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THE ATTORNEY GENERAL'S GUIDELINES FOR FBI INVESTIGATIONS

John T. Elliff†

On March 7, 1983, Attorney General William French Smith issued new guidelines for FBI investigations in the areas of domestic security, racketeering enterprise, and general crimes.¹ They replaced previous guidelines for FBI domestic security investigations issued in 1976 by Attorney General Edward H. Levi² and guidelines for FBI racketeering enterprise and general crimes investigations issued in 1980 by Attorney General Benjamin R. Civiletti.³

The Smith guidelines made significant changes in the standards for domestic security investigations. This article examines the first amendment implications of the new guidelines, giving particular attention to two issues. First, whether the Smith guidelines increase the likelihood that FBI investigations will impair the constitutional rights to protest and dissent; and second, whether the Smith guidelines provide adequate safeguards against FBI monitoring of lawful political expression and association. In addition to analyzing the Smith and Levi guidelines, the article interprets the Civiletti guidelines and the FBI charter legislation proposed in 1979.⁴ The similarity between the Smith guidelines and the 1979 FBI charter proposal is striking. Although Congress has not considered an FBI charter since 1980, similarity between the Smith guidelines and his predecessor's charter proposal suggests a consensus on the

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¹ The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations (Mar. 7, 1983), *issued as* Department of Justice Press Release, March 7, 1983 [hereinafter cited as Smith Guidelines].

² The Attorney General's Guidelines on Domestic Security Investigations (Apr. 5, 1976), *reprinted in* *FBI Statutory Charter: Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 18-26 (1978) [hereinafter cited as Levi Guidelines].

³ The Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations (Dec. 2, 1980), *reprinted in* FINAL REPORT OF THE SELECT COMM. TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE TO THE U.S. SENATE, S. REP. NO. 682, 97th Cong., 2d Sess. 504-16 (1982) [hereinafter cited as Civiletti Guidelines].

⁴ S. 1612, The Federal Bureau of Investigation Charter Act of 1979, 96th Cong., 1st Sess. (1979), *reprinted in* *FBI Charter Act of 1979: Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 2, at 427 (1980) [hereinafter cited as FBI Charter Bill].

proper role of the FBI. The unanimous report of the Senate Select Committee that investigated the FBI's ABSCAM operation in 1982 focused on FBI undercover operations, but stressed the need for legislative standards governing the FBI generally.⁵ Thus, a careful examination of the Smith guidelines is important to assess their role as a model for legislation, as well as to determine their effect on first amendment rights.

I

THE ROLE OF THE ATTORNEY GENERAL'S GUIDELINES

In the absence of an explicit legislative charter, the FBI derives its statutory mandate primarily from the Attorney General's authority to appoint officials:

- (1) to detect and prosecute crimes against the United States;
- (2) to assist in the protection of the person of the President; and
- (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.⁶

The Attorney General's guidelines establish standards and procedures for FBI investigations conducted under this broad statutory authority, as well as pursuant to claims of presidential power to order investigations without statutory authorization. Two background points are important in examining the Smith guidelines. First, the guidelines are not enforceable in court, except to the extent that they incorporate separate judicially enforceable legal standards. Second, there are other Attorney General's guidelines that regulate particular investigative techniques and that authorize FBI foreign intelligence and counterintelligence activities.

A. Enforceability of the Guidelines

Despite limitations on their direct judicial enforcement, the Attorney General's guidelines should play a role in the protection of citizens' constitutional rights against improper governmental investigation. Indeed, the Levi guidelines were instrumental in the settlement of one such judicial proceeding.⁷ Constitutional adjudication of domestic security investigations requires accommodating law enforcement interests with the constitutional rights of individuals who represent vague or potential threats to the government. The absence of specific guidelines to control governmental overreaching may lead courts to find that domes-

⁵ FINAL REPORT OF THE SELECT COMM. TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE TO THE U.S. SENATE, S. REP. NO. 682, 97th Cong., 2d Sess. 25-29, 347-97 (1982) [hereinafter cited as UNDERCOVER ACTIVITIES REPORT].

⁶ 28 U.S.C. § 533 (1976).

⁷ See *infra* notes 15-20 and 110-19 and accompanying text.

tic security investigations unduly chill the exercise of constitutional rights. Given this situation, the Smith guidelines could play a role both in regulating FBI investigatory activity and in offering the courts guidance in reviewing claims of improper governmental investigations.

