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Should Latin American Prosecutors Be Independent Of the Executive in Prosecuting Government Abuses?

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PERSPECTIVE

SHOULD LATIN AMERICAN PROSECUTORS BE INDEPENDENT OF THE EXECUTIVE IN PROSECUTING GOVERNMENT ABUSES?

PHILIP B. HEYMANN*

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* James Barr Ames Professor of Law, Harvard Law School, Cambridge, MA. Approximately twenty-one pages from TRANSITION TO DEMOCRACY IN LATIN AMERICA (Irwin P. Stotzky ed., 1993). Copyright (c) 1993 by Westview Press. Reprinted with modification by permission of Westview Press.

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I. INTRODUCTION

GUATEMALA CITY — The United Nations issued a damning review of Guatemalan human rights . . . painting a grim panorama of state killings, death squads and abuses by leftist rebels . . .

The report accused police and army forces of cold-blooded murder, running "social cleansing" death squads to kill common thieves, drug trafficking, car thefts, and illegal logging . . .

It said Guatemala's legal system was "virtually paralyzed," and incapable of investigating crimes, even threats and attacks against its own judges and prosecutors.

The main victims of abuse continue to be human rights activists, politicians, and public prosecutors.¹

The more I have thought about the implications of the question whether prosecutors should be independent of the executive in prosecuting abuses by the government, the more complicated it seems. My own experience teaches me the importance of context in addressing this question. Having helped establish the Watergate Special Prosecution force to investigate President Nixon's abuses, I began a major project in Guatemala with the assumption that judges and prosecutors could force an end to massive governmental abuses of every sort in that troubled

1. Fiona Neill, *U.N. blasts Guatemala human rights*, REUTERS, Oct. 31, 1995, available in LEXIS, News Library, Wires File.

country. I came to see that I was expecting far too much heroism and ingenuity from ordinary human beings, that they could not compensate for a lack of enthusiastic cooperation by the highest political figures. Only the President and the Minister of Defense could mobilize the police to provide the investigative resources that were needed when there was a massacre, a political murder, or a well-connected drug deal.

When abuses in Guatemala became particularly troublesome with the murder of ten or twelve students in the late summer of 1989, I went to the Minister of Defense and the President and told them that Harvard Law School would leave Guatemala unless they initiated a vigorous investigation of crimes for which the country's security forces might well bear some responsibility. Each told me that the failure was attributable to the investigative judges and prosecutors who were, they were at pains to remind me, independent and responsible. For successful trials of terrible abuses, Guatemala needed determined efforts by high-level leaders to motivate the police to investigate and to protect judges and prosecutors from violence — two essentials for a successful prosecution. And, in the case of Guatemala, independence provided an excuse for withholding those efforts.

I have studied prosecutors attempting to deal with governmental abuse in a number of countries. The stories are very interesting. An Israeli prosecutor, traditionally independent, is fired for refusing to suppress a case against the domestic security forces for killing two Palestinian terrorists after they were arrested.² The Japanese Ministry of Justice, theoretically very independent, declines to bring an obvious wiretapping case, reminiscent of Watergate, against the official tappers of the phone line of the Chairman of the Communist Party.³ The quite independent prosecutors of South Africa decline to investigate cases of police violence, including one involving a South African officer who has personally killed dozens of demonstrators or suspects.⁴ That the police are in charge of such investigations was

2. The incident involved here was the "Bus #300 Affair," in which Israeli security officers killed two Palestinian bus hijackers while they were in custody. For a comprehensive discussion of this case, see Pnina Lahav, *A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture*, 10 CARDOZO L. REV. 529 (1988).

3. See Setsuo Miyazawa, *Scandal and Hard Reform: Implications of a Wiretapping Case to the Control of Organizational Police Crimes in Japan*, 23 KOBE U. L. REV. 13 (1989).

4. The South African case is considered in Nico Steytler, *Policing Political Op-*

the explanation I was given by the Attorney General in Cape Town.

A British investigation of a "shoot-to-kill" policy affecting IRA suspects in Northern Ireland and as far away as Gibraltar is effectively hushed-up by the government without so much as a peep from the prosecutors in a land we strongly associate with the rule of law. Nor is it the prosecutors who reveal an apparent fabrication of evidence against IRA suspects tried for bombings in England.⁵

Obviously, more is involved than a structural arrangement and a pledge of independence if the object is controlling governmental abuses. For reasons of state, the government of France humiliated its theoretically independent chief prosecutor by having him urge on an unwilling court a trivial sentence for Abdallah, the terrorist murderer of American and Israeli officials.⁶ Even the evidence presented by the French prosecutor seemed purposely pared back to accomplish that result.⁷

The answer as to the desirability of an independent prosecutor and what that means seems to me to require a quite complicated analysis. If you will bear with me, I will try to be the guide for a first exploratory excursion of this subject. My hope is that, after this preliminary excursion, others will build on my analysis to explore further its implications.

There are several major steps to the analysis, but initially it

ponents: *Death Squads and Cop Culture*, in *TOWARDS JUSTICE? CRIME AND STATE CONTROL IN SOUTH AFRICA* (D. Hansson & D. van Zyl Smits eds., 1990).

