

Crime on Camera

by Michael E. Tigar

On Sunday, February 4, 1980, readers of the *New York Times* unfurled their hefty Sunday papers and discovered the video age in the detection and proof of crime. Or so they were told. The government had actually videotaped members of Congress as they took bribes from representatives of a fictitious Arab sheik. NBC television regaled its viewers with an enthusiastic, colorful (and in some instances, defamatory) version of the same story.

The FBI had introduced an advance in criminology by creating an Arab scam. The sheik and his entourage had been government agents. The congressmen had been scammed into taking money on television. The video age knows that reality resides in the television set, so the FBI had created a new tool of justice. Who is to say that the camera lies? The FBI operational term *Abscam* has now grown into a new term in the legal dictionary.

In another investigation, which the FBI called "Brilab," cameras and microphones supposedly had captured local politicians and union officials taking bribes from FBI agents. Perhaps longing for Elliott Ness and Efram Zimbalist, Jr., the FBI has returned to television with a vengeance, trading weapons for high-tech video equipment. You could almost sense the tremors of excitement set off by *Abscam* and *Brilab* in law-enforcement circles. But how do lawyers deal with the new age in realistic evidence?

I am not taking up space merely to debate the merits of these techniques, or to argue this or that theory of due process. There is a sort of grim and implacable logic behind the *Abscam* methods. Recall that the FBI sought out willing congressmen and enticed them into taking Arab money in exchange for legislative influence. Direct evidence of such influence peddling had scarcely ever been seen before. The difficulties of ferreting out political corruption make a powerful case for inventing ways to give public servants an opportunity to do corrupt things on camera.

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What a beguiling argument. It makes you wonder just how many other crimes are as difficult to detect and thus candidates for having a television series of their very own. I look forward to the day when television cameras will scan every bathroom in the Capitol itself to detect the otherwise undetectable speculations of those who both sponsor and commit acts of Congress.

Delights of Entrapment

Why stop there? I am convinced that a great deal of illegal vegetable matter is being smoked by the citizenry. No doubt a good many subversive books are being read and even talked about in the living rooms of America. I seem to recall having read a book about putting video cameras in all places to uncover these crimes, but in 1982 we are two years ahead of the time Orwell identified as propitious for such things.

Nor shall I rehearse the delights of the entrapment defense. Many have explored it, but few are willing to adopt it openly and call it by name. The defendant who wishes to claim entrapment faces a double risk, for reasons judges find persuasive. First, he must admit to the physical elements of the offense and may quibble only about whether the mental element was supplied by a government agent. Second, and often more telling, he opens the issue of predisposition, that is to say, the prosecutor may drag up all the otherwise inadmissible incidents in the defendant's prior conduct that are said to bear upon his willingness to commit a crime.

I am not conducting an excursion into such controversies as these. They are exciting and certainly necessary in analyzing the legal position of a video defendant. The debate that has surrounded *Abscam*, *Brilab*, and their successors has concentrated on questions of entrapment and due process. But that obscures the most basic and difficult questions a trial lawyer faces in defending a case based on taped evidence. These are questions of tactics: how do you cross-examine the government's witnesses,

and how do you identify fruitful areas for defense testimony.

I turn for inspiration to "Red" Barber, one of the great sportscasters of network radio. Barber, living in retirement in Florida, was asked to evaluate the top players of the 1981 baseball season. He declined. Barber said to do that he would need to see each player in the ball park. Television, even with its multiple angles and the magic of instant replay, was not an adequate substitute. After all, video coverage gives you only what the director thinks you should see.

That is the problem with taped evidence. It has only two dimensions. Videotape and audiotape are not *the* event; they offer a more or less accurate recreation of *an* event. In this respect, they are like a witness's testimony, which is more or less an accurate recreation of an event.

As evidence, the tape suffers from all the defects of live testimony, except that the tape always tells the same story in the same way. The persuasiveness of a videotape depends on its own characteristics and the skill of the advocate who explores its strengths and weaknesses.

