that "indiscriminate application of the exclusionary rule—impeding the criminal justice system's truth finding function and allowing some guilty defendants to go free—may well generate disrespect for the law and the administration of justice." The bill introduced today incorporates the ruling of the Supreme Court that the exclusionary rule should be modified to permit the introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate. It also permits the use of evidence seized in warrantless searches where the seizing officer was acting in a reasonable and good faith belief that his conduct conformed with the fourth amendment.

The exclusionary rule will still be applied in cases where police conduct is objectively and patently unreasonable or where it is based on a warrant which was acquired through intentional and material misrepresentation. Thus, the effect of the bill is simply to limit the use of the exclusionary rule in those cases in which its cost to society is grossly disproportionate to the minimal deterrent effect it may have on law enforcement officers.

Mr. Chairman, legislation in the area is long overdue. I strongly urge my colleagues to support S. 237, as we did with the identical bill, S. 1764, last year, so that the 99th Congress will effect a needed modification of the exclusionary rule. Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Mr. Chairman, last year the Senate did some excellent work on effective anti-crime legislation. It passed a landmark crime package by an overwhelming majority (91-1), containing a complete overhaul of criminal sentencing, bail reform, and

many law enforcement improvements in the area of drug trafficking, criminal forfeiture, and prosecution of violent offenders.

The coalition of Democratic and Republicans, liberals and conservatives, which supported the crime package that was signed into law a year ago demonstrates that we can adopt significant anticrime legislation, without jeopardizing the constitutional rights or the civil liberties of any citizen.

In contrast to this meaningful anticrime legislation, which I worked on for over a decade, is the bill to curtail the fourth amendment exclusionary rule, S. 237, which is the subject of today's hearings.

In the past I have opposed proposals to eliminate or limit the exclusionary rule because these proposals were not anticrime and they could have infringed constitutional rights and important civil liberties.

In particular, there is no evidence that relaxing the exclusionary rule is a practical step to take in the war against crime.

Studies show that in only between 1 and 2 percent of over thousands of criminal prosecutions examined was evidence excluded as the result of a fourth amendment violation. In less than one-half of 1 percent of the cases analysed in a GAO study was an exclusionary rule problem the primary reason for a prosecutorial decision not to bring a case. Simply put, the so-called reform in this legislation will not make any significant difference in reducing crime.

I have even greater reservations about the bill now before this committee.

First, we need to evaluate why congressional action at this time is appropriate. The Supreme Court decisions in *United States v. Leon* and *Massachusetts v. Sheppard* created a limited "good faith" exception to the fourth amendment exclusionary rule in warrant cases.

The impact of these July 1984 decisions on police behavior and training practices is currently being studied by the Department of Justice, though the National Institute of Justice. I believe that the data from this study should be available to this committee so that it can evaluate whether any further modification of the exclusionary rule is appropriate.

Second, the Court has not extended the good faith exception recognized in *Leon* and *Sheppard* to any warrantless search situation. The difficult constitutional issues raised by extension of *Leon* to warrantless search suggests that deliberate consideration by the court of further refinement of *Leon* is preferable to sweeping statutory change.

Third, this bill is identical to the bill introduced in the 98th Congress before *Leon*. Its language has not been revised to reflect the requirements for warrant searches recognized by *Leon*.

In sum, exclusionary rule legislation which at best is an empty gesture appears to be particularly ill-conceived at this time.

I would hope today's hearing will address these concerns.

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman, I want to thank you for holding this hearing on S. 237, which modifies the exclusionary rule as it pertains to the fourth amendment.

It is unquestionable that the exclusionary rule is not a personal constitutional right, but one that was court-created as a sanction against a violation of the fourth amendment prohibition of unreasonable search and seizures.

Consequently, the exclusionary rule's purpose was to deter police misconduct. However, when police have acted mistakenly, but in good faith, excluding seized evidence will not deter similar acts in the future. Exclusion of the evidence can, however, have a monumental adverse effect on the trial, and ultimately society.

Consequently, as Justice White once stated, "any rule. . . that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness."

Therefore, it is time to eliminate the abuses of the Rule. The Supreme Court, in its *Leon* decision, took a positive step in this direction by allowing a good faith reliance on a reasonable search warrant. S. 237 conforms with this decision, since searches and seizures would only be allowed if they are undertaken in a reasonable, good faith belief that the fourth amendment is complied with. Consequently, I support S. 237, and look forward to its passage. Thank you Mr. Chairman.

Senator McCONNELL. I am pleased to welcome our witnesses today, the first of whom is the Honorable Stephen S. Trott, who is Assistant Attorney General for the Criminal Division. Mr. Trott.

STATEMENT OF HON. STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. TROTT. Thank you very much, Mr. Chairman and members of the committee.

I am very pleased to be here today to present the views of the Department of Justice, and of the administration, on legislation to modify the exclusionary rule.

As you know, the rule is a device through which a court excludes otherwise admissible probative evidence solely because it determines that the evidence was obtained improperly. As such, as the Supreme Court itself has remarked, the rule, quote, "deflects the truthfinding process and often frees the guilty."

Such a doctrine, when applied in such a way as to not produce any corresponding benefit for society, is intolerable. It hampers the police in honestly but aggressively seizing evidence of a crime, and worse, it destroys the respect of our citizens for the law and the judicial system.

This administration regards legislation to restrict the application of the exclusionary rule to those cases where there has been real police misconduct—as you pointed out in your opening statement, Mr. Chairman—as one of its most important goals in the criminal justice arena. When I was in law school over 20 years ago, studying the exclusionary rule was an abstract proposition. Parenthetically, of course it has been in effect in the Federal courts since 1914, and in California, since 1955. I believed that the rule was a great thing because I, as did you, Mr. Chairman, believe that the fourth amendment is truly the cornerstone of liberty in this country as we enjoy it.

But I have now been a prosecutor for 20 years, and sadly, I must tell you, that during those 20 years, I probably have, by application of the exclusionary rule, caused hundreds and hundreds and hundreds of cases, felony cases against criminals, not to be filed in our courts because an analysis of the manner in which the police gathered the evidence in those cases indicated that the case, although based on good-faith objective police work, would not survive the patchwork quilt of rules and regulations that defy the imaginations of the best lawyers in the country.

So I now have come, on the basis of 20 years of experience as a prosecutor, to the belief that the good-faith exception is long overdue.

In the last Congress, the Senate passed S. 1764, a bill that provided for a reasonable good-faith exception to the exclusionary rule by a vote of 63 to 24. A few months thereafter, the Supreme Court, in the cases of *Leon* and *Sheppard*, carved out such an exception for cases involving search warrants. The Court squarely held that the fourth amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by law enforcement officers acting in objectively reasonable reliance on a search warrant issued by a

neutral and detached magistrate, even if the warrant is ultimately found to be invalid.

Although the Supreme Court has now effectively laid to rest any real argument that the exclusionary rule is constitutionally required, the House did not see fit to enact S. 1764, or any other bill.

It is therefore necessary that the Senate again act to codify the *Leon* and *Sheppard* holdings, and, even more importantly, to extend their limitation on the rule to search and seizure cases where search warrants are not involved.

Although the argument was sometimes raised in the past that the rule was required by the fourth amendment, the Court made it increasingly clear that this was not the case.

That point was then nailed down by *Leon* and *Sheppard*, the Court indicating that this is "a judicially created remedy designed to protect fourth amendment rights."

Thus, the question, in essence, becomes, really, not one of law but of policy. The Court in *Leon* stated, as it had in a number of other recent cases, that the question of whether evidence should be excluded must be resolved by weighing the costs and benefits of preventing the use in evidence of inherently trustworthy tangible evidence. Therefore, the question we really have to ask is this: Does applying the exclusionary rule to keep out of evidence something that a court believes has been seized in violation of the fourth amendment's prohibition against unreasonable searches and seizures deter police misconduct? The answer of course depends on the situation.

If a law enforcement officer acts in an objectively reasonable belief that a particular search was proper, applying the rule to exclude the evidence he then seizes, could not possibly have any deterrent effect because there is no misconduct, and hence, nothing to deter.

And in fact, again, based on my experience of talking to police officers over 20 years under these circumstances, not only does it have no deterrent effect, but it produces a state of mind on the part of the police officers where they begin to wonder what is wrong with the law, and they actually develop a disrespect for the fourth amendment concept because it is applied so perniciously to their activities, that it produces no deterrence, and exactly the opposite effect from the effect intended.

So, in a number of ways, I think that the exclusionary rule, when applied to these circumstances, has been tremendously counterproductive of the respect for the law that it was intended to promote. Where an officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way, for it is painfully apparent that the officers are acting as a reasonable officer would, and should act under the circumstances. Excluding the evidence can in no way—in no way—affect his future conduct unless it is simply to make him less willing to do his duty, another problem that I have seen on many occasions.

I have had hundreds of police officers say to me, in effect, the hell with it; why don't we just flush the dope down the toilet next time instead of bothering to come over to this office and have you tell me all these rules and regulations that change from week to

week, that we have no opportunity to follow, and it just results in everybody's waste of time.

We continue to try to recruit them in the other direction, but it is very, very difficult when you are dealing with honest police officers applying the law, and the courts destroy the good work that they put in.

If I can spend 1 second and then I will be finished, Mr. Chairman. The facts of the kinds of cases that we are talking about are rather dramatic in showing what we are talking about with the good faith exception.

These are the facts of an actual case in Colorado. On September 29, 1981, Darlene Bergen was outside her home in Denver sweeping the porch, a citizen living in a community. She saw a man walking on the opposite side of the street and observed him briefly peering into the front window of the house across from hers.

After observing him apparently looking into other windows at the same house, she saw him stop at another house, after which he disappeared from her view. The next saw him an hour later at a bus stop next to her house. He had taken off his shirt and was using it to cover a television set. He appeared nervous to Mrs. Bergen and she called the police.

For years, we have been asking citizens to do exactly what Mrs. Bergen did. She knew what she saw, and she did what she should have done: she called the police.

Officer Freeman, a 21-year police veteran was the first to respond to the dispatcher's report of a possible burglary suspect.

He asked the respondent for identification. The respondent had none. Other officers then arrived at the scene. They asked respondent various questions to which he responded that he had bought the television set from someone in the neighborhood for \$100 and was taking it home.

He was wearing an undershirt and had wool gloves in his back pocket. Mrs. Bergen came outside and identified herself as the person who called the police, respondent was arrested and then searched. Under his shirt, police found the television set, a video game, \$140 in cash, five rings, including two class rings bearing different initials, and women's jewelry.

Sometime later, they were able to track all of that property to burglaries in the neighborhood, and what happened to that case? The case was thrown out of court because it was held that Officer Freeman's conduct was illegal. This resulted in I think—I wonder what Mrs. Bergen thought when that happened.

Here is a woman living in a neighborhood. She calls the police, the police come—no decent citizen would do anything else—and the case gets kicked out. And the court felt well, there is no reasonable good faith exception, so that is just life in the big city.

These are unfortunately the facts of a case that was originally entitled *State of Colorado v. Quintero*. That is a case that made its way to the U.S. Supreme Court. Unfortunately, Mr. Quintero passed away before the case could be argued and it was mooted out.

But again, I keep harping back to my own experience. That is similar to the kinds of cases with which I have dealt over the years, where police officers performing good and decent police work

then go into court, or into a district attorney's office, and find cases kicked out, and potential felons freed back into society.

We firmly believe that this is a good approach, it preserves the values in the fourth amendment, it will restore respect for the law that has been lost by decent citizens and especially police officers, and it in no way compromises the concept of liberty that we believe is important in this country.

Mr. Chairman, may the remainder of my statement be received in the record, and I will be happy to answer questions.

Senator McCONNELL. It will be inserted at the appropriate place.
[The statement follows:]



Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Mr. Chairman and Members of the Committee, I am pleased to be here today to present the views of the Department of Justice and of the Administration on legislation to modify the exclusionary rule. As you know, the exclusionary rule is a device through which a court excludes otherwise admissible probative evidence solely because it determines that the evidence was obtained improperly. As such, as the Supreme Court itself has remarked, the rule "deflects the truthfinding process and often frees the guilty." ^{1/} Such a doctrine, when applied in such a way as not to produce any corresponding benefit for society, is intolerable. It hampers the police in honestly but aggressively seizing evidence of crime, and worse, it destroys the respect of our citizens for the law and the judicial system. This Administration regards legislation to restrict the application of the exclusionary rule to those cases where there has been real police misconduct as one of its most important goals in the criminal justice area.

Mr. Chairman, almost four years ago, on October 5, 1981, D. Lowell Jensen, my predecessor as head of the Criminal Division, had the privilege of appearing before the Subcommittee on Criminal Law to suggest legislation to provide that otherwise admissible evidence should not be excluded on the grounds that its seizure violated the Fourth Amendment if the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with that amendment. A lot has happened since then.

In the last Congress, the Senate passed S. 1764, a bill that provided for a reasonable, good faith exception to the exclusionary rule by a vote of 63 to 24 on February 7, 1984. A few months thereafter the Supreme Court in the Leon and Sheppard cases ^{2/} in effect carved out such an exception for cases involving search warrants. The Court squarely held that the Fourth Amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by law enforcement officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant is ultimately found to be invalid.

Although the Supreme Court has now effectively laid to rest any real argument that the exclusionary rule is constitutionally required, the House did not see fit to enact S. 1764 or any other exclusionary rule bill. It is therefore necessary that the Senate act again to codify the Leon and Sheppard holdings, and, even more important, to extend their limitation on the rule to search and seizure cases where search warrants are not involved. I will also suggest that the Congress should act to forbid courts from acting on their own volition and applying the exclusionary rule in contexts other than the Fourth Amendment.

Mr. Chairman, in the last Congress, the Committee produced an excellent report on S. 1764 which discussed the origin and development of the exclusionary rule in some detail. ^{3/} In light of that report, I will not go into the history of the rule in any great detail. But it must be remembered that the rule is merely a judicially created one. It is not set out anywhere in the Constitution or the Bill of Rights. It was not even stated by the Supreme Court until 1914 -- well over a century after the Constitution was adopted -- in Weeks v. United States. ^{4/}

Although the argument was sometimes raised in the past that the exclusionary rule was required by the Fourth Amendment, in the ten or twelve years before Leon and Sheppard, the Court made it increasingly clear that this was not the case. Leon and Sheppard then nailed down the point that the rule was not constitutionally mandated. Rather, the Court characterized it as "a judicially created remedy designed to safeguard Fourth Amendment

Rights generally through its deterrent effect, rather than a personal right of the person aggrieved." ^{5/}

Thus, the question becomes one not of law but of policy. The Court in Leon stated -- as it had in a number of other recent cases -- that the question of whether evidence should be excluded must be resolved by weighing the costs and benefits of preventing the use in evidence of inherently trustworthy tangible evidence. Let's think for a minute about who benefits when the rule is applied and evidence is excluded. Pretty clearly, the defendant benefits because the jury never gets to see or hear about the very evidence that would in most cases prove his guilt -- the bag of cocaine, the gun used to murder a law enforcement officer, or the satchel of top secret documents destined for a Russian KGB agent. Just as clearly, society loses in a case such as this when a guilty person is returned to the streets, unless, somehow, excluding the evidence and freeing the criminal serves some even more important purpose like deterring misconduct on the part of the police.

Therefore, the question we have to ask is this: Does applying the exclusionary rule to keep out of evidence something that a court believes has been seized in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures deter police misconduct? The answer, of course, depends on the situation. If a law enforcement officer acts in an objectively reasonable belief that a particular search was proper, applying the rule to exclude the evidence he then seizes could not possibly have any deterrent effect because there is no misconduct and hence nothing to deter. I might also add that applying the rule in such a case results in attaching a false label of "police misconduct" to what is, in fact, proper and commendable police conduct. This adversely affects the whole criminal justice system by fostering the public's perception that the police have engaged in lawless conduct when this is simply not the case.

As the Court in Leon summed it up: "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will

not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act under the circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty..."

While Leon was, as you know, limited to cases involving search warrants, its reasoning applies equally strongly in and should be extended to warrantless searches as well. Applying the exclusionary rule in cases in which a law enforcement officer has acted in a reasonable belief that a particular type of search -- typically a search incident to an arrest or a search of an automobile -- could be conducted without a warrant and was otherwise proper cannot possibly have any deterrent effect on misconduct because, by definition, there is no misconduct. What is really involved when such a search is ruled in violation of the Fourth Amendment is a determination by a court, usually years after the officer's confrontation with the criminal, that his actions did not quite comport with the requirements of the law of search and seizure as it has been developed by thousands of appellate court decisions over the years. To exclude such evidence because a court finds the officer should have acted differently, even though it also finds he acted reasonably, can have but one result: the unjustifiable acquittal of a guilty defendant.

An acquittal in a case such as this is simply too high a price for society to pay. It is the elimination of this result that we seek to end by our legislation. It is important to keep this goal in mind because I know that certain groups have claimed that our proposals to restrict the application of the exclusionary rule would encourage police misconduct. That is simply not the case. We do not intend to use illegal methods to combat crime, but at the same time we cannot tolerate the freeing of guilty criminals without a valid reason.

Turning now to S. 237, this bill is identical to S. 1764 which the Senate passed in the last Congress before the Leon and Sheppard cases were decided. As you know, S. 1764 was drafted

and strongly supported by the Department. Nevertheless, we would propose one minor amendment in light of the Leon case. S. 237 states that evidence will not be excluded on the grounds that the search or seizure was in violation of the Fourth Amendment if the search or seizure was undertaken in a "reasonable, good faith" belief that it was in conformity with that Amendment. The Committee's report on S. 1764 explained that this required that the conduct be found both objectively and subjectively to have been undertaken in good faith. ^{7/} But in Leon, the Supreme Court determined that it was preferable and sufficient to rely solely on the concept of objective reasonableness and not try to plumb the officer's subjective belief in the legality of his actions. We agree and thus recommend that the phrase in the bill "a reasonable good faith belief" be replaced with the phrase "an objectively reasonable belief."

In addition, we think that legislation limiting the exclusionary rule should extend beyond just its application in the context of the Fourth Amendment. In contrast to its extensive consideration of the rule in cases involving the constitutional requirements of the Fourth Amendment, the Supreme Court has never given in depth consideration to whether evidence should be excluded if it was obtained in violation of a statute, rule, or regulation. However, the Court has held that suppression of evidence is not required for every statutory violation, even when the statute contains an exclusionary rule, and has declined to adopt an exclusionary rule for evidence obtained by an agency in violation of its own internal guidelines. ^{8/}

On the other hand, some lower courts have invoked the exclusionary rule for non-constitutional violations, although the Second Circuit has cautioned that "courts should be wary in extending the exclusionary rule ... to violations which are not of constitutional magnitude." ^{9/} Moreover, Rule 402 of the Federal Rules of Evidence, enacted in 1975, states: "All relevant evidence is admissible, except as provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Arguably, this would prevent the application of the

exclusionary rule for a non-constitutional violation, although no court appears to have considered Rule 402 in this light.

In any event, given the heavy price in terms of the truth finding process exacted by an exclusionary rule, coupled with the Supreme Court's holding that the rule is not required even for constitutional errors, we think it is important for Congress to legislate the principle that when the underlying violation is not of constitutional magnitude, the exclusionary rule ought not to be invoked by a court unless a statute indicates that it should be so applied. Accordingly, we recommend that a new section be added to title 18 specifically stating that except as provided by statute or rule of procedure, evidence which is otherwise admissible shall not be excluded or suppressed in a federal court proceeding on the ground that the evidence was obtained in violation of a statute, rule, or regulation.