5. See *World in Action*, *In the Interests of Justice* (Granada television broadcast, Oct. 28, 1985) (transcript on file with author); see also *World in Action*, *A Surprise Witness* (Granada television broadcast, Jan. 12, 1986) (transcript on file with author). One of our triumphs in Guatemala was to bring the prosecutors and investigative judges to the point where they would attack such an effort to fabricate evidence.

For examinations of the British response to IRA activities, see William R. Nelson, *Terrorist Challenge to the Rule of Law: The British Experience*, 13 *TERRORISM* 227 (1990); R.J. Spjut, *The "Official" Use of Deadly Force by the Security Forces Against Suspected Terrorists: Some Lessons from Northern Ireland*, 1986 *PUB. L.* 38 (1986). (These articles do not discuss the role of prosecutors specifically, but rather focus on the governmental response in general).

6. The Abdallah trial, particularly its implications for multilateral cooperation in combating terrorism, is explored in Philip B. Heymann, *International Cooperation in Dealing with Terrorism: A Review of Law and Recent Practice*, 6 *AM. U. J. INT'L L. & POL'Y* 1 (1990).

7. *Id.*

is important to clarify an uncontroversial assumption that underlies it. Like most of those discussing the subject of the relationship of the prosecutor to the highest governmental officials, I will assume that because of professional tradition or public expectation, the prosecutor is more committed to equal and unbiased enforcement of the law than is the president or the other governmental powers such as, in Latin America, the minister of defense. Otherwise, and "otherwise" was often the situation in Guatemala, structures make no difference. The prosecutor will simply behave as the highest political officials wish, without regard for the structural and other guarantees of independence. I will also assume that the law itself is, on its face if not in application, fair, neutral, and respectful of human rights. Substantial pressures from other nations have often assured this condition of formal correctness even in very repressive regimes. With those assumptions stated, I begin my analysis.

In Part II, I categorize the types of governmental abuses and discuss the sources of abuse, the motivation for each of the sources of abuse, and the attitudes of high-level officials towards them. In Part III, I analyze the power of the significant actors — elected officials, police, and prosecutors — in relation to one another. In Part IV, I discuss the relevance of independence for the effectiveness of prosecutions, analyzing the ambiguities in the notion of independence and the inherent complexity about the areas of independence. In Part V, I explore these ideas as applied to the most difficult cases — abuses by security forces in the name of internal security. Finally, in Part VI, I look at the steps prosecutors may be able to take that would increase the power of democratically elected leaders to prevent abuses by the military in the name of national security.

II. A CATEGORIZATION OF THE TYPES OF GOVERNMENTAL ABUSE

A. *Sources of Governmental Abuse*

Without great loss in generality, we can use a relatively simple framework to classify abuses by their source and by their motivation. As to source, there are at least four possibilities which I shall illustrate with American examples.

First, abuses may be initiated by the highest government officials, including the elected or unelected political leaders. In the United States the cover-up of Watergate would be a clear

example. Second, abuses can be carried out by lower level officials in the executive branch, without the direction of their political superiors. The claimed independence of Oliver North and John Poindexter in the Iran-Contra Affair would be an example of the second.

Since the police are the primary investigators of crime and the maintainers of public order, we should consider as a third category, different from the second, abuses by the police. The beating of Rodney King by Los Angeles Police Department officers is a now very familiar example. Fourth, and finally, there is the extremely troublesome case of abuses directed by intelligence or military forces and carried on relatively independently of the elected political leadership. The break-ins to the houses of the families of political radicals in the aftermath of the activities of the Weathermen in the United States, break-ins ordered by top officials of the FBI, would be a rare U.S. example of this.

B. Motivations for Governmental Abuse

The source of abuse furnishes only one axis on the matrix of governmental abuse. The other axis is furnished by the motivation, for each of the sources of abuse may be acting out of any of several motivations. Recognizing that any of several categorizations would be useful, I will propose a division into three types of motivations.

First, the purpose of the governmental abuse may be personal enrichment through corruption or extortion. Corruption at the highest level of government has posed serious problems for Japan, Argentina, the United States, and many other countries. The corruption of the military or intelligence forces, for personal gain, is a serious problem in many countries in Latin America — a problem made far worse by the United States policy of encouraging military involvement in drug suppression. Mexico and Colombia are only two examples. I need hardly provide examples of corruption or extortion at the working levels of the police or the lower levels of other bureaucracy.

A second major motivation for governmental abuse, and one that is particularly threatening to democracy, is the monitoring and control of political opponents.⁸ Sometimes the monitoring

8. Intelligence investigations give rise to a serious dilemma for democratic so-

itself is illegal; examples are Watergate and the wiretapping in Japan. However, in many countries, including Great Britain and France, some political intelligence-gathering on mainline political opponents is believed to be an appropriate activity for the police or intelligence agencies. In other countries, Germany is an example, where gathering intelligence on radical parties of the Left or Right is an authorized activity, the authorization has been stretched to reach mainline opponents.

Of course it is not simply the intelligence gathering that constitutes the serious abuse in many cases. Using the intelligence, the government may order the torture, murder, or disappearance of political opponents. That has been true in Argentina, Chile, Uruguay, Guatemala, and many other Latin American countries. In the United States the Nixon Administration proposed to use such information to penalize its opponents by tax audits or, in the case of Daniel Ellsberg, by making public his most personal secrets (which the Administration hoped to find by breaking into the office of Ellsberg's psychiatrist).