Let us recall the earliest FBI video sting. The FBI and the District of Columbia police set up a fencing operation, spreading the word that they were willing to buy stolen goods. As the burglars brought in the loot, video cameras captured the action.

Now this sting only detected crimes that had taken place outside camera range and with no involvement by any government agent. But the sting gave rise to the video scam. An assistant U.S. attorney was allegedly dropping cases against burglars in exchange for money. The police officials decided to fake the crime and government agents procured statements on videotape from the government prosecutor.

Thus videotape turned an assistant U.S. attorney into a real criminal defendant. The lawyer made statements on camera to the agents that seemed compromising, and the grand jury indicted the lawyer.

The jury acquitted him. To the jury, the taped evidence seemed too contrived and the scene too carefully arranged to resolve ambiguities in the government's favor.

We learn that you may successfully defend a tape case. There have been other acquittals in tape cases: Congressman John Murphy was acquitted of bribery, although con-

victed of lesser offenses. A jury acquitted Billy Clayton, the speaker of the Texas House, in a Brilab case. So let us turn to questions of trial tactics. On what terrain will the battle be fought, and which weapons will be appropriate? These tactics, by the way, will reach the civil trial lawyer with the spread of amateur recording equipment.

Your first question will be whether the tapes are admissible. Do they satisfy the minimum requirements for display to the jury? Are the sound portions audible? Can the speakers be identified from either internal evidence or the testimony of a sponsoring witness? Does the tape sufficiently depict the event that it purported to represent? Finally, you must inquire whether the tape has been edited, doctored, or otherwise interfered with.

Actors on the Tape

Once you have resolved the problem of admissibility, using and countering taped evidence is no different analytically from using or countering any other form of evidence. You must know your adversary's weapons. If you can defeat them quickly and cleanly, you should do so. Otherwise, the opponent must cut off the proponent's opportunity to use and display the weapons. With tapes, that will be the usual case. (A commonplace application of this latter principle is the cross-examiner's admonition to the witness not to repeat his direct testimony.)

What do prosecutors say about their weapon of tape-recorded evidence? First, they claim that the tapes are real and cannot be changed. Second, they claim that the tapes portray events accurately. Third, they claim that the people the jury will see and hear on tape will behave naturally and without any irrelevant stimuli. Fourth, they claim that ambiguities on the tapes are insignificant. The prosecutors make these points not only in argument to the court but by the repeated playing of important portions of the tape for the benefit of the jury.

The prosecutor benefits from the technical limitations inherent in tape. For example, in the Abscam trials, the recorded conversations took place in normal, well-lighted, healthy-looking rooms. But the videotapes presented grainy, dull, blurred images in shades of gray. They were shot on black-and-white tape in available light. The overall impression was like that left by the stag films once shown in fraternity houses and American Legion halls before the business of making X-rated movies became as successful as it now is. The normal voices used by the participants were transmitted by the microphones into a hollow, almost sinister series of sounds.

How does the defense counter the image put forward by these tapes? First, you demonstrate how the events that took place before the cameras started grinding are not only relevant but crucial to an understanding of what the jury sees on the video screen. Second, you point out that the government is in control of the ambiguities that appear on the tapes. Third, you note that every single person on the tape except for the mark (or prospective defendant) is an actor seeking to achieve a result. Fourth, as a matter of tactics, you try to minimize the prosecution's opportunity to play the tapes to the jury.

Consider the typical Abscam scenario. An FBI agent and a convicted swindler posing as agents of an Arab sheik



came into communication with a lawyer in Philadelphia. The lawyer claimed he could find congressmen who could help the sheik with his immigration problems if the sheik were forced to flee his country because of political upheavals. The lawyer intimated that the congressmen would be willing to accept money in exchange for agreeing to help the sheik.

The lawyer then told the congressmen that the sheik wanted to invest money in their districts. Did the lawyer say to each congressman that money could change hands in the meeting with the sheik? We will never know for sure, because the conversations between the middleman and the

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congressman were never recorded. Nor were all of the conversations between the middleman, the FBI agent, and the convicted swindler recorded.