If the Committee decides to adopt this proposal for limiting the exclusionary rule's application in non-constitutional situations, the limitation of the rule for constitutional violations, as set out in S. 237 needs to be modified by eliminating any reference to statutory authorization for the exclusion of evidence. For the sake of clarity, I have attached as a one-page appendix to this statement new sections 3508 and 3509 to reflect these changes. ^{10/} We urge the Committee to modify S. 237 so as to set out both of these new sections.

In sum, let me emphasize again that legislatively limiting the exclusionary rule so as to prevent its abusive application is critically important. Federal law enforcement efforts should not be hampered by an evidentiary rule that can operate to turn loose hoodlums and spies who belong in jail. Moreover, limiting the exclusionary rule would have the desirable affect of encouraging more of the states to do the same. Finally, limiting the rule would send a message to the law enforcement community and the public that the Congress will not stand idly by while courts throw out evidence by second-guessing the actions taken by reasonable police officers in obtaining it -- actions often taken during a sudden, dangerous confrontation with a criminal.

§ 3508. Limitation of the fourth amendment exclusionary rule

Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the fourth amendment. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable belief, unless the warrant was obtained through intentional and material misrepresentation.

§3509. General limitation of the exclusionary rule

Except as specifically provided by statute or rule of procedure, evidence which is otherwise admissible shall not be excluded or suppressed in a proceeding in a court of the United States on the ground that the evidence was obtained in violation of a statute or rule of procedure, or of a regulation issued pursuant thereto.

FOOTNOTES

- 1/ Stone v. Powell, 428 U.S. 465, 490 (1976).
- 2/ United States v. Leon, ___ U.S. ___, No. 82-1771 (July 5, 1984); Massachusetts v. Sheppard ___ U.S. ___, No. 82-963 (July 5, 1984).
- 3/ Report No. 98-350, 98th Cong., 2d Sess.
- 4/ 232 U.S. 383 (1914).
- 5/ Leon, slip op., p. 7.
- 6/ Leon, slip op., pp 20-21.
- 7/ Fn. 3, supra, p. 21.
- 8/ See United States v. Donovan, 429 U.S. 413, 432-434 (1977), and United States v. CacereS, 440 U.S. 741, 754-757 (1979).
- 9/ See United States v. Burke, 517 F. 2d 377, 386 (2d Cir. 1975). Our report on S. 237 dated August 20, 1985, discusses these cases and the entire question of eliminating the exclusionary rule for non-constitutional violations in greater detail.
- 10/ We note that any new sections added should start with 3508, not 3505 as is set out in S. 237. Sections 3505-3507, dealing with foreign evidence, were added by the Comprehensive Crime Control Act of 1984.

Senator McCONNELL. I notice that the Senator from Ohio and the Senator from Arizona have joined us. Senator Metzenbaum, do you have an opening statement?

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. I appreciate your holding the hearings on this bill as well as the other criminal law bills that are before the committee. It is particularly important that we hear testimony on this issue of changing the exclusionary rule. It should be pointed out, as we all know, that the recent Supreme Court decisions in this area, really zero in on the question. I do not know why we need to go further. When you have an amendment, or proposal, and you say that the search was undertaken in a reasonable good faith belief that it was in conformity with the fourth amendment, I would like to give a test to all the police officers of this country on the fourth amendment.

I think that proposed is really calling upon them to have a knowledge they don't have. I am not so sure that the mayors, or the chiefs of police, or anybody, would be in a position to speak to that, determine whether a search is in conformity with the fourth amendment.

Let us not kid ourselves: The Founding Fathers adopted the amendment because of the practices of unwarranted searches of these homes. Now, as our witness points out, you can always make out an egregious case in order to make a point, but sometimes, you have to look at the overall good, the overall value of our constitutional protections. I remember very well, many years ago, when the Kefauver committee was conducting hearings, and so many alleged criminals were taking the fifth. There was a big move on at that time to amend the Constitution to eliminate the fifth amendment.

Well, it was not eliminated and it has been very difficult to cause changes to be brought about in connection with the Constitution; but I seriously question whether or not this proposed legislation is itself constitutional.

And although I respect those who are making this effort to move forward with this bill, my own best judgment tells me that it is not in the Nation's best interest to do so at the moment. I think that there may be the votes, because it did pass the Senate previously. But it did not pass with my support at that time, and I do not think will have my support at this time. However, I would guess that if the matter is brought to the floor, it still might have the necessary votes.

That does not make it right, and I would respect my colleagues' right to be wrong, if they see fit to pass it in this instance.

Senator McCONNELL. Thanks, Senator Metzenbaum. Senator DeConcini.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeCONCINI. Mr. Chairman, thank you. I support S. 237 which amends title 18 of the United States Code, by adding the new section, 3505 to chapter 223. The bill before us provides that evidence obtained as a result of a search and seizure, and which is

otherwise admissible, shall not be excluded in a proceedings in a court of the United States, if the search and seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment.

The exclusionary rule is a judicially created rule under which evidence is barred from introduction at a proceeding such as a criminal trial, if the evidence is determined to have been obtained as a result of a search or seizure that violated the first clause of the fourth amendment.

The rule is of comparatively recent vintage and was not even applied by the Supreme Court in the context of the fourth amendment until 1914, 123 years after the the fourth amendment was adopted.

Mr. Chairman, I have a full statement that I would ask to put in the record. Let me just add to that statement, that having been a prosecutor, I have witnessed the so-called egregious cases that the Senator from Ohio talked about, and these are cases against all society. When a criminal is totally relieved of the entire evidence against him and ultimately does not have to answer for the crimes that he might have been involved in, to me, all of society pays. This is a carefully drafted amendment which does not deprive people of their fourth amendment rights but gives some direction to the Court, as the Court has given to the Congress, to make amendments and alterations of this rule.

So, Mr. Chairman, thank you for allowing me to be here and I ask that my full statement be put in the record.

Senator McCONNELL. Without objection, that will be done at this point.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR DENNIS DeCONCINI

Mr. Chairman, I support S. 237, a bill that amends title 18 of the United States Code by adding a new section 3505, to chapter 223 to limit the application of the fourth amendment exclusionary rule in Federal court proceedings. The bill will provide that evidence obtained as a result of a search and seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search and seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment.

The exclusionary rule is a judicially created rule under which evidence is barred from introduction at a proceeding such as a criminal trial if the evidence is determined to have been obtained as a result of a search or seizure that violated the first clause of the fourth amendment. The rule is of comparatively recent vintage and was not even applied by the Supreme Court in the context of the fourth amendment until 1914, 123 years after the fourth amendment was adopted; it has only been held applicable to State criminal proceedings for the past 22 years.

There are no constitutional or statutory provisions which specifically set limits on what is meant by an "unreasonable" search or seizure. Instead the law in this area is an amalgam of cases dealing with a vast range of issues relating to the undertaking of searches and seizures. Yet courts continue to apply the rule even as they continue to develop the law of search and seizures. The heart of the present problem in application of the rule is that it has been expanded gradually by the courts to apply in situations in which the rule cannot possibly serve its primary purpose of deterring police misconduct. In my experience as a former prosecutor, I have seen this distortion of the rule's purpose result in grave injustice as well as a substantial cost to our society as law enforcement officers and private citizens alike have lost faith in our criminal justice system. I have seen, as the Supreme Court has stated, that the rule "deflects the truthfinding process and often frees the guilty."

This bill is intended to enhance the operation of the Federal criminal justice system by allowing courts greater access to all reliable evidence relevant in deter-

mining the guilt or innocence of the defendant, and to promote renewed respect for that system as a search for the truth in the minds of our citizens. It is intended to aid the courts in that search for the truth and in criminal cases, where the police have reasonably tried to apply the complex law of search and seizure, insure that the guilty are convicted and the innocent are acquitted.

This bill will not eliminate the exclusionary rule. Rather it will eliminate the disproportionate application of the rule, and the disrespect for the law that application engenders. We must allow the courts to grant a remedy for the violation of Fourth Amendment rights which matches the seriousness of the violation while still deterring willful or negligent police misconduct.

For these reasons, I urge my colleagues who are concerned about crime in America, and the perception people have of our legal justice system, to support this bill.

Senator McCONNELL. I see that our distinguished ranking member of the committee has joined us. Senator Biden, do you have an opening statement?

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator BIDEN. Yes; I do. I thank the Chair and my colleagues for their indulgence in hearing me in light of the fact that I am late.

Mr. Chairman, no one who has worked in law enforcement or the court system, as most members of this committee have, and as the distinguished chairman of the full committee has, can be satisfied with the state of search and seizure laws to this day.

The fourth amendment reads as follows:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

In 1914, the Supreme Court, in *United States v. Weeks*, decided the obvious: That the fourth amendment is not self-enforcing, that some mechanism is needed to give life to the provision.

The Court's response to this situation was to create the so-called exclusionary rule. The rule has been much criticized over the last 70 years, and as Justice Cardozo put it: It makes no sense to free an obviously guilty person charged with a serious crime because, "the constable has blundered."

Mr. Chairman, it is easy to criticize the exclusionary rule, but we must not allow such criticism to blind us to the fact that we must have an effective mechanism for enforcing the fourth amendment.

Chief Justice Burger pleaded with the Congress in the early 1970's, in the *Bivens* case, to develop an amendment to the Federal torts claims statute to create a more effective civil remedy against the Federal Government for law enforcement abuses, so that it might serve as an alternative to the exclusionary rule.

I believe that only after we enact tort claims legislation and have had an opportunity to see how it works in action, should we consider significant reform of the exclusionary rule.

That is the first reason that I think it is premature to move on the exclusionary rule bill at this time. The second reason is, as we all know, last year the Supreme Court created a good faith exception to the exclusionary rule with regard to cases where the warrant is issued.

Most legal scholars who have examined closely the language of the Court's decision and have looked at the direction in which the

Court is heading, have concluded that the Court will extend the good faith defense to cases in which a warrant is not used.

By not acting on tort claims legislation, I think we make it unlikely for the Court to act because they will be reluctant to make such significant modifications to the exclusionary rule without there being another mechanism for enforcing the fourth amendment.

Mr. Chairman, in conclusion, I think that the step that needs to be taken now is not to enact the exclusionary rule, a rule that has served us well, and which, in my judgment is responsible, more responsible than any other single factor for the high standard of police behavior in this country, but to enact the tort claims legislation.

I hope this committee will agree and I hope that my colleagues will look at S. 492, the bill that I have introduced, the Tort Claim Act, as an alternative.

One last comment I should make, Mr. Chairman. The Justice Department, as I understand it, has a study that is under way on the effects of the Court's decision on the exclusionary rule, and there are a number of outstanding questions relating to the impact of the Court's two decisions in the *Sheppard* case and the *Leon* case, that I think warrant us slowing down just a little bit and taking a look at the Justice Department's study that I understand is under way, and will not be done for some time, and moving expeditiously to deal with the Tort Claims Act. I thank the Chair for his indulgence and I anxiously await the testimony of the witnesses who both propose significant change, and those who argue against any change. Thank you, Mr. Chairman.

Senator McCONNELL. Thanks, Senator Biden. Mr. Trott, S. 237 seems to set up a rebuttal presumption of good faith in law enforcement, unless there is evidence that the police acted to intentionally misrepresent the facts in obtaining the warrant.

Does this approach create the potential for abuse, that might outweigh the benefits of the modification?

Mr. TROTT. Mr. Chairman, I do not believe so. I think this is a relatively simple test that the judges of the Nation will be able to cope with. Each situation will be approached as the situation is.

There will be opportunity for cross examination of the officers, and for an examination as to whether there is an objective good faith belief in the constitutional cleanliness of the conduct.

I do not really think it sets up a presumption; it just presents the issues squarely to a judge for decision.

Senator McCONNELL. The Supreme Court, as several Senators have mentioned, has recently issued two decisions in the field of search and seizure that set up good faith exceptions for evidence that was obtained through a defective warrant. Why should the Congress interfere in this area of the law which is evolving on its own?

Mr. TROTT. Well, No. 1, I think the evolution has been quite slow, but No. 2, I do believe that Congress has a direct stake in this, and an interest in remedying a situation that still cries out for change.

This is the type of issue that was addressed last year, and as I pointed out before, the Senate really overwhelmingly decided that

this was in the best interests of law enforcement in the United States.

Senator McCONNELL. Senator Biden.

Senator BIDEN. Thank you. Mr. Trott, as I indicated in my opening statement, it is my understanding, in part based upon the American Bar Association's written statement, that the Department of Justice through the National Institute of Justice, now has a major study under way looking at the impact of last year's *Leon* case in which the Court created the good faith exception to the exclusionary rule for searches in which a warrant is used.

The ABA says the purpose of the study is to look at the impact of *Leon* on police behavior and training practices. Is such a study being conducted, and what is your understanding of the purpose? And if there is such a study, when do you anticipate it will be completed?

Mr. TROTT. Mr. Chairman, I am not completely up to date on that. I would be delighted to respond to your questions in great detail, in writing, just as soon as we possibly can.

[The information follows:].



U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

OCT 17 1985

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Honorable Joseph R. Biden, Jr.
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Biden:

At the October 2, 1985 hearing on the exclusionary rule, you inquired about a study of the effects of the Leon case being conducted by the National Institute of Justice (NIJ). I have been informed by the NIJ that shortly after Leon was decided, Deputy Attorney General D. Lowell Jensen suggested that an effort be made to determine the effect of that decision on police practices. As a result, the NIJ made a grant of \$148,414 to the Police Executive Research Forum in Washington, D.C. to examine the effects of Leon on police search warrant practices.

The project has three specific purposes: to learn whether and in what ways the Leon decision has changed the search warrant process; to determine the extent, nature, rationale and trends in regulations of the search warrant process imposed by the state supreme courts; and to locate especially constructive police administrative procedures relevant to the search warrant process.

The initial data for the survey was gathered by telephone interviews of police and prosecutors in a sample of thirty metropolitan areas throughout the country. Subsequently, site visits were conducted at seven cities whose search warrant procedures had been documented in a 1984 report written under an NIJ grant to the National Center for State Courts. An analysis of the data is now underway and a draft report is expected in February of 1986. It is anticipated that in addition to a comprehensive final report, the research will result in a 25-50 page summary of the study's findings for practitioners and an article length summary for a law journal.

During the hearing you also suggested that amending the Federal Tort Claims Act (FTCA) should take precedence over efforts to limit the exclusionary rule and you asked for our views on this issue. As you know, amending the FTCA to allow

persons who are subjected to unlawful searches or seizures to sue the government for money damages has been frequently suggested as an alternative to the exclusionary rule. In fact, the Chief Justice's dissent in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 422-424 (1971), suggested just such an approach. During the past several years, however, the Department has been of the view that providing a reasonable, good faith exception to the exclusionary rule was the most effective way of limiting the rule to its proper function of deterring police misconduct and that the question of amending the FTCA should be considered separately from the exclusionary rule. In essence, the Supreme Court's adoption of a reasonable good faith exception to the exclusionary rule for warrant cases in Leon and Sheppard supports this position. We think it is now clear that it is not necessary to amend the FTCA to provide an alternative remedy to the exclusionary rule for victims of unlawful searches or seizures.

Nevertheless, as you are aware, for reasons unrelated to the exclusionary rule, the Department has long sought amendments of the FTCA to immunize federal employees from civil liability for constitutional torts committed while in the performance of their duties and to make the United States, not the individual employee, the sole defendant in such cases. Questions have arisen as to whether amendments of the FTCA to achieve these results should apply just to law enforcement and investigative officers or should extend to all federal employees. Moreover, there is the question of the extent to which the reasonable good faith of the federal employee who committed the alleged tort should be available as a defense to the United States if it is substituted as the defendant. I note that your bill on this subject in the present Congress, S. 492, raises these issues. The Department is preparing a report on that bill for the Judiciary Committee at the present time and we hope to finish this task shortly. Meanwhile, as I indicated, we think that the consideration of legislation limiting the exclusionary rule should proceed independently of the FTCA amendments.

You will probably recall that during the hearing we discussed that portion of the Leon majority opinion in which the Court stated that exclusion of evidence would still be appropriate in certain situations. Specifically, at page 28 of the slip opinion, Justice White noted that the exclusionary rule might be applied if the judicial officer who issued the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; if the warrant was issued by a judicial officer who abandoned his judicial role (such as by personally taking part in the search) so that he could not be considered neutral and detached; if the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its

existence entirely unreasonable; or if the warrant was so facially deficient (such as by failing to particularize the place to be searched or the things to be seized) that the executing officers could not reasonably presume it to be valid.

You inquired if these four "telltale" signs of bad faith should be incorporated in a statute imposing a reasonable good faith exception to the exclusionary rule. In effect, the first and the last of these indicia of bad faith, the supplying of false information and relying on a warrant so facially deficient that it provides no direction where to search or what to seize, would be covered in the final sentence of the legislation we have proposed. (As I indicated in my statement, we favor modifying S. 237 slightly to comport with Leon and rely solely on the objective reasonableness of the officer's actions so that the final sentence would read: "A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable belief [that the search was in conformity with the Fourth Amendment], unless the warrant was obtained through intentional and material misrepresentation.") Clearly, supplying false information in the affidavit would destroy the presumption that the search was proper, and a search conducted pursuant to a warrant that gave no direction as to where to search or what to seize would in essence have no scope, thus also destroying the presumptive validity of searches conducted pursuant to warrants.

Similarly, our suggested revision of S. 237 already includes the third instance mentioned by the Court where the reasonable good faith exception to the rule would not apply, the situation where an officer relies on a warrant based on an affidavit so deficient in showing probable cause as to make the reliance unreasonable. As you know, we favor language stating that evidence would not be excluded on Fourth Amendment grounds "if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the Fourth Amendment." While searches pursuant to warrants would be presumptively valid, the presumption would quickly disappear in a case in which the affidavit to support it showed no indication of probable cause worthy of official belief.

Finally, it would be extremely difficult to codify the concept that no exception to the exclusionary rule should be made based on reasonable good faith where the judicial officer departs from his neutral and detached role. While we agree that applying the exclusionary rule in such a case of judicial misconduct makes more sense than in cases of alleged police misconduct, we think that the instances of magistrates departing so completely from their proper role as to justify the application of the exclusionary rule would be so few and yet so obvious that the courts could adequately apply the rule in such situations without

legislative guidance. For example, in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), the case that Justice White cited as an example of a magistrate's total departure from his proper role, the magistrate actually took part in the search and ordered the seizure of hundreds of items for which he had not previously found probable cause to seize when he issued the warrant.

I hope that the above has been responsive to your questions and that the Committee will quickly give favorable consideration to this important area of providing reasonable limitations on the exclusionary rule.

Sincerely,

/s/ STEPHEN S. TROTT

Stephen S. Trott
Assistant Attorney General
Criminal Division

cc. Honorable Strom Thurmond
Chairman, Committee on
the Judiciary
United States Senate

Senator BIDEN. That would be very helpful. I would appreciate it. A followup question that I have is that Justice Blackmun made the following statement in the concurring opinion in the *Leon* case, and I quote:

If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the fourth amendment, we shall have to reconsider what we have undertaken here.