When political repression is carried out at a street level, at the direction of a local police commander or even of lower-level officers, we have order maintained through the repression of legal activities that are disapproved by the police. I would include racist forms of law enforcement in this category, although they are of course worse for being based on race. They are an effort to maintain a form of dominance on the street and are thus a low-level abuse motivated by political repression.

Neutrality in the ever-present contest between lawyers and police requires me to note that prosecutors, too, can be the initiators or agents of repression and violence, if they knowingly use false evidence to obtain convictions, either for their own purposes or at the direction of political superiors. Bringing false or weak charges against the political leader's enemies was an abuse perfected by Stalin and his chief prosecutor, Vyshinsky,

cieties, even if those investigations are conducted through legal channels. On the one hand, monitoring may be a necessary tool for combatting domestic violence or terrorism. Yet, on the other hand, since people who advocate political views in line with terrorists and in opposition to the government are the ones most likely to join or aid terrorists, intelligence agencies will seek surveillance of those political groups, thereby threatening democratic values by discouraging dissent. See PHILIP B. HEYMANN, *INTELLIGENCE GATHERING AND PROCESSING* (1992) (unpublished manuscript on file with author).

and then associated more broadly with the former Soviet Union and its satellites.

Finally, I would use a catch-all category of abuse of power where the motivation is neither economic self-interest nor political repression, but simply pleasure in the exploitation of the powers of an office or excessive enthusiasm for one's role. An army that kills its guerrilla opponents even when it would be wiser (not simply more moral) to take them prisoner, a police force that freely provides beatings without trial, an intelligence agency that exploits its access to private information — these are the more dramatic examples I have in mind. But the same category would cover Kafkaesque abuses of bureaucratic power.

C. Attitudes Of High-Level Officials

As if four sources of abuse and three motivations for each did not create a complicated-enough matrix of twelve boxes, I should add one more variable in terms of types of abuse. As to any abuse, except the obvious case where it is directed by the highest-level government officials, it is important to know the attitude of those highest political officials. There are several possibilities. The form of governmental abuse may be opposed by the highest political levels, in which case it survives only when it is undiscovered. The abuse may be tolerated by the political leaders or simply ignored, as when the political power of those engaged in the abuse or — in Latin America — their military power makes opposition unwise or dangerous. In extreme cases, the governmental abuse may be protected and covered up at the highest political levels. Prime Minister Shamir protected the killing of two Palestinian terrorists by Shin Bet in the Bus #300 Affair.⁹ Margaret Thatcher protected the killing of IRA terrorists.¹⁰ On assuming office Ronald Reagan promptly pardoned Felt and Miller, the FBI executives who had ordered illegal break-ins to pursue the Weathermen.¹¹

9. Lahav, *supra* note 2.

10. For an account of the killings in Gibraltar, see Ian Jack, *Gibraltar*, 25 GRANTA 15 (1988).

11. Francis J. Martin, *Leveling*, N.Y. TIMES, May 11, 1981, at A19. In 1972 and 1973, Mark and Miller, F.B.I. officials, authorized secret searches of homes of individuals suspected of association with the Weathermen, a violent faction of the anti-Vietnam war movement.

This final distinction is important. If the highest political levels are protecting a form of governmental abuse or, worse, are directing it, any control they can exercise over the prosecutor will be used to prevent successful prosecution of that wrongdoing. If, at the opposite extreme, the highest political levels are opposed to the form of abuse, but simply are unable to discover and control it, they will be a source of support to the prosecutor, particularly if they are his superiors and can claim credit for his activities. The most interesting category is the middle one, where the highest political officials are tolerating or ignoring abuses because of the political or military power of those responsible. That situation, so characteristic of military-civilian relations in recent decades in Latin America, will require our further attention, but not yet.

III. THE POWERS OF THE MAJOR ACTORS (ELECTED OFFICIALS, POLICE, AND PROSECUTORS) VIS-À-VIS EACH OTHER

Since we are assuming that our purpose is to strengthen the rule of law and respect for human rights, and since we are assuming that the prosecutor is more committed to these values than the police, the highest political figures, or the security forces, what we want is to grant the maximum freedom, resources and influence to the prosecutor. My description of our objectives is contentious. There are values other than the rule of law and respect for the political and civil rights of individuals. But if, for simplicity, you will accept my statements of our tentative objective — at least for countries where legality and human rights have not been widely respected — then the fact that we want to grant maximum power to the prosecutor follows from his greater interest in the objectives.

What does *not* follow is that the greatest *power* comes from the greatest *independence*. We would not think that necessarily true of a foreign minister who we know needs the help of the president in dealing with military and intelligence officials as well as domestic organizations. It is not necessarily true of an attorney general. It is of course true that being subject to the direction of political figures less committed to the rule of law and human rights results in their power to deflect him from pursuing his, and by hypothesis our, objectives. But being subject to some control by the highest political figures may also provide powers that the prosecutor needs.

Let me be precise. Preventing governmental abuses may require the cooperation, at the prosecutor's request, of any or all of the following groups which are independent of him: police, courts, and the authorized managers of government agencies. The first is obvious. To find the facts, the prosecutor is likely to need the cooperation of the police. In many countries the formal arrangement puts the prosecutor in charge of the investigation and directs the police to follow his directions; but rarely if ever is this scrupulously or even generally followed in practice.¹² The relationship between the prosecutor and the police, whose support he badly needs, is always problematic.