The middleman-lawyer had a financial stake in delivering the congressman to meetings with the representatives of the sheik. The middleman was paid whether or not the congressman accepted money. Indeed, several of the tapes display the middleman negotiating with the FBI for payment on delivery, whether or not the congressman actually took any money. On one tape, the middleman says, "I would rather work a deal with you so that when I deliver the guy to you, you're gonna take care of me as if I made the contract with you. I'll deliver a guy; you're gonna pay me." The agent gives him \$5,000.

Moreover, the middleman arranged with the FBI agents that if money were to be offered to a congressman, the money could be placed in a sealed envelope or briefcase and the middleman would carry it from the meeting. The middleman was ostensibly to split the cash later with the congressman, but proof that the division took place rests on the credibility of some incredible characters.

In this script, the middleman has every financial incentive to make the congressman appear willing to accept money, whether or not the congressman is in fact willing. The convicted swindler assisting the FBI has every reason to make it appear on tape that the congressman has come close enough to accepting money that there is a prosecutable case. Only by assisting the FBI in making a case can the convicted swindler work off his problems with the government. The FBI agents are also concerned almost exclusively with the taped appearance of impropriety. They seek to make the appearance so strong that a jury will convict.

This entire process was theoretically to have been controlled by government lawyers to make sure that the creation of the appearance of impropriety was coupled with enough real improprieties so that nobody was unfairly dealt with. In fact, this process of supervision was more il-

lusory than real. In a meeting to involve the congressman, everybody in the room is a schemer—except your client. The placement of cameras and microphones, however, reinforces only the image of the congressman as a crook. The camera focuses on him, he becomes the center of the picture, his voice can be heard above the conspiratorial suggestions of the actors.

The government's theory at trial is that the agents of the Arab sheik contacted the middleman and explained to him that only those congressmen willing to accept a bribe should be brought to the meetings. The middleman spoke to the congressman, according to the government, and explained to him carefully that he was going to meet representatives of the Arab sheik and would there be offered cash for his own personal use in exchange for deploying his influence on behalf of the sheik's business and immigration problems. All of this has taken place off camera, but the government says the videotape of the eventual meeting contains damning evidence that all of these prior events took place. The denouement occurs when a briefcase full of cash leaves the room in the hands of the middleman.

If that is the government's theory, the defense must present a plausible alternative theory sufficient to raise a reasonable doubt. The videotape inevitably contains ambiguities that can be only resolved by reference to events that occurred before the cameras began to turn.

In discovery, therefore, the defense must obtain all tape-recorded conversations between the middleman and the representatives of the sheik and all records or memoranda of preparations for the congressman's appearance before the hidden camera. In this way the defense may develop an alternative theory to prove that the middleman's real interest lay only in creating the appearance that the congressman was willing to break the law and that the representatives of the sheik did not control the middleman's conduct.

The second way to counter the image on the tapes is to change the jury's perspective. The tape should be viewed not from the perspective urged by the prosecution, but from the perspective that it contains a series of ambiguities. That is, the conversation between the congressman and the representatives of the sheik ought to be viewed as what the congressman thought it was. The congressman may have thought he was hearing a series of references to the problems of a wealthy potential immigrant whose politics fit American foreign policy.

This immigrant, by the way, was expressing through his representatives a willingness to invest in the congressman's district. If the congressman had troubled to call Chase Manhattan Bank in New York he would even have been falsely assured that the sheik's deposits there were \$450 million. Immigration problems, particularly of political figures, and investment in a congressman's district are legitimate subjects for a congressman's time and attention. Viewed in this light, references on the tape to the wealth of the sheik may all become understandable.

From this perspective, you may argue that the tape shows that the middleman was attempting to steer the conversation so as to create the appearance that the congressman was willing to accept money. But of course, the

real aim of the middleman was to induce the representatives of the sheik to part with the briefcase and the cash.