Do you agree with the Justice's statement, if the effect of either the *Leon* case and/or of this legislation passes?

Mr. TROTT. Senator, I think the *Leon* and *Sheppard* cases were decided 2 or 3 days before I was to address the National District Attorneys Association training conference in Houston, Texas.

I was going to talk about some innocuous subject when *Leon* and *Sheppard* were decided. I tore up my speech and I wrote a new speech on *Leon* and *Sheppard*, and as a matter of fact, the key element of my speech was to quote the exact language that you just read from Justice Blackmun's observations, and I pointed out to the prosecutors who were there, in a career prosecutor training course, that the responsibility for making sure that the fourth amendment was protected, and that this new exception was handled with responsibility, fell on our shoulders. And I said each prosecutor, and each police officer in the United States ought to make it a part of his and her own personal agenda, to make sure that Justice Blackmun's concerns never come true, and that we are able to demonstrate, with objectivity, that we have lived up to what I call the challenge of the good faith exception to the exclusionary rule, to prove that we can do what we have said we can do, and that is, guard the fourth amendment, and at the same time vigorously pursue crime. I would be delighted to send you a copy of this.

It is my view, after talking to the U.S. attorneys, that we have lived up to that challenge thus far, and that the results during the last 1½ years of *Leon* and *Sheppard* have been quite positive.

The fourth amendment continues to be respected. This was a good step in the right direction. Law enforcement and prosecutors have shown that they can live up to these exhortations, and we are quite confident that we will continue to do so.

Senator BIDEN. I am not being solicitous, when I suggest that I have no doubt about the good faith of the vast majority of the law enforcement agencies in this country, and the Department of Justice in particular, but my specific question is, that if, in fact, it were shown that it did impact negatively upon the conduct and performance of police agencies in this country, do you believe that we should then go back and attempt to legislatively remedy that?

Mr. TROTT. Well, as a rhetorical answer to your question, the answer certainly would have to be yes. If somehow this produces chaos, and the fourth amendment becomes ignored, and police agencies all over the country, or even in certain areas, start running around abusing the dickens out of the fourth amendment, I would be the first one to call for some tightening up of the process.

But I see it just the other way. This is a situation where the responsibility is placed where the authority is for carrying out these decisions, and the response that I have seen, nationally, is the same response I tried to describe for you earlier: Law enforcement all over the country saying, it is now on us to do this right. If anything, it is spurring agencies on to make sure that their police officers are trained well enough to qualify for these new exceptions that are out there. So, I am—

Senator BIDEN. I am not disagreeing with that. The only point I am trying to make is, if we go back and look at the exceptions of those things which warrant my discomfiture with the exclusionary rule over the last 70 years, and the Justice Department's more acute discomfiture with the exclusionary rule, it might be argued that it is a fairly small body of cases that are in fact involved.

Let me put it this way: Do you believe that the existence of an exclusionary rule has had a dramatic impact upon the administration of justice in this country?

Mr. TROTT. A dramatic impact, yes; not all positive.

Senator BIDEN. That is what I mean. A dramatic negative impact?

Mr. TROTT. I believe that it has. On balance, I think the negatives far outweigh the positive aspects of this, and with apologies to the chairman for repeating what I said before: I have been a prosecutor for 20 years. I have released hundreds and hundreds and hundreds of felons, talking to police officers, trying to explain why what they did, although they thought it was objectively reasonable at the time, failed to take into consideration a new case here and a new case there, that changed the rules in midstream, about which they were completely unaware.

Senator BIDEN. I was only involved in the criminal justice system for 4 years, and I was on the other side of it, and you must have dealt with a bunch of shoddy officers if you had—you are telling me you have had hundreds and hundreds of cases—

Mr. TROTT. Oh, yes, and let me give you an example how. In California, a lot of arrests involve impounding automobiles that are being used by criminals, and the rule for a long period of time was, when you arrest somebody and impound an automobile in connection with that arrest, you may inventory that car, and take everything that is in the car out of it, and list it. And if in the process of running an inventory, you discover a gun, narcotics, stolen property, all of that can be used against whomever. It is not an illegal search and seizure to inventory a car.

All of a sudden, out of the blue, the California Supreme Court decided in the case of the *People v. Mazzetti*, that it was an illegal search and seizure. Instead they should just lock the car.

I had rafts and rafts and rafts of cases coming in for 6 months where police officers had impounded cars, listed things and then made cases, and, all of a sudden, because they changed the rules, out they went.

And the police officers looked at me and said what kind of nonsense is this? I said sorry, they apply this stuff retroactively and now we are in court, the rules shift. Over and over again that occurs.

Now, it takes a long time for police officers to catch up. Finally, 6 months later, then they caught up, and they say, OK, well, the new rule is you have got to lock the car; fine and dandy.

But then we went through a series of cases where, if you recovered a stolen car, the theory was, oh, you could search a stolen car because the crook driving it had no privacy interest in the car. Then the California Supreme Court came down with the *Dallas* case, and found a right of privacy in a stolen vehicle, suppressing sawed-off shotguns, drugs, and other weapons, and we had a whole raft of cases following that where police officers, in reliance on what they thought the law was in the past, found themselves caught short and their cases were going out the window.

We had another series of cases where it said, well, if you arrest somebody carrying a briefcase, you can search the briefcase. They all knew that and they all did.

The California Supreme Court came down and changed that, so then you had all these searches that went out the window. Then you had a series of cases on whether or not you could search a suitcase, whether or not you could search a Jack-In-The-Box cup, whether or not you can search a lunchbag, and the police officers ended up throwing up their arms, and most of them simply telling me: "Look. I'm going to do what I think is right and if you clowns want to throw it out, that's your problem, not mine."

This is the kind of disrespect that was promoted for the fourth amendment. I found hundreds and hundreds of decent men and women who are police officers in this country trying their best to do the right thing fighting crime, time and time again running into situations where judges, apologetically to the police officers, in my presence said, "I'm sorry, we're going to have to suppress the evidence in this case, officer. I know you didn't understand the change in the rule and I know you thought you were doing the right thing, but there's a technical rule that you weren't aware of, that requires me to find this to be an illegal search and seizure."

And the officers are not deterred from anything. They go out of the room thinking, this is silly stuff. I think the objective good-faith exception to the exclusionary rule permits no heavyhanded rogue police conduct.

It enables every judge in every courtroom in the United States to spot that type of nonsense behavior and to exclude the evidence, and it also enables every prosecutor to refuse to bring cases behind that kind of contaminated evidence.

But it also enables us to recognize that these are judgments being made in very complex areas, and that the purpose of the rule is to deter police misconduct.

You are deterring nothing, if you are telling an objectively reasonable police officer that what he did was wrong, even though he thought it was right.

Senator BIDEN. Well, it seems to me that for the series of examples that you have cited—and in part I think you would acknowledge and admit that one of your problems is you are from California.

Mr. TROTT. I cannot deny that.

Senator BIDEN. I think that if you go back and look at the 70-year history of the exclusionary rule, what impact it has had on police conduct has been, by and large, extremely positive.

If you look at the way in which law enforcement officers behave in many of the States, my own included, and the State of California, I suspect, prior to the imposition of the exclusionary rule, or the enunciation of the exclusionary rule, I would doubt whether or not you would suggest it did not have a positive impact.

Mr. TROTT. Senator, I would agree with you that the exclusionary rule, as such, has had a positive impact. It has caused training programs, it has caused a lot of good things to happen, but that aspect of the exclusionary rule that has been pernicious and arbitrary, has held back some of the progress that we might otherwise have made, and that is why I think we are getting rid of one part of the exclusionary rule by pursuing a good-faith exception, that cuts against the direction in which we all want to go, which is to continue to promote and preserve the values that are inherent in the fourth amendment.

Because this is the part of it that penalizes a decent police officer and causes that officer to have real confusion as to what he is doing.

Senator BIDEN. Well, let me ask you whether or not the good faith exception should prevail, if the magistrate who issued the warrant was not neutral.

Mr. TROTT. No. I think the *Leon* and the *Sheppard* cases make it clear, that if you are going to a rubberstamp magistrate because you just want to skirt the whole issue, that should be thrown out; it should not be allowed to happen.

Senator BIDEN. Should we write that into the law?

Mr. TROTT. Well, I think the legislative history would certainly include something like that, but I think the test itself that we are establishing, and *Leon* itself, which covers the warrant situation, makes it pretty clear that that is already the case.

Senator BIDEN. Well, the question that I have—let me ask you this, then. Is it the Justice Department's position that the four ex-

ceptions were not advisory but they were a constitutional requirement being dictated by the Supreme Court?

Mr. TROTT. Well, I am not quite exactly sure how to answer that. Whatever they are, they contain values that ought to be promoted, either continuously in the court decisions or in the legislation.

Senator BIDEN. Well, see, that is my problem. My problem is that if in fact it is ruled by a later court, that they were merely advisory, or dicta in the case, and we do not write it into the law, then we have a gaping hole that exists in the law. Because as I said, I was only a criminal defense lawyer, the bad guy, for 4 years, but I know for a fact that there are in every State in the Union, as in mine, certain rubberstamp magistrates that you can go to, and they will issue a warrant for Mickey Mouse, if in fact a proper police officer standing over 6 feet tall, in the proper uniform, suggests that there should be one issued.

So that it seems to me that—I am sorry. Yes, you may.

Senator SPECTER. Thank you very much. Senator Biden. I just passed him a note asking if I might interrupt him for 30 seconds and I will be brief.

Senator McCONNELL. I recognize the Senator from Pennsylvania.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. I just wanted to commend the chairman for convening these important hearings. I regret that I cannot stay because of other commitments, but I think that this is a very important subject, and I will be following the hearings closely, and I am pleased to see you here, Mr. Trott, and commend you for the good work you are doing. Thank you very much, Senator Biden.

Senator BIDEN. Thank you, Senator.

Senator McCONNELL. The Chair will note that the subject matter brought out all of the former prosecutors today. Senator DeConcini was here as well.

Senator BIDEN. And so was a defense lawyer.

Senator McCONNELL. And one defense lawyer. Senator Biden.

Senator BIDEN. It has always somewhat been the odds, Mr. Trott: One defense lawyer against several prosecutors. I have never walked into a courtroom where there have not been more than one, but fortunately, none—

Senator SPECTER. I object. I object.

Senator BIDEN [continuing]. Of them as competent as either of my two colleagues.

If I may proceed. Mr. Trott, you understand my concern, I suspect, because the four exceptions—obviously, if the magistrate was intentionally misled, as pointed out in the *Leon* case; or if the magistrate who issued the warrant was not neutral; or it was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or if a warrant were so factually deficient that the police could not reasonably presume it to be valid; I hope the Justice Department is suggesting that in that case, in any of those cases, the good-faith exception should not exist.

And so it seems to me we should do one of two things, at a minimum. We should either write those exceptions into the law, into

S. 237, or, we should wait for further clarification from the Supreme Court as to what they meant by it.

Because I have, in seeking requests for information on this from legal scholars, both opposing and supporting changes in the exclusionary rule, gotten varying opinions as to whether or not those exceptions constitute the law of the land.

So I wonder if you would comment on how we should handle—first of all, does the Justice Department subscribe to the four exceptions cited, and, second, if so, how should we deal with it?

Mr. TROTT. I think the exceptions are good exceptions. I think they are nothing more than a way of fleshing out what is meant by objective good-faith belief, reasonable belief.

I think the test itself already includes what you are referring to. It would be a further clarification but I do not think a necessary one, to give the courts of this land sufficient direction to know what to do in these circumstances.

Senator BIDEN. Would you have objection to us adding those four exceptions, state them explicitly in the legislation?

Mr. TROTT. Well, Senator, I have to study that, but sitting here right now, no, because I, as a prosecutor, in no way would ever try to sell a case like that to a court because that is not objective good-faith belief, when you are monkeying or tampering with a system in the way that is described in those four circumstances.

Senator BIDEN. Again, I am not being facetious when I suggest that I have no doubt about your reasonable exercise of a, quote, "blanket good-faith exception." I really do not.

But in the history of this land, we have not always had women or men as competent as you sitting in your position. We need only cite the attorney generals that have been dismissed, put in jail, or debarred, to lend credence to the statement I have just made.

So that that is why I am, you know, to cite the old saw, "We are a nation of laws, not men," and we have competent men and women now, but I am always skittish about whether or not we leave it to the good-faith exercise of the good-faith exception by good-faith women and men.

Mr. TROTT. Senator, your observation about rubberstamp magistrates is an accurate one.

In California we used to have a sitting municipal court judge—the superior court judges referred to him as the "law east of the freeway," and whenever they saw a search warrant that was issued by that magistrate, believe you me, they gave it careful and close scrutiny.

The point that I am making is that the system, in many respects, is self-policing. These are situations where you have reviews at different levels of these decisions.

If a magistrate in the first instance makes the decision, it is almost axiomatic, especially in felony cases, that there will be other judges along the line, before the trial, that will be reviewing this decision, and then of course the appellate courts of each State, and the Federal Government, remain available to self-police and make sure that the exceptions that you are concerned about—and that we are concerned about—are washed out of the system.

Senator BIDEN. I want to make it clear that—let me try to put this in some sense of proportion, at least how I feel about it.

There are those who argue that the requirement to make a good-faith exception or any other alteration of the exclusionary rule is a matter of such consequence that the republic hangs in the balance.

There are those who suggest, on the other side, that in fact if there is any alteration of the exclusionary rule, that the civil liberties of every American will be in such jeopardy that we will probably be only a step away from a totalitarian state next Wednesday. I do not subscribe to either of those positions. I understand the frustration as to how we got to where we are now, because of the inability to acknowledge any of the abuses that have, in effect, been thrust upon the system and the public by the exclusionary rule, or certain applications of the exclusionary rule.

But I view it more in an incremental sense. It seems to me that we have lived with this so long, that it is wiser to move to exceptions very consciously and very slowly.

For example, there was a move to amend the exclusionary rule prior to the decision in the *Leon* case. I think that was unwise.

We knew it was up before the Supreme Court. Many of us argued the exception would be granted under limited circumstances, and that we should wait to see what the Court does. If you go back and look at some of the legislation that was introduced with regard to the exclusionary rule over the last 10 years, it is out of whack, by a longshot—not what you are supporting but what had been put forward previously—out of whack with the *Leon* case.

The *Leon* case came along, and in the minds of all—except those who believe that civil liberties are in such jeopardy that we are going to collapse tomorrow—it was viewed as a progressive step. Now, I apologize for taking so much time, Mr. Chairman, but since I am the one that badgered the chairman for this extra day of hearing, and the chairman chastened me very accurately, suggesting that if I wanted the hearing I had better damn well show up and have questions. I have got a lot of questions.

And I will either yield now and come back, or pursue one more line of questioning with regard to tort claims.

Senator McCONNELL. Why do we not see if Senator Simon, who has joined us, has an opening statement.

Senator SIMON. I will yield to the Senator from Delaware.

Senator McCONNELL. You are on, Joe.

You are paying a heavy price for asking for this hearing.

Senator BIDEN. Do you agree, Mr. Trott, that any modification to the exclusionary rule, by the Supreme Court is more likely, if an effective tort claims scheme is in place before the Court reaches the issue the next time around, assuming we do not move on this legislation?

Mr. TROTT. I am not sure, Senator. It is possible. There is no question about it. The more ways you can shore up the fourth amendment, the more attractive it becomes to loosen some of the safeguards that have been in place.

Senator BIDEN. Would you consider the possibility of moving first on the Tort Claims Act, and after that is in place, then consider this modification? I know you have been supportive of attempting to move the Tort Claims Act, but the exclusionary rule seems to be a matter that is higher on the agenda than the Tort Claims Act.

Is there any prioritizing within the Department, not that there need be—but could you give us a sense of how you in the Department feel about the urgency of each of these? I suspect you will say both are urgent.

Mr. TROTT. Well, I think both are important. I think they stand alone. Senator Biden travel together. I think this bill that we are talking about today is, as far as we are concerned, of a greater priority.

Senator BIDEN. My concern is that—I may be mistaken, and I ask any staff, in addition to mine, to correct me on this. But my recollection is, under Attorney General Smith there was a higher priority placed upon amending the Tort Claims Act.

Is that correct, or am I wrong on that? Because we were really working on it. Just speak up, anybody. It is true. That does not mean it is true, but—

Mr. TROTT. I am advised that—

Senator BIDEN. That is my recollection, because I worked like hell on it, and I cannot remember why, other than the merits of it. Someone was pushing me.

Mr. TROTT. I am advised that we included both titles in the Comprehensive Crime Control Act, and I do know that William French Smith placed a high priority on straightening out some of the problems with the Tort Claims Act, no question about it.

Senator BIDEN. And you know the breakdown we had there. It related to—maybe you do not know—but there was a request in the Department's submission for amendment of the Tort Claims Act that we go well beyond police officers, for example, dealing with OSHA.

Mr. TROTT. Sure; yes.

Senator BIDEN. That is where we had a real breakdown.

One of the downsides of being the ranking member of this committee is I know less about the detail of specific items that come before us than I should, and more about all that is happening.

I become more of a generalist, unfortunately, and, my recollection is we have not gotten much of a nudge, this Congress, on the Tort Claims Act.

Have you all made, pushed us on that? I honestly do not recall. And while you are getting briefed, as I have had to be briefed, I may explain, state the obvious, why I am asking the question, because if that is correct, we all know that the way things move here in terms of modification of the criminal law, as we labored for 8 years to get the comprehensive crime bill passed, as little gets done unless the Department is pushing as hard as the Congress is pushing, and to be honest with you, unless it is pushing the Congress sometimes.

Mr. TROTT. I am told—and this refreshes my recollection, that the problem with the Tort Claims Act is that we have been unable to agree at what the fix ought to be.

There is still some disagreement as to exactly what the fix should be; therefore that remains somewhat of a matter that is in limbo.

On the other hand, we are very firm as to what we believe the fix ought to be on the exclusionary rule.

Senator BIDEN. I would like to suggest something, because my view of not moving forward with this exception at this time, may not prevail. Your view may prevail, and the view of the chairman.

But whether or not it does, I would suggest that you consider, in effect, dividing the Tort Claims Act—I realize this is not a hearing on tort claims—between those relating to law enforcement officials, of a police nature, and the other enforcement provisions with the Federal Government. If you do that, I can almost guarantee you, although I speak only for all Democrats, right, Paul? I can only speak for all the Democrats in the Senate; I cannot speak for all the Republicans.

All kidding aside, I suspect we would be able to pass a tort claims bill in this Senate in very short order, if we could settle that problem, and then take up the separate issue of extension beyond traditional police agencies.

But I guess I would ask you to consider that, and I would appreciate, not for this record, or for this hearing, but if you all would get back to me on your feeling about that.

Mr. TROTT. We certainly will.

Senator BIDEN. Well, I really am taking too much of this witness's time. I know we have four or five other witnesses.

Senator McCONNELL. Several others.

Mr. TROTT. If I may just slide in sideways, I have used a lot of California examples, but one that I quoted earlier, before you arrived, was a Colorado example. So it is more than just a California problem, Senator.

Senator BIDEN. It is basically a Western problem. [Laughter.] OK. I thank you very much, and I thank the Chair, and my colleague from Illinois.

Senator McCONNELL. Thank you. Senator Simon, do you have any questions of Mr. Trott, or a statement?