The prosecutor needs the support and trust of the court that will adjudicate any cases he brings. Countries vary in this area. The support of the judiciary is so clear in Japan and China and was so clear in the Soviet Union that many western nations questioned whether the system is one of administrative determination by the prosecutor rather than adjudication by a court. At the opposite extreme, the skepticism of judges in many Latin American countries about evidence produced by the police makes conviction on such evidence very difficult. The same is true in the Bronx in New York City.

The prosecutor may need the cooperation of the highest government officials if he is to get the cooperation of lower-level officials in furnishing information and evidence about governmental wrongdoing and if he is to get the cooperation of the police in investigating such cases. The prosecutor may also need the cooperation of the highest government officials in establishing systems and mechanisms to reduce the possibility of governmental abuse in the future: review boards for police brutality or procurators or inspectors general to detect corruption.

To handle governmental abuse the prosecutor must put together an effective cooperating team out of this group of independent actors. To enlist their support he has at his disposal more or less of a few powers. Let me review them. He can call upon the courts to adjudicate guilt or innocence if he has the necessary evidence and independence of contrary orders by superiors. He can call upon the police to gather the needed evidence relying on their subordination to the highest political or military

12. See Thomas Weigend, *Criminal Procedure: Comparative Aspects*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* (S. Kadish ed., 1983).

officials, if the highest political or military officials are willing to assist the prosecutor. He can call on the police on his own if the police have developed a tradition of independence and want convictions (rather than summary punishment of offenders or impunity), but only if the police also see the work of the prosecutor as helpful in convincing the court to convict. That helpfulness may take the form either of advising what evidence is necessary on what elements of the crime or of obtaining the court's approval for certain investigative steps like a search arrest or wiretap.

If the political leaders are recalcitrant and the police uncooperative, the prosecutor can call on the public to use its political pressure to support the prosecutor.¹³ Whether the public will respond to the call depends upon the role it assigns to the prosecutor, the police, and (to a lesser extent) the courts in dealing with two crucial issues: the danger of violence by private groups and the danger of lawlessness by government officials.

How the public responds, which is often a crucial variable in terms of the power of the prosecutor, also depends upon the relative importance influential segments of the public attach to order and safety on the streets, on the one hand, and governmental abuses, on the other. If the danger of street violence is very great, the prosecutor may not be able to generate public support in demanding police cooperation or increased police lawfulness; the public is likely to support the police instead. If concern about government illegalities is great, the prosecutor may not be able to generate public support in any conflict over

13. An independent media can greatly enhance the prosecutor's ability to draw on the power of the public to pressure high government officials, the courts, or the police to aid the prosecutor. On this topic, consider David M. Kennedy, *Exposing Police Terrorism in Spain*, in PHILIP B. HEYMANN & ROBERT KLITGAARD, *DEALING WITH CORRUPTION AND INTIMIDATION IN CRIMINAL JUSTICE SYSTEMS: CASES AND MATERIALS* (1991). As Kennedy notes, "The Spanish public, spurred onward by a scoop in the Spanish press, wanted to know much more. Late in August, reporters for the newsweekly *Diario 16* had received a tip and discovered a GAL cache in the south of France . . ." David M. Kennedy, *Exposing Police Terrorism in Spain*, [CASE PROGRAM, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, 1990, CASE NO. C16-90-956.0].

The media can play a role by either investigating government abuses on its own, or by urging the public to demand an official investigation. The key to keeping a system from being "user-friendly" is to preserve avenues which would reveal — or insist on the revelation of — information the government may not want published. An independent media is one such avenue.

his authority vis-à-vis that of the courts.

Finally, the power of the prosecutor to invoke public support in order to control the other agencies necessary to eliminate government abuse depends upon the reputation of the prosecutor's office. If the prosecutor is thought to be a forceful representative of personal security and order and a strong opponent of street crime, he need worry less about quarreling with the police even in a situation of substantial public apprehension about law and order. The same is true, of course, if the police are thought to be totally ineffective in providing safety. If the prosecutor is thought to be wholly committed to law and human rights, he need worry less about the complaints of judges.

Most important, perhaps, if the prosecutor is thought to be much more committed to enforcing lawfulness among government officials than the highest political officials, he will enjoy a substantial political advantage in mobilizing those who are very concerned about this issue. They in turn may be influential with an elected political figure and yet themselves have very little influence on the leaders of the military.

The result of all this is to create a complicated set of forces, the strength of which depends upon public attitudes and organizational reputations and capacities. This set of forces determines the relative powers of the prosecutor, the police, the judiciary, the highest elected officials and the security forces. The extent of these relative powers determines the capacity of the prosecutor to generate the cooperation he needs to deal with government abuses. And what cooperation he needs depends upon what governmental abuses we are talking about, as does what cooperation he will get from others.

I apologize for the complexity of the picture, but that's the way it is. Perhaps this complexity helps explain why it is so difficult to say that independence helps or harms a prosecutor in dealing with the whole array of forms and contexts of governmental abuse.