In analyzing and presenting these ambiguities in the taped conversation, the defense lawyer should enlist an expert. Some of the most persuasive work on the deficiencies of the Abscam tapes has been chronicled by Mary Gallagher, a Ph.D. in linguistics and a practicing lawyer, in her article, "Linguists Could Provide Insights into ABSCAM Tapes," *Legal Times of Washington*, p. 12 (Aug. 31, 1981). She testified before both the House of Representatives and the Senate on this subject. Her thesis was that the government contaminated the conversations in both the Abscam and Brilab cases by artificially injecting the topic of money into them:

As a linguist I know that it is relatively easy for one party not only to impose his own agenda on the conversation, but to produce almost any impression on a transcript of the conversation. Few of us speak with one eye on what a resulting transcript might look like. Nor have we come so far from the civilized view that gentlemen do not eavesdrop that we must take the invasion of privacy for granted in daily life.

People merely hearing tapes of artificial conversations, however, apply normal standards of interpretation to those tapes. The simplest and the most common false impression that a speaker with an agenda can convey is that everyone in a conversation agrees with the other speakers, when in fact there is no agreement at all. Simply to bring up a topic a number of times can produce the impression on a transcript that everyone agrees about that topic. Linguists call this contamination.

Let me illustrate contamination with a type of example not found in the Abscam tapes, to my knowledge. Suppose that there are two participants in the conversation, one with an agenda, the other without. If the speaker with the agenda vigorously attacks and slanders an absent third party, and the other party remains silent, the venom of the agenda will contaminate the entire conversation: someone overhearing the conversation or reading the transcript, but subjecting it to no analysis, may very well conclude that the two speakers agree about the defects of the one who is absent. In fact, the silent participant may be silent not out of agreement, but out of politeness, boredom, torpor, or good judgment.

A linguist can help to reconstruct the meaning that might plausibly attach to the verbal clues given the congressman.

The defense must recreate a sense of the taped meeting that counters the image put forward by the government. One of the most difficult decisions will be whether to put the defendant on the stand. If he testifies, those parts of the tape supporting the government will be played, perhaps repeatedly, as a predicate to questions on cross-examination. Indeed, minute for minute, the cross-examination of Abscam defendants who have taken the stand has consisted more of replaying the most damaging portions of the tapes than of questions and answers.

In sum, confronting tape-recorded evidence is no different from confronting any other evidence. *Meaning,*

veracity, memory, and observation are the four watchwords in analyzing this evidence:

Meaning: Do we understand what the witness is telling us?

Veracity: Is the witness telling us the truth?

Memory: Does the witness accurately recall what went on?

Observation: Was the witness so placed as to be able to see and hear that part of the event in which we are interested?

It is true that a tape will tell the same story every time you play it. Yet the meaning derived from it may change depending on how well one understands what went before and the motivations of the participants.

Veracity: The tape, the inanimate object, has no interest in shaving the truth, but the people who made the tape had an interest in seeing that a particular result was reached. As a result, some of those on the tape may have been more interested in appearances than in reality.

Memory: While the tape will tell the same story every time, the persons who made it will not. Cross-examine them about their recollection of the crucial events off-camera.

Observation: The angle of the camera, defects in lighting, failure to portray all of the participants, and the decision not to record parts of an event amount to deficiencies of observation. They are just as significant as the defects in the testimony of a witness who turned his head at the crucial moment.

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It is true that taped evidence is powerful, but inflated claims made by the prosecution may weaken its impact. We are told that the tape will give us incontrovertible evidence of a corrupt promise for which money was accepted. Since intent cannot be photographed, the transfer of funds in a closed container (such as a briefcase) and their removal from the scene in the hands of a middleman suggest that the tape does not measure up to the prosecution's claim. Sometimes the prosecution has even been driven to argue that the congressman was so clever that the tape could not really show an exchange of cash for favors. In argument, the defense lawyer must hold the promise made for the tape against the reality of its origin and contents.

Trial lawyers of America: remember that no matter how big the television screen, there are more reasons than hot dogs and popcorn for going out to the ball park and watching the game live. Red Barber said it all.