Senator SIMON. I do not at this point, Mr. Chairman. I am here to get some wisdom from my colleagues from Delaware and Kentucky, and the witnesses.

Senator McCONNELL. Thank you, Senator Simon. You may end up presiding at 11:30, if you stick around, because I have to leave then.

Thank you, Mr. Trott.

Our next witness was scheduled to be Jim Smith, the attorney general from Florida, and I understand he is in an airport somewhere; is that correct? So, we will move on down to Prof. William Greenhalgh from Georgetown Law School, who is the former chairman of the Criminal Justice section of the ABA. Professor.

Dr. WASSERSTROM. I am not Professor Greenhalgh. My name is Wasserstrom. I also teach at Georgetown. I think it might make more sense for me to go first since I am going to be very brief and I am just going to respond to some of what Mr. Trott said, if I might.

Senator McCONNELL. All right.

**STATEMENT OF SILAS J. WASSERSTROM, PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW SCHOOL, WASHINGTON, DC**

Dr. WASSERSTROM. Mr. Trott mentioned for example this case from Colorado and talked about the behavior of the police officer

there, and it seems to me his real objection is to the ruling of the Colorado court and what the policeman did was illegal under the fourth amendment, and it is not really an objection to the exclusionary rule. I mean, a very simple point which people sometimes have trouble, I think, understanding, is that the exclusionary rule only comes into play if the police have violated the fourth amendment as the court interprets the fourth amendment.

Many of the problems which I think the Justice Department perceives in this area are really problems I think with the Court's decisions under the fourth amendment. That is, interpretations of the fourth amendment itself and the kind of powers the police should be allowed to have to search and seize.

His description of the Colorado case I think was meant to make the point that everything this police officer did was perfectly fine.

Well, if everything the police officer did was perfectly fine, then he did not violate the fourth amendment, because all the fourth amendment requires is that the police act reasonably. When the police act reasonably, there is no fourth amendment violation and there is no reason why evidence would be excluded.

He also gave a parade of horrors from California involving decisions of the California Supreme Court concerning searches of cars.

Senator BIDEN. Excuse me, Professor. I hate to interrupt you but since you are going to be brief, I do not want to miss the point.

You are suggesting that the determination of whether or not the police officer acted reasonably, in compliance with the fourth amendment, is somehow a separate and distinct issue from the exclusionary rule. I do not quite follow that.

Dr. WASSERSTROM. Well, if the court determines that the police officer did act reasonably and in conformity with the fourth amendment, then there is no reason the exclusionary rule ever comes into play.

Senator BIDEN. Then the only time it comes into play is when they conclude he did not act reasonably.

Dr. WASSERSTROM. That is right, and that is—I am sorry.

Senator BIDEN. So what?

Dr. WASSERSTROM. Well, if it comes into play only when they have acted unreasonably, then—

Senator BIDEN. But who determines that? The court determines whether it is unreasonable.

Dr. WASSERSTROM. That is right. The court interprets the fourth amendment.

Senator BIDEN. And by determining whether or not it is unreasonable, they are saying that this should fall within the exclusionary rule.

Dr. WASSERSTROM. They are saying first, this violates the fourth amendment; therefore, the evidence should be excluded.

Senator BIDEN. Right.

Dr. WASSERSTROM. That is right. But what Mr. Trott was objecting to—

Senator BIDEN. You are from Georgetown. You have been educated by Jesuits, have you not?

Dr. WASSERSTROM. No. As a matter of fact, I have not. What Mr. Trott was describing in Colorado, I think his point was—if I under-

stood him—was that this police officer acted in a way that should have been found to be constitutional. That is his real complaint.

OK. His complaint, then, is about the court's interpretation of the fourth amendment and not with the application of the exclusionary rule, and it seems to me that his examples from California were making really very much the same point: The court should have permitted searches of those cars in those cases. If the court had permitted the searches of the cars in those cases, then what the police would have done would have been legal and there would have been no problem with the exclusionary rule.

The fact that the fourth amendment prohibits only unreasonable searches and seizures makes this bill, it seems to me, entirely unnecessary.

All this bill would do is say that where the police have acted in conformity to the fourth amendment, then the evidence should be excluded. Well, that is the law now.

Let me take up in somewhat more detail his California cases. He said he had hundreds of cases where evidence was excluded. Well, as you pointed out, Senator Biden, that means that he must have been dealing with police officers who were violating the fourth amendment hundreds of times, or the exclusionary rule issue never arises.

It seems to me you cannot have it both ways. You cannot say the police are doing a great job, and yet, there are hundreds of cases where what they have done was illegal.

He said, for example, that he had lots of cases where the police had inventoried cars under a decision of the court which said it was OK to do that.

And then later the court decided that that search was invalid. Those cases involved interpretations of the California State constitution. This bill would obviously have no effect on that; it would not apply in State court at all.

But in any event, those were interpretations of the State constitution.

Now the court announces for the first time that inventory searches of cars are illegal, and according to Mr. Trott, there were hundreds of cases out there where the police had searched the car before the new decision was announced.

Well, when the U.S. Supreme Court announces a new decision which expands the protections of the fourth amendment, it does it prospectively only; the decision does not apply with respect to searches conducted before the decision was announced.

So that kind of situation would never arise in the Federal system because the Court has made it clear that any kind of decision expanding the scope of the fourth amendment—and those decisions are not really likely to be coming down any time soon, I do not think—but when they were coming down, 10 years ago or so, 15 years ago, or so, they were always made prospective.

So police officers who relied on prior law were protected. That no exclusion was ordered anyway. The only thing this bill would accomplish with respect to changes in the law would be this. It would have the effect of saying that when the Court announces a new decision which would invalidate conduct which had previously been legal, that that decision should not apply even to the case itself.

That is, that the exclusion should not be applied even to the case where it is announced. It should never apply to older cases, anyway.

And the problem with that is, that if you do not apply the exclusionary rule to the case where the new rule of law is announced, you deter litigants from ever arguing for changes in the law. They have nothing to gain by it.

Even if they prevail on the court, convince the court that this has been a bad rule, the rule should be that there has to be a warrant here.

If they know that even if they win the case, they are going to lose the war because the evidence is going to come in anyway, then why should they bother to make the argument?

And if they do not make the arguments, then you do not have any kind of movement with respect to the fourth amendment at all. You do not have any kind of progress with respect to the interpretation of what the fourth amendment does or does not require.

Another problem with the good faith exception which is very similar is this. I think police officers everywhere, if they are going to do their job well, need to know just what it is that they are or are not allowed to do under the fourth amendment.

The only way they can know that is by courts telling them, this is OK; this is not OK. If you have a good faith exception the courts are simply going to stop doing that.

In any case where it is sort of close, where what the police did was near the line of illegality, or legality, the court is just going to say, "Well, we do not have to decide whether what they did was legal or illegal."

We do not have to tell you what you can or cannot do. The fact is that what you did was close enough, that you acted in good faith and so the evidence comes in.

Senator BIDEN. Well, is that true? Won't they be saying, the courts, I suspect that in fact they will be defining—if this were to pass—they would be defining much more specifically what constitutes good faith?

Won't they be looking at whether, like in the *Leon* case, it was a biased magistrate, or if no reasonable police officer could believe it to be legitimate, et cetera?

Won't they be further defining what constitutes good faith?

Dr. WASSERSTROM. Well, in the area where you have searches conducted to warrants, as you did in *Leon* and *Sheppard*, the Court did explain to some degree what it is that constitutes good faith.

But I am thinking of cases where the issue is whether or not the police had a sufficient basis to conduct a warrantless search, whether they had probable cause to make an arrest, or whether they had exigent circumstances which would justify making a search without a warrant.

In those cases, let's suppose that what the police have in the way of basis for their search is something that may—some people's view would be enough to justify the search and other people's view would not be enough, the court could elaborate and say: "Look. When you're going to conduct an arrest or a drug transaction, say, on the street, you've got to see at least this much. And if you see this much, let's say an exchange of something wrapped up for

money, that's enough; but if you don't see that, if all you see is somebody handing money to somebody else, that's not enough."

That kind of decision could help the police know what they can and cannot do.

Under the good faith exception it seems to me likely that what is going to happen, when you are dealing with trial courts that are burdened with many more cases than they can handle well, they are going to get a case where the police officer made an arrest, that the trial court is just going to say: "Look. I don't have to worry about whether this actually is probable cause or not; it's close, a close—

Senator BIDEN. Professor, you—

Senator MCCONNELL. Excuse me, Senator Biden. I have got to go. I just want to indicate that Senator Thurmond wished to have an opening statement inserted at the beginning of the hearing.

It is my understanding that through the miracle of aviation, the attorney general from Florida is here, and you can go back to him, Senator Biden, when you would like, and also, I understand that you are willing to take over the hearing, which I appreciate. I want to thank all the witnesses for being here this morning.

Senator BIDEN [presiding]. Professor, as I said, you know much more about this than I, but has not the development of our jurisprudential system been such that in fact, the courts are going to do the exact opposite of what you just suggested?

Notwithstanding they are overburdened, I cannot believe that a trial court and/or an appellate court, is not going to define, more and more clearly, the definition of good faith as they did with defining the reasonable man standard for the last 300 years.

I mean, we have a whole body of law that defines what constitutes a reasonable man.

Dr. WASSERSTROM. The outcome of the case is not going to turn on what they say, you see, because even if they say that what you did, officer, here, was unconstitutional under the fourth amendment, but because of the good faith exception it is close enough to the line, that the evidence will come in anyway.

Then the result is the same in the case, whether or not they find a violation or do not find a violation. You are talking about a tort situation where they are defining how reasonable a man behaves. Well, the outcome of that case turns on how the court decides whether or not the person—

Senator BIDEN. Well, I am probably missing something here, and since I tend to agree with the position you are putting forward, I am maybe somehow not being as sharp as I should be here.

But it seems to me, that in fact there will be many court cases that will turn on whether or not what was done was a good faith exercise by the police officer. That will be an issue.

Dr. WASSERSTROM. Senator, where you are talking about the question of whether or not the police had probable cause—for example, to conduct an arrest, to make an arrest—the question of whether or not they acted in good faith comes down to no more than the question of were they close to probable cause? It is the same question.

Senator BIDEN. Well, in part, it comes down to—let us be blunt about it. Sometimes, it comes down to no more than what the ideological predeliction of the judge listening to the case is.

Dr. WASSERSTROM. That may be.

Senator BIDEN. Just as much as it does whether or not—I mean, I have been before judges who in fact are very, very strong civil libertarians, who will sit there and suggest—notwithstanding how close to the line it is—that in fact it did not meet that judge's standard of what constituted probable cause.

I mean, it seems to me you are painting a very one-sided picture. I agree with the thrust of what you are saying, but to suggest that it will not warrant defense attorneys moving forward to make the argument that in fact what the police officer did did not constitute a good faith exception, is a misrepresentation of what is likely to occur and what judges are likely to do.

Dr. WASSERSTROM. There are two different situations. One situation is one where the defense attorney is asking the court to overrule a prior decision. In that sort of situation, it seems to me unlikely, that the litigants are going to push very hard for that, if at all, because even when the older decision is overruled, the new decision will not help them any.

Because where the police have relied on the old decision, they will be shielded by the good faith exception to the exclusionary rule, and so even if I were to prevail on the court, convince them to change, the court to change its mind about what the law should be—

Senator BIDEN. And that is assuming they are changing a standard that they have heretofore—

Dr. WASSERSTROM. That is the first kind of situation. The second kind of situation is one where what is at issue is whether or not the police acted with the requisite factual basis for their conduct.

Senator BIDEN. As determined by the court?

Dr. WASSERSTROM. Determined by the court. And it seems to me there, that what is likely to happen is, the court is going to say, look, we do not have to say exactly where the line is with respect to the factual basis that you need. If you are close to the line, wherever it might be, then that is good faith.

Senator BIDEN. All right. Well, I would say to you that that will depend in large part on the judge. Let me be very specific. If it is Ab Mikva, and he is convinced that the fourth amendment has been violated, notwithstanding that the court has moved forward, or the prosecution has said that the police officer acted in good faith, Ab, God bless him, is going to sit there and say—he is going to look awfully damn close to find a reason to prove that that was not done in good faith.

Dr. WASSERSTROM. Some judges would do that. I think they would have to say that, "I think you acted in bad faith because this isn't even close to probable cause. I mean, that is the only way you could say it, I think. If it close to—"

Senator BIDEN. They do not have to say "close." They would just say: "It does not meet the standard which I, the court, conclude, is good faith."

Maybe we have not practiced before the same judges. Now I admit there is more of the other kind of judges out there who will

say—which worries me—who will say, “By the way, police officers want this guy nailed, there was in fact marijuana or cocaine, or a sawed-off shotgun, or whatever—notwithstanding the fact the fourth amendment has been violated, the guy acted in good faith, he was close—bang. Nail him.”

I admit there are more of them than the other, but to suggest that a body of law will not develop defining what constitutes good faith, and that it is not in the interest of the defendant to make the case that it does not meet the good faith exception, seems to me to misrepresent the way the courts work.

Dr. WASSERSTROM. Well, I think unless a court has—

Senator BIDEN. I guess I am not going to get my son into Georgetown Law School, huh?

Dr. WASSERSTROM. I am not on the admissions committee. Unless the court has actually told the police that this is the sort of thing that you should not be doing, it seems to me that the judges will find that, despite the fact that we never told you you cannot do precisely this—the number of judges that will say, nevertheless, what you did was in bad faith—the number is small. Those judges are few and far between. I am not saying there are no judges that do that.

Neither of us has had any experience practicing before a judge operating under a good faith exception, so we are both speculating about how judges are likely to behave.

Senator BIDEN. That is true.

Dr. WASSERSTROM. But my judgment is based on experience trying criminal cases in DC, where the courts generally, the trial courts at least, want to deal with these motions to suppress as quickly, and as expeditiously, as they can, for the most part, and if they can do it by simply saying: “Look. This is a close case. I don’t have to decide right where the line is. It comes within reasonable good faith; therefore, the evidence is admissible.”

It seems to me that is the way most judges, most of the time, will do it. I am not saying all judges do it all the time.

Senator BIDEN. I do not disagree with that.

Dr. WASSERSTROM. Then you may have some law development, but it is going to be considerably slower than it would otherwise be.

Senator SIMON. Just one question, and unfortunately, I am going to have to move on, and you have, by indirection, answered this I think, but not directly.

Does this bill violate the spirit of the fourth amendment?

Dr. WASSERSTROM. It depends on what you take to be the spirit of the fourth amendment. In my view it does, but the way the Supreme Court has interpreted the fourth amendment over the last 10 years, I would not want to say that this bill is unconstitutional, given the current makeup of the Supreme Court.

That is, if I were simply to predict what the Supreme Court would do about this bill, I have very little doubt that they would find it was constitutional.

Senator SIMON. But it is a substantial extension of the *Leon* decision, is it, or—

Dr. WASSERSTROM. It is a substantial extension of the *Leon* decision and I think it is an extension which extends it to areas where it makes even less sense than it did in *Leon*.

Let me make one other point about the extension of *Leon*. With *Leon* the law, the police have an incentive to get warrants because they are shielded by a good faith exception which will protect them to some degree where they get a warrant.

If you extend the good faith exception and apply it across the board, then that added incentive, which they now have to get warrants, is dissipated. There is no longer any bonus that they get, in a sense, from getting a warrant. They are protected from some kind of good faith, sort of shield; even when they act without a warrant, protected against exclusion. It seems to me that is one of the bad effects of a bill of this sort that extends the good faith exception to those areas where they have acted without a warrant.

Senator SIMON. I thank you.

Senator BIDEN. I would like to ask another question, if I may.

Senator SIMON. I will let you soften your questions and get your son into—

Senator BIDEN. Well, I will, I will. I think I am going to work on Yale with the next question. Pretend you are teaching at Yale, Professor—

Dr. WASSERSTROM. That is where I went.

Senator BIDEN [continuing]. And disregard the law, and just talk about philosophy—I am looking for a philosophic input here, and I am being very facetious about Yale and Georgetown but I am being serious about this question.

Is there any validity to the argument that is made by so many people these days, admittedly on the center right or far right of the political spectrum, that respect for the law has been seriously eroded, as a consequence of many things, not the least of which has been the seemingly ineffective application of the criminal justice standards to people who are clearly bad guys, who clearly have the sawed-off shotguns, who clearly, deal in dope and who walk the streets? And I know that there are a number of cases, and I could cite ones where I represented a defendant, and, quote, "got the defendant off" because in fact I believed his fourth amendment rights were violated, notwithstanding the fact that he was not a good guy.

Unless we do something to remedy these cases where folks—to quote the Assistant Attorney General—with the "sawed-off shotguns get off scot-free" because of, as the public views it, a technicality, will we continue to do harm to the criminal justice system?

By the way, I compliment you on pointing out what I wanted to point out—the distinction between the California Constitution and the Federal Constitution, when Mr. Trott was here.

Second, isn't there a frustration buildup on the part of good, decent police officers, because of what appears to them to be, and in some cases is, a totally frustrating effort on their part to deal with some of the seamier elements of the American public? When things like those stated by Mr. Trott and others happen, doesn't that only make them more cynical, so that they commit more illegal acts against innocent folks out of frustration?

That they, instead of bringing that dope dealer in, shoot him? I am not being facetious. I am being serious.

Do you think there is any merit to those kinds of arguments that are made, and should a committee like ours consider that in the

mix, when we are making judgments about alterations of, in this case, the exclusionary rule?

Dr. WASSERSTROM. Well, I think it is important to realize that the bill you are talking about of course will only apply in Federal courts, and the Federal courts, there has been an exclusionary rule now for 70 years, for fourth amendment violations.

So there is no reason to think there is more frustration out there now than there has been over the last 70 years. I am talking about FBI agents, other Federal law enforcement agencies like the Drug Enforcement Administration.

What you are saying I think may have more validity with respect to some State and local police forces than it would the Federal police forces.

But even with respect to the States, the exclusionary rule has been in force for 25 years. As I say, it is nothing new. I am sure that it is frustrating for a police officer to find that when he has arrested somebody who is clearly guilty, that the case cannot be prosecuted effectively because evidence has been excluded.

I do not really think it happens very often. My experience, as a defense lawyer, the number of cases where evidence was excluded, or cases were dropped because the evidence would have been inadmissible, there were not many.

The only offenses were the less serious kind of possessory offenses, usually drug possession defenses, small quantities of narcotics, arrested on the street—that kind of thing.

But I am sure it is frustrating for police officers. On the other hand, I am sure half of them that live within the confines of the fourth amendment itself, is sometimes frustrating for police officers.

That is, they cannot search and seize whenever they please. I think the cause of their frustration may, in many cases be, the rules themselves that say when they can search and seize.

That is a different question than the question of whether or not the exclusionary rule should apply when they violate those rules. And it may be that they should be allowed, for example, to search and inventory a car when they make an arrest of the driver. Well, that is a disagreement with interpretation of the California Constitution by the California Supreme Court. That itself I am sure is frustrating to police officers because it hampers law enforcement.

But that is an argument about something different. It is not an argument about whether or not, when they do violate the fourth amendment, the evidence that they obtain should be excluded.

And I just do not think that, at least as far as Federal law enforcement agencies are concerned, there is any reason to think that there is a demoralizing effect from the exclusionary rule. I mean, they have lived with it for 70 years, as I said.