The final section of the Smith guidelines describes their limited legal effect as a statement of policy "solely for the purpose of internal Department of Justice guidance."⁸ The language is unequivocal:

They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any manner, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.⁹

The Civiletti guidelines issued in 1980 contained an identical statement.¹⁰ Although the Levi guidelines contained no such language, the 1979 FBI charter bill expressly barred judicial enforcement of either the proposed statutory standards or the Attorney General's guidelines that the bill required for FBI investigations.¹¹ These provisions in the guidelines and the charter bill parallel the Supreme Court's decision in *United States v. Caceres*,¹² where the Court held that technical violations of Internal Revenue Service guidelines for undercover investigations should not lead to reversal of a conviction on either due process or statutory grounds.¹³

⁸ Smith Guidelines, *supra* note 1, § VII.C.

⁹ *Id.*

¹⁰ Civiletti Guidelines, *supra* note 3, § IV.B.

¹¹ FBI Charter Bill, *supra* note 4. Section 537a of the bill provided:

(a) NO CIVIL CAUSE OF ACTION AGAINST UNITED STATES.—Nothing in this chapter creates a civil cause of action against the United States not available under other provisions of this title, or a civil cause of action against any officer, agent, or employee or former officer, agent, or employee of the United States Government not otherwise available at law.

(b) EFFECT OF FAILURE TO FOLLOW THIS CHAPTER, GUIDELINES, OR PROCEDURES.—Nothing in this chapter, or in any guidelines or procedures established pursuant to this chapter, creates any substantive or procedural right and no court has jurisdiction over a claim in any proceeding, including a motion to quash a subpoena, suppress evidence, or dismiss an indictment, based solely on an alleged failure to follow a provision of this chapter or of guidelines or procedures established pursuant to this chapter.

FBI Charter Bill, *supra* note 4, at 44, reprinted in *Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 2, at 470. Section 537 of the FBI Charter Bill would have authorized the FBI Director to impose a civil penalty of up to \$5,000 on any FBI employee who intentionally used "sensitive investigative techniques" in knowing violation of the charter. *Id.* at 43, reprinted in *Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 2, at 469. These techniques, described in § 533b, *id.* at 14-25, reprinted in *Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 2, at 440-51, included the use of informants or undercover agents, physical surveillance, mail surveillance, electronic surveillance, investigative demand for records, trash covers, pretext interviews, and covert photographic surveillance.

¹² 440 U.S. 741 (1979).

¹³ *Id.* at 749-50. The Court stated that the "duty to enforce an agency regulation is most

Alternatives to judicial enforcement of the guidelines include internal disciplinary procedures and congressional oversight actions. Unfortunately, nothing in any of the FBI guidelines suggests the types of disciplinary penalties to be imposed for violations, although the charter bill would have authorized the FBI Director to impose a civil penalty for certain violations.¹⁴

Despite the Smith guidelines' express limitation as to their legal effect, in *Alliance to End Repression v. City of Chicago*,¹⁵ the government agreed to judicial enforcement of the Attorney General's guidelines as part of a settlement. The *Alliance* plaintiffs challenged pre-1976 FBI activities in Chicago. As part of the settlement agreement, the parties set forth certain "general principles"¹⁶ to govern FBI domestic security investigations and incorporated the Attorney General's guidelines for such investigations. The 1981 agreement recognized that the Levi guidelines might be superseded and directed that new guidelines become part of the settlement so long as the new guidelines conformed to the agreement's general principles.¹⁷ Under the agreement, members of the plaintiff class—which includes, among others, citizens residing in Chicago at the time of the settlement—may petition the United States District Court for a finding that the terms of the agreement, including the provisions of the Attorney General's guidelines, have been violated.¹⁸ If the court finds "reasonable grounds" to believe that a violation has occurred or is occurring, the court may permit discovery to rule "on whether the activities in question are lawful, and [enter] an appropriate remedial order."¹⁹ As discussed below,²⁰ the Chicago settlement provided the first avenue for testing the Smith guidelines in court.

Absent such consent by the government, the guidelines are judicially enforceable only insofar as they incorporate independent constitutional or statutory requirements, an area of protection that the Supreme Court has interpreted narrowly.²¹ The Court held in *Laird v. Tatum*,²² that mere collection of information about constitutionally protected political activities does not give rise to a justiciable issue.²³ Although

evident when compliance with the regulation is mandated by the Constitution or federal law." *Id.* at 749. The Court went on to state that "the agency was not required by the Constitution or by statute to adopt any particular procedures or rules before engaging in consensual monitoring and recording." *Id.* at 749-50.

¹⁴ See *supra* note 11.