IV. THE RELEVANCE OF INDEPENDENCE FOR THE PROSECUTOR'S EFFECTIVENESS

There is more ambiguity in the notion of an independent prosecutor than at first appears. Prosecutors in Germany, the United States, and Japan are formally subordinate to justice

ministries, but tradition guarantees them substantial independence. It was a scandal for Prime Minister Shamir to remove the Attorney General of Israel. Firing the specially-appointed Watergate prosecutor, Archibald Cox, led very directly to President Nixon's near-impeachment and resignation. There is also complexity about the areas of independence. The highest political figures may be authorized by tradition as well as delegation to make prosecutorial policy at a general level and forbidden to interfere in individual decisions.¹⁴

So what we are talking about is a continuum between very substantial independence and very substantial dependence on the orders of political superiors who are not entrusted with prosecutorial responsibilities. Few prosecutors' offices have the independence of the United States' "Independent Counsel" in setting their own budgets. Few prosecutors' offices are subject to direct orders to bring or drop a case. Most prosecutors fall somewhere between these extremes. The question is, what is to be said for a closer or more remote relationship between the prosecutor and the highest political figures in a country? I think the answer is contextual; it is different in different situations.

A. Abuses Committed or Protected by the Highest Political Figures

This is the case that comes most readily to mind and as to which the answer seems straightforward. To whatever extent the prosecutor can be given orders by the very officials whose corruption or acts of political repression should be stopped, the prosecutor will be disabled from bringing those leaders into court even where the force of public opinion is strongest in its demands for equal treatment of the powerful with the most ordinary citizen.

For that reason the United States has a statute appointing an independent prosecutor in any such cases.¹⁵ Japan has an even older tradition that involves a similar procedure for similar

14. In a way that is not relevant to our discussion, prosecutorial independence may also be affected by various schemes of judicial or public review of a decision not to prosecute. That is true in Germany and Japan, for example.

15. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1820 (codified as amended at 28 U.S.C. §§ 49, 591 (1988)).

reasons.¹⁶

B. Abuses Committed by Other Governmental Officials

If we turn from the highest political figures to the other possible sources of government abuse, several questions become crucial:

- * How important to prevention of the abuse are steps that only the highest political figures can take?
- * What is their attitude toward the particular combination of the source of the abuse and the type of abuse (for example, brutality by police or corruption by middle-level department officials)?
- * What is their freedom to act with regard to those sources and types of abuse?
- * Are the highest political figures more likely to act in support of a prosecutor who is known as their agent or in support of a prosecutor who is known to be independent?

The last question demands special attention. Depending on the costs and risks, political figures will support a prosecutor if they see that to be in their interests. To be precise, they will do more than they otherwise might do because of the requests or actions of the prosecutor only if they see that to be a route to greater domestic or international support for them and their goals by the public or influential organizations or nations.

If the prosecutor's position is a highly respected one and the occupant shares in that respect, political figures may be brought to support the prosecutor simply because of the losses in political or international support that would come from his publicizing their lack of cooperation. The clearest and most extreme example of this was the ability of Archibald Cox, as the first Watergate Special Prosecutor, to bring the very powerful President of the United States to deliver incriminating documents and tapes to the courts.

16. See Miyazawa, *supra* note 3.

If, on the other hand, the prosecutor's position is not greatly respected or if there is widespread cynicism about the neutrality of application of the criminal law, political figures are not likely to fear the consequences of failing to cooperate or of refusing to order other members of the executive branch to cooperate with an investigation. In that situation the greatest effectiveness of the prosecutor may lie, as in the case of other executive branch officials, in his ability to persuade the highest elected officials of what is in their interest. A prosecutor known to be loyal to the president or prime minister is likely to be more persuasive than one thought to be entirely independent.

Consider an opposite extreme from corruption or abuse by the president, the prime minister, or closely associated colleagues. The police in many countries are corrupt and brutal for their own purposes, not exclusively or largely for the purposes of the administration. A prosecutor cannot successfully investigate this or take steps that will bring it to a stop without the cooperation of friendly or at least supportive police commanders. The Serpico scandal in New York would not have ended in substantial reforms without the appointment of a new, reforming police chief, Patrick Murphy. Reforms in Los Angeles after the beating of Rodney King depended on finding a police chief more supportive of reform than Darrell Gates.

If the chief political figure is embarrassed by police abuse of governmental power and if he could be persuaded to take strong steps, I would rather see the arguments and the proposals for reform made by a prosecutor closely tied to the executive branch than by an independent prosecutor. Only in the former case will the arguments have the force of coming from a loyal supporter and an informed insider. Only in the former case will the recommendations be fully informed and will there be the potential of police cooperation with the prosecutor in carrying them out. Only in the former case will remedial action redound to the credit of the administration and not look like the response of those who were caught failing in their duties of supervision. All or much of the same could be said of crimes of corruption carried on, without high-level approval, by the middle ranks of other government agencies.

V. THE HARDEST CASE: ABUSE IN THE NAME OF SECURITY BY SECURITY FORCES

The hardest question arises with regard to the most frightening form of governmental abuse in Latin America — abuse sponsored or supported by leaders of the military against a political element they consider dangerous even when it is not involved in armed resistance. Many months after the conversations I had with the Minister of Defense and President of Guatemala in 1989, most people thought that the situation was not greatly changed. In early 1992 a professor of history at Guatemala's major university was shot dead in front of his home. He had been working on the organization of internally displaced people. The leaders of human rights organizations and trade unions still receive serious death threats. The student organization, the murder of whose leaders had led us to confrontation and our departure, was bombed in the same early days of 1992. In late October 1995, the United Nations reported widespread human rights abuses and a paralyzed justice process in Guatemala.