Senator BIDEN. Thank you very much, Professor. I appreciate it.

Our next witness will be Attorney General Jim Smith here of Florida.

Attorney General SMITH. Yes, sir.

Senator BIDEN. Welcome. We appreciate your taking the time and effort to come all the way up.

Were you in Florida this morning?

Attorney General SMITH. Yes, sir, and I apologize for being late. We had fog in Atlanta, and we were about 45 minutes late.

Senator BIDEN. Anybody who has to go through Atlanta has a dispensation, automatically, and that is the only way I know how to get from there to here, just about.

General, I am here to listen to your testimony. Please proceed.

STATEMENT OF JAMES SMITH, ATTORNEY GENERAL, STATE OF FLORIDA, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ACCOMPANIED BY BILL BRYANT, DEPUTY ATTORNEY GENERAL, STATE OF FLORIDA

Attorney General SMITH. Thank you, Mr. Chairman.

I would like to introduce Mr. Bill Bryant who is the deputy attorney general of Florida, who is with me today, and I appreciate the opportunity to be here this morning and discuss a matter of considerable significance to our criminal justice system.

When I appeared before the Senate Judiciary Subcommittee on Criminal Law in March 1982, it was to advocate legislation limiting the judicially created exclusionary rule.

My earlier comments are a matter of record and I will not repeat them this morning. Basically, it was my opinion that the rule had become an obstacle to justice rather than a vehicle for justice.

This issue continues to be of special interest to the National Association of Attorneys General, as well as to the State of Florida.

Along with many other States, Florida faces a very serious crime problem. Our constant battle with drug smuggling and crimes related to drugs greatly intensifies the challenges faced by law enforcement and balloons the statistics that make us a high crime State.

Although Federal, State, and local law enforcement are making record seizures and arrests, they are bailing against the tide.

We must provide law enforcement officers and prosecutors with effective weapons to combat drug smuggling and other crimes that it spawns.

Much of the evidence upon which our prosecutions turn results from search and seizure conducted by law enforcement officers without a warrant in situations that require immediate action.

If we deny to the prosecution the ability to use drugs and other evidence seized, in good faith without a warrant, we seriously impair their ability to put drug smugglers out of business.

Since I last testified on this issue, the Supreme Court has issued two rulings that have helped curb use of the exclusionary rule as a means of withholding probative evidence of crime from our courts.

In two cases, *Massachusetts v. Sheppard* and *United States v. Leon*, the court held the exclusionary rule will not be applied in cases in which law enforcement officers seized evidence on the basis of a search warrant later found to be technically flawed, or faulty.

Instead, the court held that when a search is undertaken in good faith reliance on a presumably valid warrant issued by a neutral and detached magistrate, the evidence obtained is admissible.

In so holding, the court recognized that the rule's function of curbing police misconduct would not be served by excluding evi-

dence from a search conducted as the result of a judicial error rather than police error.

However, the court cautioned that certain evidence would not be admissible under this good faith exception.

The exception does not apply to evidence seized through a warrant procured by a police officer who knowingly or negligently swears to materially false facts.

Nor does it apply to a warrant issued by a judge or magistrate who abdicates his position of neutrality.

With the implementation of this good faith exception for evidence obtained through search warrants, the battle to right the wrongs permitted by blind reliance on the exclusionary rule was half won.

But the Supreme Court left one question unresolved. It did not address the question of whether the rule applies to evidence obtained without a warrant by police officers who reasonably, but incorrectly, believe they have proper basis for their search.

It appears likely that the court will consider and validate this additional good faith exception in the near future, if I can predict the direction of the recent court rulings.

However, in my view, and because of the continuing drug problem that we have in Florida, the interests of safe, effective law enforcement require that we not wait for the judiciary to rule on this issue.

Adoption of Senator Thurmond's bill would accomplish this needed step much sooner and I urge its passage.

In closing, let me emphasize that I do not advocate the admission of evidence seized without probable cause or in bad faith. We should not ignore irresponsible police behavior by excluding probative evidence, nor should we reward the guilty.

In effect, that is what we do, when we allow the criminal courts to punish responsible police behavior by excluding probative evidence.

What I am suggesting is that we eliminate the all or nothing rationale, and allow admission of evidence seized by an officer acting in good faith with a reasonable belief, supported by objective grounds, that his conduct, or her conduct, was lawful.

The procedural rules guiding our criminal justice system should be a means for eliciting truth and ensuring fair and speedy trials. They should not be used as a means to withhold critical evidence and to frustrate justice. I will be happy to answer your questions.

Senator BIDEN. General, thank you very much. Before we begin, let me compliment you on a totally unrelated matter, on the phenomenal job you are doing under very difficult circumstances in the State of Florida.

Florida seems to have had visited upon it a national problem, and you in fact, and the State of Florida, and you particularly, General, I think you are doing an extremely commendable job in the circumstance that would boggle the minds of most other State attorneys general, and I compliment you.

Attorney General SMITH. Thank you.

Senator BIDEN. General, let me ask you a couple of questions, if I may. First of all, in the *Leon* case, as you know, the court defined with some specificity circumstances under which the good faith ex-

ception would not prevail in a warrant search and they cited four of those circumstances—a tainted magistrate, a warrant that is obviously flawed on its face, et cetera.

Now I assume that you have no objection to those stated—

Attorney General SMITH. No, sir. Not at all.

Senator BIDEN. Now, when you suggest that the Court only went halfway—and it did—I would like to ask you, that if you acknowledge that the exceptions stated to the newly created good faith exception in warrant searches are useful, or helpful, warranted—no pun intended—what do we do in the case of the warrantless searches, where in fact there are no similar guidelines? Should this committee, if it wishes to extend, legislatively, the good faith exception to warrantless searches, in fact define in a manner similar to that which the Supreme Court did in warrant searches, what in fact would not qualify as a good faith exception?

Attorney General SMITH. I think you would agree that it would be very difficult, legislatively, to do that. I would prefer that that be developed through case law, as I am sure it would be.

Senator BIDEN. Now, having said that, it gets me to my third point, and that is—

Attorney General SMITH. I think you are getting into a cliff here.

Senator BIDEN. Well, no, I never trifle with people who are probably going to be governors some day, especially in States that have such significant primary votes. I say that only for Senator Kennedy, I want you to know. I have no interest in anyone else in this committee. But I—

Attorney General SMITH. We have a couple good law schools down there, too.

Senator BIDEN. I have no further questions. [Laughter.]

In the Florida situation—no, let me back up. It is your view, that as it relates to guidelines of what constitutes a good faith and what does not constitute good faith search, warrantless or warrant, that the preferable route is not to attempt to legislate that but to let case law develop to define that. Is that correct?

Attorney General SMITH. Yes.

Senator BIDEN. Now would you rather have, assuming you could get the same result—would you rather have the good faith exception extended to warrantless searches by the Congress or by the Supreme Court, assuming the Supreme Court tomorrow were about to—

Attorney General SMITH. Well, I think the Court, I believe the Court is headed in that direction. Because of the real life problems that we have in Florida today, we—you know—when we lose major drug cases, they are on motions to suppress, usually over the warrant, or, you know, those kinds of problems, and I would like to see the Congress move—you know, we—and I do not want to be dramatic—but we really have a crisis situation in our State.

We have spent—3 years ago, we appropriated—new—\$200 million in our State budget for law enforcement. We have had dramatic increases in Federal law enforcement in our State, but during that period of time, the price of cocaine has gone from \$60,000 an ounce down to about \$15,000 or \$20,000. The quality of it has gone up. You know, it is inundating our high schools. You know, we really need help, and I think Congress acting here would help us.

Senator BIDEN. Let's speak to that for a second because that is the point. We have a tendency—not you—we, in the Congress, have a tendency to see a problem, attempt to solve it, initiate an effort and pass legislation to, quote, solve the problem, and after reflection, observe that our solution has little impact upon the real problem.

For example, we spent years and years talking about street crime, and we had a lot of people up here, and both parties declaring war on crime, until somebody finally pointed out, by the way, 96 percent of all that street crime, there is nothing the Federal Government can do to impact on it.

All of a sudden, Federal officials stop running on the issue of, "Elect me Senator to stop rape in the parking lot." And so what we are doing here as—I am a little worried that the Attorney General, or the representative of the attorney general, Mr. Trott, and you General, and many, many others, my own attorney general—I mean all across America—have real serious problems in their States.

And my question is, assuming we pass this law, what impact could it have in the State of Florida? Because in all those cases in the State court, as I understand it, they are still going to be applying a Florida law, an interpretation of the Florida Constitution, right?

Attorney General SMITH. Well, but under our State constitution we follow whatever the Federal standard is in this area.

Senator BIDEN. Well, you mean to tell me that if we, legislatively, change the standard, that that amends your constitution?

Attorney General SMITH. We follow whatever the Federal standard is and that can change, and we passed that constitutional amendment before some of these, you know, U.S. Supreme Court cases came out, with a hope that there would be a change in Federal law.

Senator BIDEN. Well, I will not badger you on that point right now.

Attorney General SMITH. I mean, we have a moving standard in that area. We follow Federal law.

Senator BIDEN. You mean the courts have determined by case law they will follow it, or, there is something written in the constitution of the State of Florida?

Attorney General SMITH. I cannot recall the precise language, but basically, our State constitution says we follow whatever the Federal standard is.

Senator BIDEN. Well, I would appreciate it—and I will not pursue the matter with you now—but I would appreciate it if you would have your staff, one of your assistants—

Attorney General SMITH. We would be happy to. And frankly, we did that as a result of, you know, some Florida supreme court decisions that were really more limiting in this area, you know, than the Federal, and we felt—usually, you know, you feel like you are safer with your State courts. We felt like we might be in better shape with Federal courts and so we—

Senator BIDEN. Well, General, again, I do not want to pursue it, it is catching you a little offguard here on this, but I would appreciate it if you would have your staff submit, in writing—

Attorney General SMITH. Sure.

Senator BIDEN [continuing]. An answer to the question of whether or not the Florida Constitution calls for following the Federal constitutional standard, or the Federal statutory standard, which are two different items. Because if in fact it is the latter—and I do not know enough to know that it is—but if it were the latter, I think you would have to admit, then, that what we do here, notwithstanding what the objective is, and what your real problem is, we would not have had much impact.

Now, if in fact your constitution, which is—I guess it would be somewhat exceptional in this regard—if it were to follow Federal statutory language, which in effect means that the Congress can amend the Florida State Constitution, then I would say that we would be, quote, “helping you”, from your perspective. But having said that, let me move to the next point.

Attorney General SMITH. But to answer the question we started out on, I mean, I certainly could not sit here and say that passage of this legislation, you know, would dramatically reduce the crime rate in the State of Florida. That would be naive.

Senator BIDEN. No, and by the way, I know you are not attempting to say that, but I would assume that one of your hopes is that it would in fact dramatically reduce the number of cases where evidence is suppressed because of what you believe to be good faith initiations by police officers in your State, which in fact, unfortunately, do not comport with the Court's interpretation of what is the proper application of the fourth amendment.

Let me just move on. I know you are a busy man and you have many places that you must go, and I appreciate your coming up here.

But let me get to the last point. I am very concerned that if in fact we are correct—if in fact I am correct—that it would be better for all concerned, even those who strongly support amending the exclusionary rule, for the Supreme Court to do that, in the area of warrantless searches, then, I think we are moving somewhat prematurely, because it would seem to me that it is better to do the following. And I would just like you to comment on this and then I will stop. If anything, we should codify the Supreme Court's decision on warrant searches, and move on the Tort Claims Act, and wait for the Supreme Court to go in the direction that you and I, and everybody believes they are moving, including the Justice Department, under what circumstances a good faith exception would prevail in warrantless searches.

That seems to me to be a more prudent and reasonable way to go because the urgency, at the Federal level, to the extent that it exists, is somewhat miniscule compared to the extent that there is an urgency that exists at a State level, which in fact we, from a statutory standpoint, could not impact on anyway.

That is somewhat my emerging position, if you will. I would like you just to comment on why you would disagree with it, if you do.

Attorney General SMITH. My response would be that if there were a real, you know, a major concern that this legislation would trample on the fourth amendment, then I would say we should wait on the Court. The previous witness gave the opinion that the

legislation, he felt would be, you know, declared unconstitutional in that sense.

I think the Congress really has the responsibility to set policy and not wait on the Court. I think in areas of constitutional interpretation, that should be a matter for them and not the Congress.

Senator BIDEN. I appreciate it, General. Let me just say in conclusion, that just as I think most of us would agree, that the Court would have made a mistake if it just said nothing more than good faith was necessary in the *Leon* case, and, if it failed to go on and cite guidelines, as it did at a minimum, in the four instances they cited—just as we would have sat here and said that the Court should have said more, it seems to me that we should act as responsibly as the Court is acting.

And that if we are going to put in a good faith exception, we had better do as the Court did, and do what we all acknowledge to be a very difficult thing, as it was for the Court, and that is, to define circumstances under which there is not good faith.

We have never, in our law, allowed a stupid person's interpretation of an existing principle in our constitutional law and/or statutory law, to rise to the level of being treated with respect within the courts, regardless of how much good faith that not-so-right person had.

Attorney General SMITH. Right.

Senator BIDEN. It is not part of our English jurisprudential system to reward stupidity, and so I am worried that if we all agree, and that there seems to me a mounting—mounting, that is an exaggeration—there seems to be, at least this morning, some consensus that the Court acted wisely in *Leon*. We should do at least as the Court does, and not do what the Court did not do, and that is, just have a blanket good faith exception.

I sincerely appreciate your time and your effort, and your suggestion of Florida law school. He is not even in college yet so—

Attorney General SMITH. It is warmer there, so—

Senator BIDEN. Thank you very much.

Attorney General SMITH. Thank you very much, Mr. Chairman. I appreciate it.

[Responses to questions follow:]



JIM SMITH
 Attorney General
 State of Florida

DEPARTMENT OF LEGAL AFFAIRS

**OFFICE OF THE ATTORNEY GENERAL
 THE CAPITOL**

TALLAHASSEE, FLORIDA 32304

October 9, 1985

Honorable Joseph R. Biden
 United States Senator
 SR-489
 Washington, D.C. 20510

Dear Senator Biden:

At the Senate Judiciary Committee's October 2 hearing, I recommended that the "warrantless" version of the good faith exception to the exclusionary rule be adopted through passage of Senate Bill 237, introduced by Senator Strom Thurmond.

You asked during the hearing that I provide a written response on the following questions:

1. Why not wait until the United States Supreme Court extends the good faith exception to non-warrant cases?
2. What effect would a change in federal statutory or case law have on Florida in light of the 1983 amendment to the search and seizure section of the state's constitution?

In answer to your first question, I believe that the interest of safe and effective law enforcement requires that legislative action be taken to promptly extend the good faith exception to non-warrant searches and seizures.

In the absence of legislation, we can only hope that the Supreme Court will, in fact, decide the issue in a forthcoming case. It is my view that this places a critical evidence-gathering function in limbo for an uncertain period of time, and continues to have a chilling effect on reasonable and proper searches and seizures by police officers.

It is true that at one time the Supreme Court apparently intended to address the non-warrant version of the good faith exception, judging from the fact that it agreed to review the decision of *People v. Quintero*, 657 P.2d 948 (Colo. 1983), cert. granted, 462 U.S. ____, 77 L.Ed.2d 1386 (1983), wherein the Colorado Supreme Court had rejected the applicability of this doctrine. However, before that case could be resolved, the defendant died, requiring a dismissal of certiorari, pursuant to the court's long-standing policy against issuing advisory opinions.

In addition to the uncertainty of a court decision on this issue, there is another reason for legislative action. Action by Congress will affirmatively state the policy of the United States on this issue, providing a clear basis for future judicial interpretation. I believe this approach is far more desirable from a legal standpoint, and would lend the weight of law to a judicially-adopted policy.

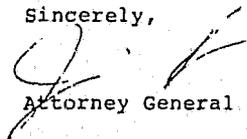
Florida has a special interest in seeing the Thurmond bill passed because our constitution requires that state courts determine the admissibility of evidence obtained in police searches on the basis of United States Supreme Court interpretations. Article I, Section 12 of the Florida Constitution, reads as follows:

Section 12 Search and seizures.--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.
[Emphasis Added]

This section explicitly provides that Florida's state courts may not afford greater protection from searches and seizures than those afforded by the United States Supreme Court in construing the Fourth Amendment to the federal constitution. Thus, if Senator Thurmond's bill becomes law and our nation's highest court finds its adoption of the "warrantless" version of the good faith exception consistent with Fourth Amendment principles, this will become the law in Florida as well. In my opinion, that result will be expedited if S. 237 becomes law.

I appreciated the opportunity to appear before the committee last week to testify on this issue, and hope my comments are helpful. If you need further information, please let me know.

Sincerely,



Attorney General

JS/pac

Senator BIDEN. Prof. William Greenhalgh of the American Bar Association, and Mr. Tony Califa, legislative counsel, American Civil Liberties Union.

Dr. GREENHALGH. American Criminal Lobby I believe that the ACL—

Senator BIDEN. The American Criminal Lobby?

Dr. GREENHALGH. That is what the attorney general said about my colleague on my right. He has not gotten quite to the ABA yet.

Senator BIDEN. That is true. That is the same guy that moved on Presser and Hutton, and all those people.

Dr. GREENHALGH. That is why I want to welcome you as the fifth in seniority at Georgetown Law Center, because you will be our distinguished Ryan Lecturer on the evening of November 6 at 8:15 p.m.

Senator BIDEN. I wish you would invite Mr. Meese to be there with me because I am going to be speaking a lot about him, and about the Justice Department's—

Dr. GREENHALGH. Anyway, I might be able to help you with your son.

Senator BIDEN. I just hope he can get through college. [Laughter.]

By the way I hope you are noting the laughter. [Laughter.]

All right, gentlemen, proceed in any order that you think is most appropriate.

STATEMENT OF A PANEL CONSISTING OF WILLIAM W. GREENHALGH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW SCHOOL, ON BEHALF OF THE AMERICAN BAR ASSOCIATION; AND TONY CALIFA, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Dr. GREENHALGH. Senator, let me make a few observations on my colleague, Brother Trott, from west of the Mississippi.

I have been teaching the fourth amendment for 28 years, 5 years as an assistant U.S. attorney, where I lectured the metropolitan police department of this city, the detective bureau, with regard to certain decisions that came down between 1958 and 1963.

That was the zenith of the so-called Warren court. Such cases as how to work within the frame of *Miller*, *Giordenello*, *Henry*, *Silverman*, *Chapman*, and of course one of the most important was *Wong Sun*, which was decided in the winter of 1963.

It was my duty and responsibility to go to these detectives and try to work within these decisions, in order that they would go out, and secure search warrants. We are talking about 1958 to 1963. We are not talking about 1985, you know, post *Leon* on that.

Senator BIDEN. Yes.

Dr. GREENHALGH. And it seems to me that if you can do that at that stage with the hot breath of the Warren court coming down on law enforcement from a Federal point of view, you certainly ought to be able to do it in 1985.

Second, I was consulted in the *Quintero* case to assist the public defender office of the State of Colorado in writing the brief for the Supreme Court in that matter.

I would like to say that the reason as to the motion to suppress, that the trial court had granted, and which was affirmed by the Colorado Supreme Court was, that when Ms. Berger said that there was somebody suspicious, she never told them exactly what he was doing until after he was arrested.

