

Excerpts from Judge Bryant's decision follow.

'Abscam subjected victim to outrage'

by Sanford Roberts

Judge William Bryant of the Federal District of the District of Columbia acquitted former Florida Rep. Richard Kelly May 13 of the bribery and conspiracy charges he had been convicted of under the Carter Justice Department's Abscam operation. Kelly's conviction was overturned because the court ruled that his Fifth Amendment due process rights were violated by the "outrageous" conduct of the government in initiating and carrying out Abscam.

Judge Bryant is the first to overturn an Abscam conviction based upon FBI "outrageousness," a legal term that signifies gross violation of due process of law guaranteed in the U.S. Constitution's Bill of Rights. Most defense cases to date have relied on the argument of "entrapment"—that the FBI had no evidence of any predisposition to crime on the part of the defendant before making

The question of due process goes to the heart of the issue that governmental misconduct in Abscam is an assault on constitutional government in the United States. Even in cases where the victim of the Abscam frameup is shown to be predisposed to criminal behavior, which could defeat a defense based on entrapment, the consideration of due process can mandate acquittal. If the government uses tactics which exceed the barest standards of fair and honest law enforcement, as Judge Bryant found was done throughout the Abscam operation against Representative Kelly, such "outrageousness" violates the due process clause of the Fifth Amendment. In Kelly's case, the court determined unequivocally that Abscam represents precisely this sort of outlawed "outrageous" misconduct, based on the FBI's persistent offers of bribery after repeated refusals by Kelly.

The Bryant decision has profound implications for other Abscam cases now in various stages of appellate review, especially for that of Harrison Williams of New Jersey, who was forced to resign from the Senate March 11 after a courageous year-long fight in which he demonstrated his innocence of any misconduct. Unlike Kelly, who finally succumbed to FBI bribery when \$25,000 was spread before him, Williams never accepted any money. The FBI succeeded only in videotaping him repeatedly saying "No" to insistent offers of bribes.

[A]s Abscam affected [Rep. Richard] Kelly, it was not the type of carefully devised and supervised covert operation generally accepted by the courts. . . .

I know of no reported case where at least some inkling of corruption was not the forerunner of undercover activity in a bribery prosecution. When Weinberg first passed the word that money would be paid to a Congressman for immigration help and that large amounts of money were available for investment, no one in the government had even the remotest suspicion about the existence of any prior, on-going, or imminent criminal activity of this type either as to its existence in general or the participation of any individual. In other words, there was nothing to trigger traditional law enforcement activities until the government made its overtures through those who were attracted to the honey pot. . . .

[A]s it affected Kelly, Abscam was not a traditional sting operation. It had a feature unknown to any sting operation that I know of. This consisted of a recruiting agent who was programmed to go out and use a formula supplied by the point man of the operation, which included a strong legitimate attraction. This formula containing legal and illegal bait was used. . . .

The ordinary sting, on the other hand, is nothing more than a passive operation which serves as an attraction for those who become criminals under their own power, certainly with no help from anyone connected with the sting. . . . Persons who patronize a "fence" operation set up by police are thieves who have already committed crimes when they contact the sting. In another standard motif, police officers disguise themselves as elderly persons sitting in a park which has been plagued by robberies and muggings. . . . In neither instance do we have officers, or persons programmed by them, canvassing the neighborhood with legitimate incentives designed to encourage apparently innocent persons to take advantage of the sting operation. . . .

Although the Department of Justice and the FBI disavow any purpose of testing the virtue of members of Congress, that in fact appears to have been the sole objective of the operation. In the case of the defendant Kelly the evidence points unwaveringly to this conclusion. Given the concession that there was not even a scent of suspicion of criminal conduct, past, present, or imminent, or of criminal behavior by Kelly or any other individual, that no investigation in this regard was underway, and the firm belief that if Cuzio got his hands on the money the Congressman would never know anything about it, no other objective can emerge except that of testing virtue, or as Judge Kaufman [of the Second Circuit Court of Appeals] stated in *Alexandro*, [one of the early Abscam convictions] "to test the faith of those in the high echelons of government." Either that, or the patently unacceptable objective—prosecution for the

sake of prosecution. . . .

When improper proposals are rejected in these virtue-testing ventures, the guinea pig should be left alone. In ordinary real life situations, anyone who would seek to corrupt a Congressman would certainly not continue to press in the face of a rejection for fear of being reported and arrested. The FBI of course had no such restraints in this case. . . .

I believe that in the circumstances of this case, any further pursuit and pressure on the part of government agents was nothing short of outrageous. A suspicion-free subject should be exempted from further testing on the basis of winning the first battle against temptation. He should not be required to win a prolonged war of attrition against chicanery. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime. If the government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of mere offensiveness to that of being "outrageous." No concept of fundamental fairness can accommodate what happened to Kelly in this case. . . .

The function of law enforcement is to prevent crime and catch criminals. Conversely, law enforcement exceeds its bounds when it manufactures crime and creates criminals. The manufacture of crime and creation of criminals have been specifically prohibited by numerous cases. . . .

To reiterate, I do not believe that testing virtue is a function of law enforcement. But this personal belief aside, and assuming that it is, the method of testing must be fair. If after an illegal offer is made, the subject rejects it in any fashion, the government cannot press on. Certainly when a person recognizes the dif-

ference between the legal and the illegal, and rejects the latter, the person should be free of further testing by a device which only government agents could have the audacity to use in the face of the penalties provided for their conduct. This standard creates a workable, discernible line separating the merely offensive and the constitutionally impermissible. Crossing this line is patently outrageous. A person corrupted under circumstances which only police officials can create or by a process which only the authorities are licensed to use, has been made into a criminal by his own government. . . .

During the course of the trial, in an apparent attempt to escape conviction and at the same time hang on to some remnant of respectability, Congressman Kelly presented the bizarre, nearly farcical defense that he was conducting his own investigation of the reason why he had been surrounded by shady characters. He suggested that he was being targeted for destruction by his political enemies who resented his independence and courage in the political arena. Not a scintilla of evidence which would support this theory ever surfaced in this case.

However, as the case unfolded I was plagued with the unsettling realization that with this loose cannon rolling around on the deck of the criminal justice system such a thing could indeed occur. Also, I became aware that even if a victim successfully invoked the defenses of selective prosecution and/or entrapment, this would be of little solace to him, for he nevertheless has been destroyed as a voice in public affairs. This great potential for a type of mischief, which hopefully will always remain alien to our system, standing alone, may be a compelling justification for outlawing the government's conduct against Kelly as a law enforcement procedure. If we condone such a measure, the fall-out might well be intolerable for us all.

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