There is never proof of who is responsible for such events; there never has been in Guatemala or in many other countries, although in Argentina they stopped abruptly with the coming of civilian government. The Attorney General of Guatemala may investigate publicly, but still no cases may be brought. This is surely the hardest category to deal with as well as the most important form of governmental abuse, both because of the horror of its consequences and because of its impact on democracy.

A. *The Many Reasons for Pessimism*

As to this crucial category of governmental abuse, the central question is not about the independence of the prosecutors or even the courts. It is simply why should anyone think that independent prosecutors or courts could help deal with abuses in the name of internal security carried out by a quite independent military? If the highest *political* authorities had the power to control the security forces, they would do it *if* they wanted to. If leaders enjoying popular legitimacy lack either the power or the will, of what possible relevance are independent courts and prosecutors?

The reasons the highest political authorities in Latin America often lack the power to control the security forces are clear enough. Middle and lower military ranks will not follow the direction of political authorities when they conflict with military orders, at least with regard to matters that are very broadly considered matters of internal security. Civilian supremacy is not established among security forces. The tradition is otherwise; the training is otherwise; political authorities are often regarded as corrupt or naive; and the risks of disobedience to military superiors are far greater than the risks of disobeying elected leaders. All this is different in western democracies

What is more, the risks to the political authorities of mounting a broad based political challenge to this are extremely serious. There could be a coup, supported in Latin America (as it would not be in Western nations and was not in France at the time of the Algerian solution) by powerful and politically influential economic forces. Democracy is held in too little repute and coups are too frequent to count on a popular uprising against them in many countries. And even if a coup is out of the question — because coups have become politically reprehensible in international society with the wave of democracy — selective assassination remains a powerfully inhibiting threat. Compared to those risks, allowing the military to control substantial but bounded areas of the nation's policy seems a small price for elected political leaders to pay in terms of insurance.

Faced with such a confrontation of extremely powerful political and military forces — the one supported by an elected mandate and an ideology of democracy, the other by a loyal army and an ideology of national security — what can be expected of the relatively weak claimants to an ideology of law, the courts and independent prosecutors? Exclusive military jurisdiction over adjudication of alleged military abuses is jealously guarded in many Latin American countries, although often civilian prosecutors may at least initiate cases in military courts. The police are generally under the control of the military, and without police support the resources for investigation of murders when bodies are found in remote areas is slight. The police will also not cooperate in protecting prosecutors, judges and witnesses from the risks associated with investigating crimes by security forces. Even if the police were willing to cooperate and to protect, evidence of crimes committed on military bases or evidence that could only be obtained there would be inaccessible.

To all these reasons to doubt the efficacy of independent judges and prosecutors in situations where the highest elected officials find themselves unable or unwilling to prevent government abuse by military forces, one more reason for doubt should be added. Nowhere is the legitimate domain of law more vigorously contested even in the most lawful of western countries than where its boundaries confront claims of national security or internal security. It was in this area that the Prime Minister of Israel refused to allow the trial of apparent murders by the intelligence forces,¹⁷ where the Prime Minister of England took active measures to prevent the exploration of responsibility for the killings of IRA agents,¹⁸ where the French tampered with the trial of a murdering terrorist,¹⁹ and where the Japanese prevented the trial of officials for illegal wiretapping.²⁰

I could extend the examples to the United States and many other countries. This point is straightforward, however, without more examples. No one knows the precise boundaries between the ideology of national security and the ideology of law in most countries, although the boundary is surely located far more favorably to the rule of law in the United States than in, for example, Guatemala. Each of these ideologies claims passionately jurisdictions that are as vigorously claimed by the other. For our purposes what is important is that the contested areas are the least secure domain for those insisting on the rule of law. President Carter acted on behalf of law to try high FBI officials, Miller and Mark, for illegal break-ins to the homes of family members of Weathermen.²¹ Reagan immediately returned the territory — hard-won by a successful conviction — to the hands of those responsible for internal security by pardoning the FBI officials.²²

17. See Lahav, *supra* note 2.

18. See Jack, *supra* note 10.

19. See Heymann, *supra* note 6.

20. See Miyazawa, *supra* note 3.

21. See Martin, *supra* note 11.

22. *Id.*

B. The Grounds for Hope

An elected president, who finds himself pushed by the military or some elements of the military to tolerate forms of brutal political repression that he personally despises, may find his bargaining position strengthened by pressure from the other side. Look for a moment at why death squads are chosen. A government could go about repression, as the Soviet Union or East Germany did, using law as its tool. The system is simple enough. You create new political crimes and crimes of association. You censor and punish for unauthorized speech. You strengthen your capacity to enforce these laws by weakening familiar judicial protections: the burden of proof, access to counsel, guarantees of privacy, rights not to be tortured, freedom from surveillance by a mass of paid or terrified informants, the right to confront hostile witnesses and evidence. Judges may be subjected to pressure by the political leadership, perhaps using prosecutors for this purpose. The Nazis did this. Alternatively, military courts or special secret courts can replace regular and open trials. If all these options remain too cumbersome, internment without trial is still available wherever the British colonial tradition survives.