In other words, there was no information upon which that officer could, at that time, establish probable cause, until after he was not free to go.

Second, Senator—and this is something Mr. Trott forgot to tell you—would you believe, that the Colorado Legislature had passed a good faith statute—

Senator BIDEN. That was in existence at the time?

Dr. GREENHALGH. In existence at the time, which was rejected by the highest court of that State. I suggest to those staffers back there that are interested in this, they may want to pull the *Pacific 2nd* decision of the Colorado Supreme Court, written by Chief Justice Ericson, as to the reasons why they did not buy the good faith statute under the facts of that case.

Senator BIDEN. Let me make sure I understand. The court rejected as being unconstitutional the good faith exception?

Dr. GREENHALGH. No. They did not reject it as unconstitutional. They said it does not apply under the facts of this case.

Senator BIDEN. Got you. OK.

Dr. GREENHALGH. But anyway there was—there are not many of these “cats” hanging around. You know, there are a lot of—I mean, Arizona I think has gone overboard with regard to a good faith exception on a statute, and maybe one or two others. But anyway, Colorado was in the pipeline as such.

Senator BIDEN. Got you.

Dr. GREENHALGH. Second, the staffers behind you might be interested in pulling a case called *United States v. Gant*, G-a-n-t, cited at 759 Fed. 2d, 484, fifth circuit, 1985, decided as of May 6.

Senator BIDEN. Did you have any of these, staffers?

Dr. GREENHALGH. I do not know. They keep yawning back there. I just want to try to keep them awake.

Senator BIDEN. You have one. I am not sure how many more.

Dr. GREENHALGH. I do not know who they are.

Senator BIDEN. All right. I just wondered.

Dr. GREENHALGH. Anyway, the *Gant* case, Senator, I suggest to you is an excellent explication of the four exceptions which you, shall we say, fortunately, have been dwelling on this morning, in its interpretation of whether suppression is still an appropriate remedy.

It was written by the chief judge of the fifth circuit along with Judge Goldberg and Judge Tate. It is a real good case to explain exactly what *Leon* decided and interpreted, and the fact that those, one of those, any of those, any one of those criteria is not met, then suppression is still an appropriate remedy.

I think the most important thing that we are getting to here is, is this legislation necessary? That has come through loud and clear this morning.

It is the American Bar Association's position that it is not, for the simple reason that we ask the Congress to wait, because we

knew that the Supreme Court would be working its will with regard to the *Leon* and *Sheppard* cases.

Now that those cases have been decided, it seems to me that we should wait, once again, as to whether or not they are going to grant a writ of certiorari dealing with warrantless seizures on public space.

Senator BIDEN. What is your considered opinion on the likelihood of that?

Dr. GREENHALGH. They have been dormant in this area for 14 months. Next Monday, they may, you know, grant a writ, because that is the first Monday in October.

They denied a writ of certiorari in a case called *United States v. Morgan* last year, where, as I recall, there were three Justices that were interested in the subject matter but they did not get a fourth vote.

Frankly, Senator, based on my knowledge of the some 240 cases dealing with the fourth amendment since 1914, I think they are waiting for the dust to settle a little bit, for the circuits to work their will in the Federal arena, with regard to cases like *Gant*, and, then also, to see what some of the State supreme courts are going to do.

In relation to those four exceptions, Senator, three of those exceptions are easy for interpretation, dealing with warrantless seizure. One is not, and that is the neutrality and detachment of the magistrate.

In a warrantless situation, first of all, you have no affidavit by which you can attack, as far as a motion to suppress is concerned.

Second, all you are going to have is the testimony of the officer, what he saw and observed, or what information he received, you know, from third parties, on that.

The whole history of the exclusionary rule has always been that all searches and seizures are per se unreasonable without judicial authorization, except for, right now, nine carefully defined exceptions to that. The whole idea of the warrant clause, which has been described in the Constitution, as interpreted by the Supreme Court, is the neutral and detached magistrate—you know—interposing his authority between the policeman, and you and I, as citizens of this country.

There is no way that a police officer, State, Federal, or local, is neutral and detached. So, in writing this opinion, I suggest to you that Justice White has written himself into some sort of a box which he is going to have a very difficult time, if he is going to use this rationale—you know—for a warrantless seizure situation. I do not see that coming.

That is not to say they can write something else. They can loosen that particular exception in some way or do something else along that line. But as of now, neutrality and detachment does not enter a police officer's mind because that is his job, to be suspicious, to have probable cause, to go out and make arrests, and then perform the subsequent searches and seizures. So, I do not see that.

So when you talk about writing these four exceptions in there—

Senator BIDEN. Well, I was trying to make the point.

Dr. GREENHALGH. I understand, I understand that, but I seriously question the neutrality and detachment argument that Justice White said in part III C of that opinion. The other thing I would like to bring to the attention of the committee: For 107 years, since 1878, good faith has never been the test. It has always been probable cause.

We go back to a bunch of civil cases, *Stacey v. Emory*, which was a civil suit for damages because an income tax collector went a little "bananas" and seized something, and as a result he was sued.

And the allegation was, "Well, he was malicious." The Supreme Court at that time, in 1878, said motive is not important; the only thing that is important is whether that officer had probably cause.

You bring that down to 1923, *Director General of the Railroads v. Kastenbaum*. Same argument. Probable cause is the test, not good faith.

One of the leading cases, the first exception carved out by the warrant clause in 1925 was *Carroll v. United States*. Same argument; the test is probable cause.

Take it on further, the *Henry* case in 1959; *Beck v. Ohio* in 1964; all the way forward. Good faith has never been the test. It has always been probable cause.

Senator BIDEN. If I can interrupt you there for a second. One of the reasons for the confusion—I think it exists among some of my colleagues and it is a bit presumptuous for me to suggest whether or not anyone is confused, but I think they confuse probable cause with good faith.

Because some who do not spend time on this committee or on this issue—which in the overall scope of the problems this country faces, is not the preeminent problem we should be dealing with, or are dealing with—they make the following kind of argument: that a police officer who has a warrant in his hand that is flawed, had probable cause to believe he could knock the door down.

And the police officer who was told by so and so that such and such was happening, even though it turned out to be a violation of the fourth amendment, had probable cause because he acted in good faith.

Do you understand what I am trying to say?

Dr. GREENHALGH. Yes.

Senator BIDEN. For those who do not think of it in purely legalistic terms, the actual person out there thinks probable cause is the same as good faith.

It has never been easy, as you know better than anyone, probably, in this room, in light of the amount of time you have spent in dealing with the fourth amendment, and I am not being solicitous, I am being serious—defending the fourth amendment or the fifth amendment.

When I first got here in 1974, if I am not mistaken, and I believe this to be accurate, there was a petition being circulated in the Capitol trying to get Senators and Congresspersons to sign a petition that reworded the Bill of Rights, but had the same principles, but just used it in, quote, "common everyday language."

They only could get something like 30 Members of the House and Senate to sign it, because it is pretty radical stuff in the minds of folks out there.

When you talk about the fourth amendment, or you talk about the fifth amendment, they say, well, you are guilty or you are not guilty. But what our Founding Fathers understood better than anyone, was that the constitution in part defends against the natural inclinations of men, as much as anything else.

And so the reason I raise it is that you hear—and I am sure it must be frustrating to you—people, who otherwise should know, interchanging the phrase “probable cause” with “good faith,” and I think that is part of the confusion, and I wish I could figure out how, and succinctly, to make that distinction.

Dr. GREENHALGH. I strongly suggest to you, because of your zeal and interest in this matter, if you do trace these cases, of *Stacy v. Emery*, in 1878, *Director General of the Railroads*—which was a war case that was decided in 1923—*v. Kastenbaum, Carroll v. United States*, 1925, *Henry* in 1959, and *Beck v. Ohio* in 1964,¹ you will see the thread going all throughout our history, and all of these cases were warrantless situations, none dealing with warrants.

The Supreme Court, consistently, for 107 years, which is some precedent, even with this Court, some precedent, that good faith has never been the test, it has always been probable cause.

It is difficult, I agree with you, to try to persuade people that that is what the law has been for such a long period of time.

Now, when you have *Leon* and *Sheppard*, and the Court—and this is based on Justice White’s concurring opinion in *Illinois v. Gates* which was decided a year before, he wrote in effect 80 percent of his opinion in *Gates*, for *Leon*, you know, the year before. There is no question about that.

Still, the important thing is, you are dealing, as you suggest, 96 percent of law enforcement is on a State level as opposed to the Federal, and we are talking about warrantless situations, for the most part on public space. We are not talking about warrants, for search warrants going into houses, or things like that. That is why it is so important to try to make them understand that we still have—and every single one of the Supreme Court Justices, including Justice Rehnquist and Justice O’Connor have written in their opinions—you know—as far as we are concerned, all searches and seizures without judicial authorization are per se unreasonable except for these exceptions.

And what I think is—if they mean what they say, then the warrant clause still exists, but the unfortunate thing is the attack, the frontal attack on the warrant clause itself, and this is part of that process which you suggest.

Senator BIDEN. Thank you, Professor.

[Prepared statement follows:]

¹ *Stacey v. Emery*, 97 U.S. 642 (1878); *Director General of Railroads v. Kastenbaum*, 263 U.S. 25 (1923); *Carroll et al. v. United States*, 267 U.S. 132 (1925); *Henry v. United States*, 361 U.S. (1959); *Beck v. Ohio*, 379 U.S. 89 (1964).

STATEMENT

of

PROFESSOR WILLIAM W. GREENHALGH

on behalf of the

AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee:

The American Bar Association is pleased to appear before you to express our views on the subject of S. 237, legislation which would limit the application of the Fourth Amendment exclusionary rule. My name is William W. Greenhalgh. As a former Chairperson of the ABA Criminal Justice Section, I have been designated by ABA President William W. Falsgraf to represent the Association.

My own background in the criminal justice area has included both prosecution and defense experience. I am presently a clinical professor of law at Georgetown University Law Center and have been Director of the E. Barrett Prettyman Program (L.L.M. in Trial Advocacy) since 1963. That program has represented over 2,000 indigents charged with felony offenses in the various courts of the District of Columbia. It has produced, among others, a book entitled, "Law and Tactics in Exclusionary Hearings" (Coiner Publications, 1969).

Before going to Georgetown, I worked as a staff attorney with the Justice Department's Internal Security Division, and served in the U.S. Attorney's Office in Washington, ending my tenure as Chief Assistant U.S. Attorney for the District of Columbia, General Sessions Division.

Just as the American Bar Association is, of course, reflective of the legal profession as a whole, so, I should note, is the Section of Criminal Justice representative of all segments of the criminal justice system. The Section is

neither the voice of the defense bar nor the prosecution. Our members include prosecutors, criminal defense lawyers, public defenders, judges, law professors and law enforcement officials. We try to reflect that balanced view in policy positions which we adopt.

ABA POSITION SUPPORTS EXCLUSIONARY RULE

The American Bar Association has long supported retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. We continue to do so, and urge this Committee to approach this issue cautiously -- and reject proposals to limit the application of the rule further in criminal trial proceedings. Despite the assumption of critics today, its abolition will not stem the tide of crime in our country -- but tampering with it will destroy a portion of the cherished constitutional fabric of which our system is constructed.

To say that the federal exclusionary rule has not worked is to ignore experience. It has contributed to substantial law reform by federal authorities. It has increased the professionalism of federal law enforcement officers. It has vastly enhanced the integrity of the federal judicial process.

Very importantly, empirical evidence reveals that the operation of the rule has not greatly affected case dispositions. The overwhelming percentage of guilty pleas and convictions in federal courts provides ample proof that the rule has not stultified either federal law enforcement or the judiciary.

There are four principal reasons why we believe action on S. 237 or similar legislation is unwise at this time -- or that, at a minimum, the legislation needs to be carefully considered in light of the impact of the U.S. Supreme Court's July, 1984 decisions in U.S. v. Leon, 104 S. Ct. 3405 and Massachusetts v. Sheppard, 104 S. Ct. 3424, both decided July 5, 1984. I will explore each of these in turn:

1. S. 237's present language would sweep away four exceptions where the supreme court in Leon declared that suppression is still appropriate.
2. Extension of the good faith test to warrantless situations represents a major leap beyond Leon.
3. More recent and comprehensive empirical evidence raises doubts about the true impact of the rule in criminal cases.
4. Results from the U.S. Department of Justice study now underway to analyze the practical impacts of Leon should be reviewed before a broader exception is considered.

S. 237's PRESENT LANGUAGE WOULD SWEEP AWAY FOUR EXCEPTIONS WHERE THE SUPREME COURT IN LEON DECLARED THAT SUPPRESSION IS STILL APPROPRIATE.

Any discussion of a good faith exception to the exclusionary rule must, of course, begin with the U.S. Supreme Court's decisions in Leon and Sheppard. These cases carved out a limited good faith exception in warrant cases. Specifically, the Court held that the exclusionary rule does not bar the use of evidence obtained in violation of the Fourth Amendment if the police acted in objective good faith reliance on a warrant that later proved to be defective. The Leon Court, however, stated that suppression is still an appropriate remedy if one of four factors is present:

1. that the magistrate is not neutral and detached;
2. that the magistrate or judge in issuing a warrant was either intentionally or recklessly misled by information contained in an affidavit;

3. that the officer relied on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (Brown v. Illinois, 422 U.S. 590, 610-11 (1975));
4. or a warrant is so facially deficient (i.e., in failing to particularize the place to be searched or things to be seized) that the executing officers cannot reasonably presume it to be valid. *Id.*, 104 S. Ct. at 3421-22.

Yet S. 237 would sweep away these limitations. S. 237 provides in part that, "A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation."

S. 237 would thus substitute a lesser standard for assessing objective good faith than that established by the Supreme Court in Leon. This proposed language in the bill is, therefore, at best a poor policy judgment flying in the face of the Court's majority opinion; and, at worst, may be unconstitutional.

EXTENSION OF THE GOOD FAITH TEST TO WARRANTLESS SITUATIONS
REPRESENTS A MAJOR LEAP BEYOND LEON.

An overriding reason it is not desirable to extend the good faith warrant exception to warrantless searches is that this expansion would negate a desirable consequence of the Leon and Sheppard decisions: if the good faith exception is limited only to seizures conducted pursuant to a warrant, the police will have an additional incentive to obtain a warrant. And as the Court stated in Leon:

Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment

of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime," United States v. Chadwick, 433 U.S. 1, 9 (1971) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)), we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." Id., at 104 S. Ct. at 3417.

Note 13 of Leon is critically important, for it states that "nothing in this opinion is intended to suggest a lowering of the probable cause standard." 104 S. Ct. at 3417, n. 13. An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause--and substitutes instead a far less reliable procedure of an after-the-event justification for the arrest or search. This method is too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. Beck v. Ohio, 379 U.S. 89, 96 (1984).

Let me proceed now to analyze whether Leon and Sheppard are workable precedents for good faith warrantless searches and seizures. Until these cases were decided, there was no Court precedent for a good faith exception to the rule. The key to the fact that the Court will be reluctant to extend the good faith exception to warrantless searches is evident in its rationale in Part III C of the Leon decision.

Let us compare a facially deficient warrant (i.e., in failing to particularize the place to be searched or the things to be seized) to a factual situation where the description of alleged criminal activity is so vague and amorphous that it amounts to mere suspicion, which traditionally has been insufficient to justify a warrantless seizure. Wong Sun v. United States, 371 U.S. 471 (1963). Citizens ought not to be deprived of personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion, the Court has said. Rice v. Ames, 180 U.S. 371, 374 (1901).

Regarding the so-called "untouched probable cause standard," the test would undoubtedly be the same. No officer could manifest objective good faith, whether relying on a warrant based on an affidavit, or making a warrantless arrest,

so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. The Court cites Justice Powell's concurrence in Brown v. Illinois, 422 U.S. 590, 611 (1975). This would appear to satisfy the first of the three Brown criteria enumerating flagrantly abusive violations of Fourth Amendment rights. The others are that the arrest was effectuated as a pretext for collateral objectives or the arrest was unnecessarily intrusive on personal privacy. By failing to include the latter two, the Court apparently concedes that these violations of the Fourth Amendment would be inapplicable to warrant situations.

On the other hand, under warrantless circumstances, the violations can become crucial, especially in a more insidious way, such as a pretext arrest, United States v. Lefkowitz, 285 U.S. 452, 467 (1932); See also Gustafson v. Florida, 414 U.S. 260 (1973) (Stewart J. concurring), or by an infamous method, as with a stomach pump. Rochin v. California, 342 U.S. 165 (1952).

A third factor to be tested as to whether suppression is an appropriate remedy is discussed in Franks v. Delaware, 438 U.S. 154 (1978). In that case, the Court held that the evidence seized predicated on a search warrant affidavit, which had been shown to contain intentional or reckless material misstatements, should be suppressed. It is somewhat doubtful that the Franks rationale laid down in Leon can be used to apply in a warrantless situation. First, there is no affidavit upon which either deliberate or reckless falsehoods used to obtain a warrant can be tested. Secondly, there is no magistrate to be misled. (This is one of the central themes running through the entire Leon case). Instead it is the judge, at a suppression hearing, who will consider the demeanor, behavior, accuracy, motive, and prejudice of the witness, in weighing credibility; he alone will make the determination that the witness is neither committing perjury

nor making statements with reckless disregard for the truth. A conscientious motions judge might detect perjury, but the Court has offered no guidance as to what constitutes a reckless disregard for truth in Fourth Amendment cases. United States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979). However, no matter what, there must be an appropriately objective definition of recklessness to be consistent with Leon.

The last of the criteria laid down in Leon, and by far the least analogous to warrantless situations, is the lack of neutrality and detachment of the seizing officer. If a magistrate cannot be financially interested, Connally v. Georgia, 429 U.S. 245 (1977), nor act as an adjunct law enforcement officer, Lo-Ji Sales v. New York, 442 U.S. 319, 326-27 (1970), not be a chief investigator and prosecutor, Coolidge v. New Hampshire, 403 U.S. 443, 451 (1971), then a law enforcement officer "while acting under the excitement that attends the capture of persons accused of crime," Lefkowitz, 285 U.S. at 464, cannot be considered neutral and detached.

NEW EMPIRICAL EVIDENCE.

Opponents of the exclusionary rule and many citizens believe the rule results in legions of criminals going free on "technicalities." Evidence from available studies strongly suggests otherwise.

A major review of research on the effects of the rule -- cited by the majority in Leon -- has been issued since the last Senate hearings held on this legislation. Thomas Y. Davies' lengthy study published in 1983 by the American Bar Foundation, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule, concluded that the "costs" of the exclusionary rule -- in terms of dropped prosecutions and lost convictions -- are actually low. Davies' research disclosed that the federal government study of the effects of the rule conducted by the National Institute of Justice (NIJ) in 1982 were misleading and exaggerated. The NIJ study had

claimed that the rule was a "major" factor in lost prosecutions. Specifically, Davies found that --

- o The cumulative loss -- nonprosecution or nonconviction -- resulting from illegal searches is in the range of 0.6% to 2.35% of all adult felony arrests.
- o In felony arrests for offenses other than drugs or weapons possession, the cumulative loss is in the range of 0.3% to 0.7% of such arrests.
- o The cumulative loss due to nonprosecution or nonconviction of those arrested on felony drug charge is likely in the range of 2.8% to 7.1%.
- o Less than 1% of individuals arrested for felonies are released because of illegal searches and seizures at the preliminary hearing or after trial.

Prior studies by the General Accounting Office* and the Institute for Law and Social Research** present a fairly consistent picture of the limited impact of the exclusionary rule on felony case dispositions.

Under these circumstances, to the effort to nullify or severely limit the exclusionary rule necessary? Would its

* Report of Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions Rep. No. CDG-79-45 (Apr. 19, 1979)

** Brian Forst, Judith Lucianovic and Sarah J. Cox, What Happens After Arrest? A Court Perspective of Policy Operations in the District of Columbia, PROMIS Research Project Publication 4 (Washington, D.C.: Institute for Law and Social Research, 1977); Kathleen B. Brosi, A Cross City Comparison of Felony Cases Processing (Washington, D.C.: Institute for Law and Social Research (Research, 1979).

abolition result in many more cases being pursued? The data do not suggest so.

AWAIT STUDY RESULTS

The U.S. Department of Justice, through the National Institute of Justice, now has a major study underway looking at the impact of Leon on police behavior and training practices.

Until results of this study of the Court's initial "good faith" steps are available next year, action on the pending legislation is premature.

ANY EXTENSION OF THE GOOD FAITH EXCEPTION SHOULD BE LEFT TO THE SUPREME COURT

The U.S. Supreme Court has had a number of opportunities in the fourteen months since the Leon and Sheppard decisions to grant certiorari in a case where the rule might be extended to warrantless searches. It is reasonable to conclude that the Court is giving the Circuits sufficient time to apply the new good faith exception in particular cases, and that the appropriate case or cases will be working their way up to the Supreme Court for its consideration in the coming year.

Given the Court's long-standing expressed "strong preference" for warrants, reemphasized in Leon, it is very clear the Court will weigh very carefully extension of the good faith exception to warrantless searches involving the "hurried judgment" of a police officer. It is no criticism to observe that it is not in the nature of a law enforcement officer to be neutral and detached.

CONCLUSION

Despite asserted claims, there is no demonstrated connection between our national crime rate and the existence of the exclusionary rule; the empirical evidence demonstrates that critics have overstated the adverse effects associated with the rule.

Further, it is clear that the Court was willing to create a good faith exception in Leon because of their confidence in the integrity of the magistrate review process.

The American Bar Association joins with the Administration, Congress and the public in recognizing the need to undertake concerted and effective steps to combat crime. But we believe expanding the good faith warrant exception to warrantless situations would be an unjustified expansion of this narrow exception. Constitutional issues aside, Congressional changes in the rule will undercut law enforcement professionalism, engender decades of litigation over various new tests, and result in very few additional criminals ending up behind bars.

Mr. Chairman, on behalf of the American Bar Association, I would like to thank you and the Committee for inviting us to present these views. I would be pleased to answer any questions you or members of the Committee might have.

STATEMENT OF TONY CALIFA

Mr. CALIFA. Thank you, Mr. Chairman. On behalf of the ACLU with over 250,000 members dedicated to preserving the constitutional freedoms that we all benefit from, we would like to commend you for having these hearings today.

I will be submitting a written statement on the ACLU's strong opposition to S. 237. In my oral remarks I would like to briefly highlight some of the points that I will bring up in the written statement.

We believe that S. 237—

Senator BIDEN. Professor, if you could—unless you have—

Dr. GREENHALGH. I have got nowhere to go.

Senator BIDEN. Good. I would like to ask a few more questions when the testimony is concluded.

Mr. CALIFA. I will be brief.

Senator BIDEN. Take your time. I want to hear what you have to say.

Mr. CALIFA. Thank you, sir.

The ACLU believes that S. 237 is undesirable and possibly unconstitutional legislation. It creates more problems than it solves.

The Supreme Court has been extremely active in the fourth amendment area, and there is no need for the Congress to pass this legislation at this time.

The fourth amendment, adopted as part of the Bill of Rights guarantees Americans the right to be free from unreasonable searches and seizures. To obtain a search warrant, the fourth amendment requires probable cause, supported by oath or affirmation, and specifically describing the place to be searched, or the person or things to be seized.

Since at least 1914, evidence gathered in violation of the fourth amendment has been excluded. It could not be presented in a Fed-

eral prosecutor's case in chief. Since *Mapp v. Ohio* in 1961, constitutionally tainted evidence could not be presented in a State prosecutor's case in chief.

Recently, there has been an alarming erosion of the fourth amendment's protections. As Mr. Justice Stewart points out in his 1983 Columbia Law Review article on the exclusionary rule, there are two ways to undermine the rule.

First, by weakening the protections provided by the fourth amendment, and second, by narrowing the circumstances under which the exclusionary rule applies.

The Supreme Court has used both methods quite frequently in the past 15 years. The Supreme Court's efforts in the area of governing search and seizure has allowed police and prosecutors to gauge with increasing certainty their diminished fourth amendment responsibilities. By simplifying the area of the fourth amendment over this 15-year period, the Court has expanded the range of permissible police activity, and drastically reduced the need for a good faith exception.

For example, *Terry v. Ohio* upheld street stops and defensive frisks on less than a probable cause. In *Schneckloth v. Busamonte*, an expansive definition of consent searches was adopted.

United States v. Robinson gave police broad power to search incident to a lawful arrest. In a case that was handed down last year, *New Jersey v. TLO*, a school official's warrantless search of a student was allowed.

And we have many more examples of cases diminishing fourth amendment rights. *United States v. Colandro* where the grand jury process was exempted from the exclusionary rule. *Stone v. Powell* which severely limited Federal habeas corpus relief on search and seizure grounds.

So the point of this is that the Court has been steadily eroding the areas to which the fourth amendment applies. In the crucial area of probable cause, the Supreme Court, in *Illinois v. Gates*, permitted probable cause to be found on the basis of an anonymous informant's tip, so long as the, quote, "totality of the circumstances," end quote, gave rise to a commonsense determination that there is a fair probability of criminal activity. This is a very flexible test, given the extremely generous reading given to law enforcement concerns by the Court during the last 15 years.

All of this put together makes the recognition of a subjective good-faith defense, which is contained in S. 237, both unnecessary and potentially dangerous.

Given the flexibility of the probable cause standard, the introduction of a subjective good-faith defense is merely an invitation to water down the fourth amendment probable cause standard even further.

This is especially true, given the decisions in *Leon* and *Sheppard*, which the Senator and Professor Greenhalgh have so ably examined.

There, an objective good-faith exception to the exclusionary rule was created. Those cases dealt with reliance by officers on a neutral magistrate's search warrant in gathering evidence, and the Court said that that evidence was admissible even if the warrant was deficient and did not conform to the fourth amendment.

We do not think that *Leon* and *Sheppard* were decided correctly. We will take further opportunities to argue our case before the Supreme Court on these issues.

We certainly think that Congress should not be considering legislation that takes those two cases even further. Our candidates for codification would be *Weeks* and *Mapp*. The interesting question to the ACLU, and other people concerned about civil liberties is, What are we left with, as fourth amendment protections after *Gates*, *Leon*, and *Sheppard*?

Evidence pursuant to a warrant is admissible even though police lacked, quote, "a substantial chance," quote, "that evidence of a crime would be found, so long as they had a reasonable belief that they had a substantial chance of uncovering criminal activity."

The bill would take this one step further. It would further attenuate this standard, by removing the need for an objectively reasonable belief, and relying totally on subjectivity.

Also of course the good-faith exception would apply to warrantless searches, and this is a very important point, as Professor Greenhalgh has pointed out. The classic fourth amendment theory would call for the application, by a police officer who was involved in ferreting out crime, to a neutral and detached magistrate.

We believe that the fourth amendment rule, as it stands now, relying on this objective test that *Leon* and *Sheppard* came out with, and with the weakened probable cause standard enunciated in *Gates*, allows police to search and seize in a very easy manner, that it creates standards that are not difficult to meet. If S. 237 would pass, it would allow police to search and seize based upon basically unreviewable hunches and suspicious. This would amount to a constructive repeal of the fourth amendment, and, I would direct the Senator to footnote 13 in *Leon*, which—in the majority opinion in *Leon*, which talks about subjective good faith, and says that the *Leon* case is not about subjective good faith, and, for that reason alone, clearly, S. 237 is not a codification of *Leon*, but goes substantially beyond those cases.

In conclusion, the ACLU believes that S. 237 should not be reported favorably. The Supreme Court has certainly made it easy to meet the probable cause standard, has restricted the situations where the fourth amendment applies.

In *Leon* and *Sheppard*, the Court has allowed evidence to be admitted even though that evidence was obtained in violation of the fourth amendment.

As our written statement will show, the cost of the exclusionary rule was never very high, and the benefits include better police training and more careful thought before embarking on search or seizure activities.

Thank you, Mr. Chairman.

[The statement follows:]

TESTIMONY

OF

ANTONIO J. CALIFA
LEGISLATIVE COUNSEL

THE AMERICAN CIVIL LIBERTIES UNION

ON

S.237 "EXCLUSIONARY RULE LIMITATION ACT OF 1985"

BEFORE THE SENATE JUDICIARY COMMITTEE

Exclusionary Rule
S.237 - "Exclusionary Rule
Limitation Act of 1985"

Mr. Chairman, thank you for the opportunity to submit testimony on behalf of the American Civil Liberties Union (ACLU). The ACLU is an organization with over 250,000 members committed to the defense of constitutional values and the Bill of Rights. One of the most important protections that Americans have traditionally enjoyed is the Fourth Amendment's protection against government intrusion into their privacy. The ACLU is strongly opposed to S.237. We believe the bill to be unnecessary, undesirable and unconstitutional. The Bill does not solve problems, it creates them. The ACLU strongly supports preserving the Fourth Amendment guarantees against government invasion of privacy. The Fourth Amendment of the United States Constitution, adopted in 1791 reads as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

THE FOURTH AMENDMENT IS AN EXCLUSIONARY RULE

This is a fundamental and indispensable freedom. The Fourth Amendment prohibits the use of illegally obtained evidence in a criminal trial. The Fourth Amendment provides a remedy for its violation. The Supreme Court decided unanimously in Weeks v.

United States 232 U.S. 383, 58 L Ed 652 (1914) that the Fourth Amendment itself and requirements of judicial integrity require the exclusion of such evidence. The illegal search and seizure is part of a larger enterprise - the presentation of the evidence to a trial court. The Courts may not insulate themselves from the entire illegality.

From 1914 to 1984, evidence that was obtained by means which did not meet the Fourth Amendment standard was excluded. The use of the exclusionary rule can be traced clearly to Weeks v. United States. There, a United States Marshall entered defendant's house and without permission removed defendant's correspondence. The United States Marshall did not have a warrant to search. The question before the Weeks Court was whether illegally seized evidence, obtained without a warrant would be used in the subsequent trial.

The Court decided as follows:

"If letters and private documents can ... be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his rights to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The effort of the courts and [federal] officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshall could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution.. Instead, he acted without sanction of law, doubtless prompted by the desire to

bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action....To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 US, at 393-394, 58 L Ed 652, 34 S.Ct.341.

Since that decision, the law on search and seizure has been developing to fit different factual situations. For seventy years, the Fourth Amendment and the exclusionary rule prohibited the introduction of evidence which had been obtained in a method that violated Fourth Amendment requirements.

**LEON AND SHEPPARD HAVE CREATED AN OBJECTIVE "GOOD FAITH"
EXCEPTION TO THE EXCLUSIONARY RULE**

In two 1984 cases, the Court narrowed the applicability of the exclusionary rule. In Leon v. United States 82 L Ed 2d 677 and Massachusetts v. Sheppard 82 L Ed 2d 737, the Court allowed evidence that had been illegally obtained to be introduced by the prosecution in its case in chief. The ACLU filed an amicus brief in these cases. It believes that the cases were decided incorrectly and will take further opportunities to argue against the continual erosion of the exclusionary rule. However, the focus of this testimony must necessarily be S.237 and not the two Supreme Court cases. Additionally, as will be seen later, the bill goes much further than do the cases in eroding Fourth Amendment protections.

In Leon, the Court was faced with a situation where a warrant was issued by an independent judicial officer, but lower

courts had ruled that the warrant should not have issued because there was no probable cause. The District Court concluded that the affidavit submitted in support of the issuance of a search warrant was insufficient to establish probable cause. Although the police officer asking for the warrant acted in good faith, the Fourth Amendment exclusionary rule required that evidence be suppressed. The Ninth Circuit affirmed, and the Supreme Court reversed.

The Supreme Court held that the exclusionary rule should not be used to bar evidence gathered by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate but ultimately found to be unsupported by probable cause. In reaching this conclusion, the Court emphasized that the exclusionary rule was meant to be a deterrent measure. In situations where a police officer had in good faith obtained a search warrant from an independent magistrate, there could be no deterrent effect. There was nothing more for the police officer to do. Weighing the cost of excluding probative evidence versus the deterrent effect, the court found the evidence to be admissible where the officer had acted in good faith and there was no illegal behavior to deter.

In Massachusetts v. Sheppard, the Court went even further. The search warrant used in that case asked for permission to search for controlled substances, when the police were really interested in searching for evidence concerning a murder. Thus, the warrant was defective in misstating the items which were seized. The Court said the evidence was admissible when the

officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently was determined to be invalid.

S.237 GOES MUCH FURTHER THAN LEON AND SHEPPARD IN LIMITING THE EXCLUSIONARY RULE AND UNDERMINING THE FOURTH AMENDMENT

S. 237 differs in crucial areas with the Supreme Court rulings discussed above. First, the bill makes evidence admissible if the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the Fourth Amendment. Second, a showing that evidence obtained pursuant to a warrant is prima facie evidence of good faith belief unless the warrant was obtained through intentional and material misrepresentation.

Let us examine the first provision of S. 237. If the officer believes he was acting in accord with the Fourth Amendment, the evidence he obtains is admissible. This is a serious infringement of the Fourth Amendment. In what other situation involving the Bill of Rights does an officer's belief that he is acting correctly excuse the violation of constitutional rights? Can the First Amendment be violated as long as the violators believe they are acting in good faith?

Clearly, most Americans would be outraged with such a result. Indeed, the Supreme Court might find fault with such an approach. Since its 1964 decision in Beck v. Ohio 379 U.S. 89, 97 (1964), the Court has rejected subjective good faith, as an excuse for violating constitutional rights.

Justice Potter Stewart has analyzed the problem as follows:

"[I]f the ['reasonable good faith' belief proposed is a] proposal to tolerate searches and seizures where, despite the deference given to the magistrate's determination [Illinois v. Gates], a reviewing court cannot conclude that the police officer had probable cause . . . even while giving the officer the benefit of the doubt where he reasonably relied on a mistaken view of the law or the facts . . . it approaches the "subjective" good faith approach condemned by the Supreme Court . . . in *Beck v. Ohio* . . ."

In *Leon*, the Supreme Court went to great lengths to distance itself from the subjective good faith approach. In footnote 13, Justice White wrote that the arresting officer's good faith was not enough. He added that if subjective good faith were the standard the Fourth Amendment would apply only in the discretion of the police.

S. 237 adopts a subjective good faith standard. In so doing, the drafters of the bill have gone contrary to more than twenty years of rulings by the Supreme Court rejecting the subjective good faith standard. Perhaps, the most convincing evidence that subjective good faith makes S.237 constitutionally suspect is the Administration's proposal of an amendment that would include the words "objectively reasonable belief."

Congress cannot pass a statute that violates the Constitution, and should reject S. 237 on this basis alone. Because S. 237 through use of subjective good faith repudiates the probable cause standard and allows evidence to be introduced where less that probable cause was present. Such a repeal of the probable cause standard cannot be accomplished by statute, and the bill is constitutionally invalid.

Finally, and most importantly, Leon and Sheppard were cases where a police officer conducted a search pursuant to a warrant. Indeed, in both cases, the Court noted that the police officers had their warrants reviewed by police supervisors and attorneys from the District Attorney's office before presentation of the warrants to a neutral magistrate. It is classic Fourth Amendment doctrine that absent special circumstances requesting warrants is preferable to officers conducting searches without warrants. Leon and Sheppard do not create an exception for officers acting in good faith without warrants. Since S. 237 does, it clearly goes further than the Supreme Court.

S. 237 UNDERMINES THE FOURTH AMENDMENT COMMAND THAT WARRANTS BE ISSUED ONLY WHERE THERE IS PROBABLE CAUSE

The bill's second major clause provides that a showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of reasonable good faith unless the warrant was obtained through intentional and material misrepresentation. The Fourth Amendment reads:

"... no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

The only explicit limit set by S. 237 is that there be no intentional and material misrepresentation. What happened to the probable cause standard? Why is this concept, with many years of federal and state judicial interpretation, being replaced by "reasonable good faith" and "intentional and material misrepresentation"? What can rebut the prima facie evidence that the officer acted in reasonable good

faith? Since intentional and material misstatements are mentioned, why weren't the other exceptions to the Leon and Sheppard rule acknowledged i.e. 1) no neutral magistrate, 2) no indication of probable cause in affidavit and 3) facially deficient unparticularized warrant? Does the bill mean that a magistrate's decision to issue a warrant will not be reviewed except where the defendant can show that the officer lied to the magistrate? And that this lie was material? Such an interpretation would make the determination of the magistrate practically unreviewable. Fourth Amendment protections would be weakened greatly. If seizure of evidence pursuant to a warrant renders such evidence admissible at trial even if the magistrate lacked probable cause such a development would effectively eliminate the requirement at the historical heart of the Fourth Amendment that "no warrants shall issue, but upon probable cause."

IN LIGHT OF GATES AND OTHER DEVELOPMENTS IN FOURTH AMENDMENT
LAW S. 237 UNNECESSARY

The Fourth Amendment requires that before a warrant is issued there exists "probable cause". If law enforcement officials can persuade an independent judicial officer, usually a federal magistrate that there is probable cause, a search warrant will be issued. The applicable "probable cause" test was enunciated by the Court in Illinois v. Gates 76 L Ed 2d 527 (1983). In Gates the Court held that "the task of an issuing magistrate is simply to make a practical, common-sense decision whether, given

all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place."

In Gates the Court redefined the concept of probable cause upon which a search warrant should issue. The Court said that probable cause is a fluid concept not readily or even usefully reduced to a neat set of legal rules. Probable cause requires only the probability and not a prima facie showing of criminal activity. The decision on probable cause calls for a practical common sense judgment.

Thus, it doesn't take much for a magistrate to issue a valid search warrant. A reviewing court will accord the magistrate's decision great weight. On review, the court will ask whether the magistrate had a "substantial basis" for believing that there was a probability or substantial chance of criminal activity. Obviously, the Gates test is much more easily met than the "two-pronged" test of Aguilar-Spinelli. S. 237 would add a good faith exception to this already minimal rule. The result would be soft indeed. As Professor Yale Kamisar has written:

"To say that evidence obtained pursuant to a warrant should be admissible even though the police lacked a 'substantial basis' for a 'substantial chance' of criminal activity so long as they had a reasonable belief that they had a 'substantial basis' for a 'substantial chance' is almost mind-boggling."²

Yet, this is the standard today, after the Leon and Sheppard decision. As interpreted by its appropriate interpreter, the Supreme Court, the standard has become quite easy to comply with. For the Senate to go further is unnecessary.