But instead of using these forms of legality, with their accompanying publicity, Latin American governments have relied on death squads for repression and they have done this despite a set of special risks that come with this secret use of violent repression. The likelihood of making mistakes increases rapidly; the Mossad brought to an end its assassination of Black September assassins when it killed by mistake a Norwegian waiter.²³ Those who operate the secret system tend over time to turn it to their own personal purposes, seeking money, power, or sex. That was true in Guatemala and in Argentina. And the absence of the notice that even repressive laws give, and of the opportunity to remain safe by obeying such laws, increases fear and resentment even in those who might support the repressive regime.

The primary reason for bearing such costs is that those who are operating the system want deniability at home and abroad.

23. See Appendix I: *Court Judgment Published After the Trial of the Israeli Secret Service Agents Accused of Complicity in Wael Zuaiter's Assassination*, in FOR A PALESTINIAN: A MEMORIAL TO WAEL ZUAITER (Janet Venn-Brown ed., 1984).

Deniability requires effective control of any authoritative fact-finding system, such as the criminal justice system. In the words of a scholar of the South African death squads, deniability requires a "user-friendly" criminal justice system.²⁴ The form of government abuses we are looking at is not simply a death squad, it is a *secret* death squad. Very few countries operate open death squads. The cost is too high in terms of international opprobrium and domestic disdain.

In this context, the "deal" between elected leaders and the military in a country tolerant of brutality by the military against dissident leaders and organizations generally assumes that there will be no scandal caused by open revelation of what has been done. The president agrees to do nothing, perhaps because his hands are tied, but only so long as it is politically and internationally tolerable to do nothing; and that is only so long as there is a substantial measure of ambiguity as to who is responsible for any killings, disappearances, or torture. The military must deliver unaccountability as part of the bargain under which the president delivers silence or excuses rather than pointed denunciations and personal support of organized opposition to the repressive role of the military.

VI. WHAT A PROSECUTOR CAN DO ABOUT MILITARY ABUSES

In the final analysis the crucial questions about independent prosecutors, like those about independent investigative or trial judges are these. What could a prosecutor do that would strengthen the hand of democratically-elected leaders in preventing abuses by a powerful military in the name of internal security; and what resources would the prosecutor's office need to provide that support? I do not think the prosecutor can act alone. Even in Israel the prosecutor who insisted on investigating killings of terrorists by the intelligence forces was fired without bringing about fundamental changes.²⁵ The same was true in Spain where a prosecutor, together with the investigating judge, insisted on pursuing killings of ETA terrorists by a special police unit.²⁶ The results have been the same with an occasional brave investigating judge in Guatemala.

24. See Steytler, *supra* note 4.

25. See Lahav, *supra* note 2.

26. See Kennedy, *supra* note 13.

Some answers are indirect. To the extent that prosecutors can strengthen the capacity of law enforcement to bring cases for violation of laws — by improving the performance and credibility of the police in the eyes of courts and the courts in the eyes of the police — they reduce the justification for secret death squad activity. The Minister of Defense of Guatemala responded to my question about illegal assassinations by describing the hopelessness of trials in Guatemala; colonels in the countryside said the same thing when asked why they took no prisoners.

To the extent that prosecutors can make high-level corruption more costly and can make more credible claims that corruption is not without risk, they will help to build the popular support that the president needs in dealing with a powerful military. After the first coup attempt of President Cerezo's tenure in Guatemala, no crowds had appeared in support of democracy as they later did in the streets of Moscow. Rumors and allegations of massive corruption were a major reason for this dangerous show of democratic weakness. Credibly establishing the independence of a strong prosecutor in handling corruption allegations would have served President Cerezo well in terms of his power vis-à-vis the military.

But what of more direct attacks on repressive violence? As we have seen, what is necessary is simply that the truth be brought out in an authoritative way for, in many circumstances, neither the elected officials nor military leaders will choose death squads whose activities are made public. Secrecy has been crucial to the maintenance of trade and aid relationships and to a general level of acceptance in the world community — matters which are frequently more important than the rather limited benefits of buying insurance in the currency of violent repression.

The military has several ways to prevent an investigation that would make the deal with political authorities intolerable.

- * It can control the police by demanding the appointment of military men as the police leaders, by establishing an understanding and a custom that certain cases will not be investigated, and by using threats or violence to discipline police who may mistake their primary respon-

sibility, thinking it is to law enforcement.²⁷

- * Instead of controlling the investigators they can control the evidence — destroying or denying access to it and intimidating or killing witnesses.
- * They can limit the jurisdiction of independent, civilian courts in cases against active duty officers or use less formal means, intimidating or corrupting prosecutors or judges or other fact-finders.

Each of these was familiar in Guatemala. Each is familiar elsewhere in Latin America, Africa, and Asia. The question is: in light of these military powers to block investigations, how can a prosecutor or investigative judge help break the chain on which impunity for military abuses depends? How can they defeat the secrecy which provides unaccountability to domestic and international audiences? Indeed, this unaccountability is a crucial condition of elected officials tolerating military abuses. If a prosecutor or investigative judge could help elected officials “trump” the three military devices for maintaining a user-friendly criminal justice system, she could help prevent the most dangerous form of governmental abuse. But how? The answer is by carefully building institutional and public support for honest and fearless investigations and prosecutions.

Picture a prosecutor's office that is widely respected both for the role it plays in dealing with ordinary crime and for its commitment to fair application of decent laws. Assume that the prosecutor's office has learned to work closely with police investigators and has won their trust, creating at the same time a shared commitment to enforcing the law. That would bring an enviable reputation to the police as well. Imagine that the relationship of the prosecutor's office is close enough to the highest elected officials that they can win domestic and international support by defending its independence and yet provide it with political support and resources. With these characteristics, what could a prosecutor's office do to deal with the hardest form of governmental abuse?

We have seen that the first military guarantee of a “user

27. The military may also have to use threats or violence to discipline members of the press who seek to investigate governmental abuse.

friendly" criminal justice system is control of the police. Defeating "user friendliness," on the other hand, requires the prosecutor to provide leadership to the police. She needs their support. Credibility in placing responsibility for deaths or disappearances requires information, and information requires independent investigators with whom it is safe to cooperate and whom it is risky for others to obstruct or even to ignore. Those investigators in turn must feel safe. These conditions, and the fact that repressive violence may take place in any corner of the country at any time, all suggest that the independent investigators cannot be a small handful of people assigned to the prosecutor's office. Nor does it suffice merely to place the entire police investigative force *formally* under the jurisdiction of the prosecutor; the leadership that appoints, promotes, transfers, and assigns must be behind the investigation, not blocking it.

These are well-known relationships. Military leaders demanded the removal of the Minister of Government in Guatemala for the crime of obtaining outside financing that was building the independence of the police. Similarly, I caused immense fear of a military response by recommending that the prosecutor's office be given a handful of investigators to handle investigations of serious government abuse including, prominently, by the military. The reluctance of the military in many countries to see a truly civilian chief of police is further evidence of the centrality of this issue.

How can a prosecutor build support in the police? Not quickly is one answer. He must be effective enough in cooperating with the police in fighting ordinary crime and generous enough in spreading the credit that the police will feel torn between loyalty to honest investigations and responsiveness to military superiors. He must be popular enough domestically or enough of an international symbol to remain relatively safe from threats and attacks, and he must be able to spread that net of safety over those working for him on important cases. He must speak up with the elected officials for police needs for resources and openly condemn police abuses. He must encourage police relationships with the best of police elsewhere and police training by the best of foreign departments.

What about the second capacity of the military: to deny access to information or to obstruct investigations of otherwise accessible information? The prosecutor must be clever enough to

generate outside demands for steps that the president would otherwise be reluctant to take. Relations with the media are central here. He must be honorable enough so that his conclusions provide public credibility to his resolution of questions *either* about the responsibility for violence *or* about the responsibility for failure to solve violent crimes. (If so, he can himself generate outside demands for effective investigative steps, honestly performed.) He must be political enough to build a domestic and international constituency that the president must respect and can tell the military he must respect — thereby lending presidential prestige to independent investigations.

And what of the final recourse of a military determined to block investigations? In Guatemala, the Chief of the National Police gathered evidence that the Chief of the separate Treasury Police and a number of his agents were engaged in death squad activity. He brought the evidence to an investigating judge, Judge Trejo. Judge Trejo was kidnapped and, the same day, one of his close associates was murdered. When he was released, Judge Trejo promptly dismissed the charges against all the Treasury Police. Similar stories are told of Chile under Pinochet, and elsewhere.

Is this a hopeless final obstacle to serious investigations of repressive violence? No, not if the prosecutor and police choose from among the sets of steps that the Italians learned in dealing with the Red Brigades, the French learned in dealing with Lebanese and domestic terrorists, and the Colombians learned in dealing with Pablo Escobar and the Medellin Cartel. There are steps, such as spreading responsibility for dangerous investigations to make intimidation difficult,²⁸ and they must be taken. The same is true of corruption in the judicial system. Dealing with repressive abuses by the military will require a program to deal with corruption among police, prosecutors and judges, too. Indeed, corruption and intimidation joined together, as drug dealers have learned to use them in Mexico and Colombia, is the most potent "medicine" for police, prosecutors, or judges straying toward honesty. But even this combination can be combatted.

28. See, e.g., LEONARD B. WEINBERG & WILLIAM L. EUBANK, *THE RISE AND FALL OF ITALIAN TERRORISM* (1987).

VII. CONCLUSION

In the final analysis an upright and courageous prosecutor can make a difference in dealing with governmental abuses. Even in areas where the police fear to tread, the press or legislators may provide the investigative support that is necessary. That happened in the case of the Spanish GAL and its assassinations of ETA members. It was true in the United States of the first stages of Watergate and of the Iran-Contra Affair.

Still, it is a mistake to think that uprightness and courage alone are enough. Nor is independence the only missing ingredient. Independent prosecutors without appropriate powers can be a dumping ground to provide political cover to leaders. Investigative help of the sort that only the police can furnish is necessary in many cases. The cooperation of others in the government is often necessary. Evidence must be accessible and preserved; witnesses cannot be too frightened to speak. Judges and other participants in the process must be free of fear or of hope of promotion engendered by those whose actions they are judging. For some of these, the help of the president is very useful and may be more readily available if the separation of the prosecutor from the executive branch is not exaggerated.

For the most difficult type of governmental abuse, violence by the security forces in the name of internal security, the picture is complicated. A strong prosecutor enjoying the trust and respect of the public and the police could provide a substantial and desired incentive for elected leaders to stop the abuse. But overcoming the capacity of the security forces to prevent investigations, deny evidence, and influence tribunals requires far more than independence. What is needed is a process of building trust and spreading a belief that the prosecutor is crucial to the two matters that are of central public concern: the control of crime and the control of governmental abuse.