A SUBJECTIVE GOOD FAITH DEFENSE REWARDS POLICE IGNORANCE AND WOULD BE
DIFFICULT TO ADJUDICATE

The Supreme Court in Leon and Sheppard was careful to emphasize that they rejected a subjective good faith exception to the exclusionary rule. As has been discussed, this has been consistent constitutional doctrine since Beck v. Ohio in 1964. The Supreme Court adopted a standard of objective reasonableness. S.237 has a subjective good faith standard. The difference between these two concepts is very important.

Objective reasonableness places limits on willful ignorance. The standard is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.

A subjective good faith defense places a premium on providing as little training as possible to police. For example, Delaware v. Prouse 440 U.S. 648 (1979) clarified the extent to which automobile searches could be executed. Under an objective reasonableness standard, police would have a powerful incentive to understand the law--because they would be expected to know the law. If, however, illegally seized evidence is admissible as long as the officer was acting in good faith, police officers would have an incentive not to know Fourth Amendment doctrine. Thus, an officer who was never informed of Delaware v. Prouse and conducted a search that violated the standard of that case could be acting in complete good faith, and have his evidence admitted.

S. 237 would impose an intolerable burden on the courts. The good faith exception it creates would become an adjudicatory horror. Each time defense counsel filed a motion to suppress, prosecutors

would counter with a good faith argument. Judges would have to probe the subjective knowledge of the searching officer. Evidence other than the officer's self-serving testimony would be scarce. As was said in Massachusetts v. Painten 389 U.S. 560 (1968) (White J., dissenting), "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resource."^{3/}

THE EXISTING EXCLUSIONARY RULE IS NOT A SERIOUS IMPEDIMENT TO
FEDERAL LAW ENFORCEMENT

The "cost" of the exclusionary rule is nothing more than doing without evidence which the founders determined should never have been obtained in the first place. Studies have shown that adherence to the Fourth Amendment and use of the exclusionary rule does not result in large numbers of criminals being set free. As the leading commentator on search and seizure cases has written:

It simply is untrue that the exclusionary rule generally imposes high costs through lost convictions. To date, the most careful and balanced assessment of all available empirical data shows "that the general level of the rule's effects on criminal prosecutions is marginal at most."

"Specifically, the cumulative loss in felony cases because of prosecutor screening, police releases, and court dismissals attributable to the acquisition of evidence in violation of the fourth amendment is from 0.6% to 2.35% (from 0.3% to 0.7% if drug and weapon cases are excluded). This same study points out that the available evidence does not show that defendants gain favorable plea bargains because of the exclusionary rule."^{4/}

One of the leading studies on costs, the GAO report, fully confirms Professor LaFave's judgment that "the 'cost' of the exclusionary rule, in terms of acquittals or

dismissed cases, is much lower than is commonly assumed."^{5/}
 A recent independent study (funded by LEAA) showed that in five localities, declinations for all due process reasons--not just search and seizure--ranged from 1% of rejected cases in the District of Columbia, 2% in Salt Lake City, 4% in Los Angeles and 9% in New Orleans.^{6/}

The conclusions of the NIJ study are both exceptionally misleading and seriously flawed. Quoting from the report's summary, NIJ claims that "4.8%, or the more than 4,000 felony cases declined for prosecution [statewide] were rejected because of search and seizure problems." Yet the relevant measure of the rule's cost is not what percent of rejected cases (86,033) were rejected for Fourth Amendment reasons, but what percent of felony complaints (520,993) were so rejected; and on that basis, the NIJ statistics show that less than 0.8% arrests made by police were declined for Fourth Amendment reasons. A devastating critique of the NIJ material can be found in the study published in American Bar Foundation Research Journal.^{7/}

CONCLUSION:

Because of recent Supreme Court action in drastically reducing the application of the exclusionary rule, further reduction is unnecessary. Indeed, the weakening of the exclusionary rule contemplated by S.237 is unconstitutional and extremely undesirable. S.237 introduces the troublesome concept of subjective good faith and undermines the constitutional standard of probable cause.

The "cost" of the exclusionary rule, even before its recent and drastic weakening, was not great. For all these reasons, S.237 should not be reported out by this Committee.

Ref. 09ER004

END NOTES

1. Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search -and- Seizure Cases 83 Colum L. Rev. 1365, 1401 (1983)
2. Choper, Jesse, Kamisar, Yale and Laurence Tribe, Vol. 5. The Supreme Court: Trends and Developments 1982-1983.
3. This discussion is more full developed in La Fave, W. "The Seductive Call of Expediency": United States v. Leon, Its Rational and Ramifications." 1984 U. Ill. L. Rev. 895, 913.
4. LaFave, *ibid.* citing Davies, "A Hard Look at What We Know (and Still Need to Learn) about the Costs of the Exclusionary Rule: The NIJ Study and other studies of "Lost" Arrests, 1983 Am. B. Found Research J. 611.
5. W. LaFave, Search and Seizure Section 1.2 n.9 (1981 Supp).
6. Brosi, A Cross-City Comparison of Felony Case Processing (INSLAW 1979) at 19.
7. See Footnote 4 above.

Senator BIDEN. Thank you. Mr. Califa, let me ask you to pursue the last point you made, that this legislation would in fact put in motion a subjective good faith as opposed to an objective good-faith standard.

In fact would there not be—would it not result in an objective good-faith standard because the Court would determine what constituted good faith? They would set objective standards by which to make the judgment?

They may not satisfy us; you may not like them.

On the one hand, I think that those who are pushing this legislation are just dead wrong, quite frankly, in portraying the number of cases where the implementation of the exclusionary rule has resulted in a defendant not being convicted, but who, otherwise, by societal standards should be convicted.

But it seems to me you exaggerate the case when you talk about this being a subjective good-faith standard, because will not the Court make the judgment as to whether or not there are enough objective facts to support the belief, by the officer, that he was acting in good faith?

Mr. CALIFA. Senator, I believe that a hearing concerning suppression of evidence would start out by the police officer saying, "I really believed that something bad was going on."

Senator BIDEN. Let us just play act a little bit. I am the judge. I am going to say, "Well, what made you believe that?"

Mr. CALIFA. "I just had this suspicion. I had this hunch. I've been a police officer for 20 years, and I really think there was something going on there."

Senator BIDEN. "And I've been a judge for 47 years and I know you all lie lots of times, and I don't believe you." I mean, I just—see, I just cannot picture many judges, even the most conservative judges, sitting there and saying, when a police officer looks at him and says, "Just had a hunch, just had a feeling," that that would constitute a sufficient cause for the Court to say, "All right. Well, you had a hunch, I guess, even though you, by any objective standard, violated the fourth amendment rights of that individual, then we're going to allow that in evidence."

That is not to suggest we should pass this. I want to make sure that you all understand where I am, and I understand, as best I can, what would be the likely impact of passage of this legislation, which I oppose.

Mr. CALIFA. Yes, sir. Let me try and go at it from another direction. In cases where the issue is, was the officer acting in bad faith—torts cases—very often, the inquiry turns into the state of mind of the police officer at the time he, or she, did something. The Court—

Senator BIDEN. The burden of proof is different there, though.

Mr. CALIFA. Who knows where the burden of proof is going to be under S. 237?

Senator BIDEN. Well, will not the burden be upon the police officer, I mean, to justify that he fits within the exception? It is clearly the burden, whereas, in the tort case, the burden is on the plaintiff to prove that the police officer, in a civil case, acted in bad faith. I mean, it is really a shift of the burden.

Mr. CALIFA. Well, under S. 237, the defendant will be moving to suppress, so the burden would be on the—I guess, although it does not spell it out—the burden should be on the defendant to show that the police officer was acting in bad faith.

Senator BIDEN. Well, the way I think it would work is, the defendant moves to suppress the evidence as a violation of his fourth amendment rights, and the State comes back and says, well, on its face that is true, it is a violation, but we acted in good faith, thereby getting us out from under the requirement. Therefore, the burden is on the State to make that case, and that is in fact a—I mean, all I am trying to do here is to make sure that I am precise about what is at stake here, and what we are talking about. Were I to make your argument on the floor of the U.S. Senate, in opposition to this legislation, I think some of my competent, well-trained legal colleagues, colleagues with legal backgrounds, would be able to point out to me that I was mistaken in comparing the burden under a tort, proving bad faith on the part of an officer, and the burden of an officer having to prove good faith under this exception to the fourth—what would otherwise be—Professor, have you a comment?

Dr. GREENHALGH. You are correct. *Leon* so holds. The *Gant* case is very, very specific in its interpretation about the burden being on the prosecution.

Senator BIDEN. And I cannot imagine—I mean, we cannot legislatively alter that, at least—

Dr. GREENHALGH. Well, you can try.

Senator BIDEN [continuing]. We can attempt to. I agree, we could try, but it would not be constitutional. I do not know how you could constitutionally do it.

Dr. GREENHALGH. You see, that is the whole difficulty, you know, the attack on the warrant clause, as this legislation, at least in our judgment, is designed to go forward. You have those nine exceptions to the warrant clause, one of which now is the good-faith warrant exception to the warrant clause itself.

Senator BIDEN. Yes.

Dr. GREENHALGH. And you are trying to—I mean, other people are trying to add S. 237 to a growing—

Senator BIDEN. No; I agree. I understand that.

Dr. GREENHALGH. You are absolutely correct. I mean, *Gant* says it, interpreting *Leon*, and if you read *Leon* carefully, there is no question about it.

Senator BIDEN. Now, one of the other questions that I have and I apologize for trespassing on your time for so darn long here but—

Dr. GREENHALGH. You are just revving me up for tonight for guess what I am going to teach tonight? One of your cases. *Delaware v. William J. Prowse*.

Senator BIDEN. God, I am glad I am not back in law school because my mind—I would be going, geez, what is that case, what is that case?

Dr. GREENHALGH. Random stop.

Senator BIDEN. All right. Thank you. You know, it has been a long time since I felt that feeling in the pit of my stomach where, knowing I have not read the cases on the night before and briefed

them, I am going to walk into my professor's class, and I am going to be the 1 out of 120 he is going to look at and——

Dr. GREENHALGH. Several of my students have left this room in order to do just that.

Senator BIDEN. As a matter of fact, Professor, several of my colleagues and former professors have indicated to me that they believe that the best training I ever received for the job I now hold, was having to stand before the entire class, and Professor Anderson, and explain cases that I clearly had not read.

But at any rate, let me—that is off the record. My son may read the record some day.

Let me conclude by asking a couple of questions on behalf of Senator Kennedy.

Professor, have you had an opportunity to review Mr. Trott's proposed amendments to S. 237 which we only received last night?

Dr. GREENHALGH. No; I have not.

Senator BIDEN. Well, what I would like to do on behalf of Senator Kennedy and the committee is submit them to you and ask you if you would take a look at them and for the record make——

Dr. GREENHALGH. All right. We will be happy to.

[The information follows:]

American Bar Association

October 17, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Honorable Joseph R. Biden
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Thurmond and Senator Biden:

During my testimony on behalf of the American Bar Association before the Committee on October 2 concerning S. 237, exclusionary rule legislation, I was asked to provide in writing the ABA's views on amendments to S. 237 proposed by the Department of Justice. I am pleased to submit ABA comments on these amendments.

Proposed section 3508 appears to be essentially a restatement of the language in S. 237 extending the good faith warrant exception established in U.S. v. Leon, 104 S.Ct. 305 (1984) to warrantless situations. As I testified before the Committee, the ABA does not believe expansion of this narrow exception is warranted or desirable.

Expansion of the good faith warrant exception to warrantless searches would undermine the integrity of the warrant review process conducted by detached and neutral magistrates. An arrest without a warrant bypasses the safeguards provided by an objective pre-determination of probable cause -- and substitutes instead a far less reliable procedure of an after-event justification for the arrest or search.

Moreover, proposed section 3508 tracks language in S. 237 which would sweep away the four criteria established in Leon where suppression is still appropriate in warrant cases. Enacting a lesser standard for assessing objective good faith than that established by the Supreme Court in Leon is unwise and may be unconstitutional.

Proposed section 3509 is equally troubling. This section would limit the application of the exclusionary rule in non-constitutional situations. In effect, this section would overturn the U.S. Supreme Court's decisions in Mallory v. U.S., 354 U.S. 449 (1957) and Hiller v. U.S., 357 U.S. 301 (1958), and their progeny, which applied the exclusionary rule in non-constitutional cases. In Mallory, the Supreme Court held that a confession obtained while the defendant was unlawfully detained in violation of Rule 5(e) of the Federal

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Honorable Strom Thurmond
Honorable Joseph R. Biden
Page Two
October 17, 1985

Rules of Criminal Procedure, which requires that a person under arrest be taken to a committing magistrate without unnecessary delay, was inadmissible. In Miller, the Court found a violation of 18 U.S.C. §3109, which deals with entry to execute a warrantless arrest, an arrest warrant and/or a search warrant, and suppressed evidence seized after the defendant's arrest. Miller also emphasized the importance of traditional fair procedural requirements:

However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house.

Miller v. U.S. at 313.

It should also be noted that Title 23 §524 of the District of Columbia Code incorporates by reference §3109. Enactment of proposed section 3509 could unwittingly undercut important protections afforded by §3109. It could affect the sanctuary of every citizen residing in the District of Columbia.

Recent decisions indicate that the Supreme Court is attempting to tailor the exclusionary rule to those circumstances where its deterrent function will be served. Proposed section 3509, by contrast, would curtail the rule without regard to its important deterrent role.

Sincerely,

William W. Greenhalgh
William W. Greenhalgh
Former Section Chairperson

WWG:dc

cc: Members, Committee on the Judiciary

Senator BIDEN. And I would also like to ask the ACLU whether they have had an opportunity to do that. If they have not, would they also submit for the record—would you also do that for us? Apparently Mr. Trott suggested several amendments. I did not hear the beginning of his testimony, and rather than us discuss them now, it would be more useful to me and to the committee if each of you could take a look at them.

One of them is on page 7 of today's testimony, but if you do not have a copy of the testimony, we will see that you have it.

Mr. CALIFA. Senator, we would be glad to do that.

[The information follows:]

AMERICAN CIVIL LIBERTIES UNION

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October 24, 1985

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NATIONAL ADVISORY COUNCIL

Dear Senator Thurmond:

We testified on S.237 ("Exclusionary Rule Limitation Act of 1985") on October 2, 1985. During our testimony, Sen. Biden asked us to comment on two amendments proposed by Assistant Attorney General, Stephen S. Trott, Criminal Division, Department of Justice. The amendments were proposed on October 2, and we did not have an opportunity to review them prior to that date. We appreciate the opportunity to comment on these proposed amendments.

The Justice Department's proposed amendment Sec. 3508 would make a very significant change in the bill before the committee. The proposed amendment would not exclude evidence obtained as a result of a search or seizure, if the search or seizure was undertaken in an "objectively reasonable belief" that such action was in conformity with the Fourth Amendment. S. 237, as introduced by you, would not apply the exclusionary rule to evidence obtained as a result of a search or seizure, if the search or seizure was undertaken in a "reasonable good faith belief" that it was in conformity with the Fourth Amendment.

Mr. Trott's proposed amendment attempts to correct a basic flaw in S. 237. The bill's reliance on subjective good faith makes the bill unconstitutional. The Court clearly rejected the subjective good faith standard in United States v. Leon 82 L Ed 2d 677, 693 (1984).

The Department of Justice amendment, 3508 attempts to meet the constitutional standard by excusing Fourth Amendment violations "if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the Fourth Amendment." Proposed Sec 3508 still misses the constitutional mark. By using the term "belief", proposed Sec. 3508 uses a standard that is too subjective. Mr. Justice White wrote in United States v. Leon:

"...[W]e also eschew inquiries into the subjective belief of law enforcement officers.... Accordingly, our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."

The objective question to be answered is whether a reasonable, well-trained officer would have acted in a certain way. The officer's belief is not the appropriate inquiry under Leon. Also see Harlow v. Fitzgerald 73 L Ed 2d 396, 410-411 (1982) cited by Mr. Justice White in Leon.

In Harlow v. Fitzgerald the standard is the objective reasonableness of the officials' conduct. If the officials' conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, the official is shielded from civil damages.

Moreover, the proposed amendment does not cure the problem of permitting warrantless searches. The long standing preference for warrantless searches before conducting a search is undermined by proposed Sec. 3508. The proposal extends Leon and Sheppard to warrantless searches. In so doing, the proposal ignores a basic premise of the Fourth Amendment. That a detached and neutral magistrate will be better able to determine the existence of probable cause than a police officer. By allowing searches and seizures, without warrant, if an officer believes he is acting constitutionally, an important incentive for obtaining a warrant is removed.

Proposed Sec. 3508 does not contain the "four exceptions" to the Leon holding. Only one of the exceptions is mentioned. Since intentional and material misstatements are mentioned, why aren't the other exceptions acknowledged, i.e. 1) no neutral magistrate, 2) no indicia of probable cause in an affidavit and 3) a facially, deficient unparticularized warrant? Indeed, the third 'exception' is much more than that. It is a part of the Constitution. A warrant must describe with particularity the place to be searched and the persons or things to be seized.

The second Justice Department amendment, proposed Sec. 3509, makes clear that the limitation in the exclusionary rule legislation would apply to all areas not just to criminal trials. The amendment states the evidence cannot be excluded in any federal court on the ground that it was obtained in violation of a statute, rule of procedure or regulation, except as specifically provided by statute or rule of procedure.

First, this is a provision on which we have not had an opportunity to testify. We need to know the practical effect of this proposal. Which statutes, rules of procedure or regulation is the Department of Justice concerned about? The situations of which we are aware where a statute has been cited as the reason for exclusion involve violations of congressional enactments proscribing police conduct. For example, in United States v. Moreno 701 F 2d 815 (9th Cir. 1983), evidence was excluded because it had been obtained in violation of 18 U.S.C. 3109 which allows agents in executing a search warrant to break down doors or windows for entry or exit if they first knock and identify themselves. The purpose of the statute is to prevent violence. The Court in Moreno excluded evidence because officers had not complied with the statute. In United States v. Chemaly 741 F 2d 1346 (11th Cir 1984) evidence was suppressed for violation of the present 31 U.S.C. 5317 (a) which calls for a search warrant based upon probable cause when treasury agents want to search suspected currency violators.

In Rea v. United States 100 L. Ed. 233 (1956) the Supreme Court considered the appropriate remedy when a federal agent obtained evidence in violation of 41(c) Fed. R. Crim. P., the equivalent of a federal statute governing issuance of search warrants. The Court excluded all evidence.

"The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruit of his unlawful act either in federal or state proceedings."

These cases are eminently well-reasoned and protect the privacy rights inherent in the Fourth Amendment. The Department of Justice bears a heavy burden in support of this radical measure (proposed Sec. 3509) which would repeal Fourth Amendment protections in all statutory situations, except where the statute specifically provides for exclusion. Very few of these statutes will provide specifically for exclusion. At the time of enactment, the universal remedy for an illegal search was exclusion of the evidence.

In summary, although the first Justice Department amendment is marginally better than S.237 it is still unacceptable for the reasons stated. The second Trott amendment vastly expands the bill's scope, and we strongly oppose it. Also, we reiterate our objections, enunciated in our testimony on S. 237, to any further erosion of Fourth Amendment rights.