¹⁵ 561 F. Supp. 575 (1983), enforcing 91 F.R.D. 182 (N.D. Ill. 1981).

¹⁶ 561 F. Supp. at 583.

¹⁷ *Id.* at 584.

¹⁸ 91 F.R.D. at 200.

¹⁹ *Id.*

²⁰ See *infra* notes 110-19 and accompanying text.

²¹ See *supra* notes 12-14 and accompanying text.

²² 408 U.S. 1 (1972) (5-4 decision).

²³ *Id.* at 10. The plaintiffs in *Laird* contended that an Army program to investigate civil disturbances chilled their first amendment rights, and that the Army's program was broader

judicially enforceable fourth amendment standards govern the most intrusive search and surveillance techniques, the Court has not extended constitutional restrictions to the most common investigative methods such as the use of informants²⁴ and examination of financial records.²⁵ In addition, some techniques are restricted by statutes with express judicial enforcement provisions, such as the Right to Financial Privacy Act of 1978.²⁶ Statutory restrictions also generally overlap fourth amendment requirements for nonconsensual electronic surveillance, mail opening, and physical search.²⁷

For techniques covered by judicially enforceable constitutional restrictions, the Court has indicated that the standards may vary according to the governmental interests at stake. In *United States v. United States District Court*,²⁸ the Court ruled that the fourth amendment requires a judicial warrant for domestic security electronic surveillance not involving foreign powers or their agents. The Court suggested, however, that fourth amendment standards might permit issuance of a warrant for domestic security purposes without meeting all the requirements ordinarily applicable in criminal investigations. Justice Powell's opinion stated that, because domestic security intelligence gathering often involves investigation from various sources over an extended period of time the "focus of domestic surveillance may be less precise than that directed against more conventional types of crime."²⁹ Nevertheless, Justice Powell recognized that national security cases "often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crimes."³⁰ Noting the "danger of abuse" due to "the difficulty of defining the domestic security interest," Powell warned that, "[t]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power."³¹ The Smith guidelines quote Jus-

than the Army's reasonable needs. *Id.* The Court found that there was an insufficient chilling effect and that the Army's program did not subject the complainant to "regulations, proscriptions, or compulsions." *Id.* at 11.

²⁴ See *Hoffa v. United States*, 385 U.S. 293, 300-01, 310-11 (1966) (presence of informer in defendant's hotel room not fourth amendment search; use of government informers not due process violation); *United States v. White*, 401 U.S. 745, 751 (1971) (no privacy right invaded by use of "wired" undercover police agent).

²⁵ See *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (no fourth amendment privacy right to protect depositor's bank records from governmental examination).

²⁶ 12 U.S.C. §§ 3401-3422 (1982).

²⁷ *E.g.*, 18 U.S.C. § 2236 (1982) (searches without warrant); *id.* §§ 2510-2520 (electronic surveillance for law enforcement purposes); 39 U.S.C. § 3623 (1976) (mail opening without warrant); 50 U.S.C. §§ 1801-1811 (Supp. V 1981).

²⁸ *United States v. United States Dist. Court*, 407 U.S. 297, 321 (1972).

²⁹ *Id.* at 322.

³⁰ *Id.* at 313.

³¹ *Id.* at 314. Justice Powell suggested that Congress revise title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982), which imposes a strict probable cause standard for electronic surveillance. *Id.* at 322-23. Powell went on to state that the standards for domestic security investigations should be different than those for

tice Powell's analysis as part of the description of FBI criminal intelligence investigations.³²

Rarely have the courts relied solely on first amendment grounds to limit investigative methods. In prior cases, the courts have limited investigations that were conducted pursuant to overbroad internal standards. The Smith guidelines may play a similar role in future constitutional adjudication. The leading case in the area, *Paton v. LaPrade*,³³ involved mail covers.³⁴ Although courts have held that the fourth amendment does not require a warrant for mail covers,³⁵ in *Paton* the Court found a postal service regulation that permitted mail covers to protect national security unconstitutional as overbroad and "chilling" on first amendment grounds.³⁶ In *Paton*, through use of a mail cover, the FBI identified a high school student who had written to the Socialist Workers Party, and then conducted routine interviews to determine the reason for the student's interest in the organization. Attorney General Levi terminated the investigation in 1976. Subsequent to the Court's decision in *Paton*, the Postal Service issued new regulations that confined "national security" mail covers to foreign counterintelligence investigations involving foreign powers or their agents.³⁷ The regulations permitted mail covers for domestic security purposes only under the procedures for ordinary criminal investigations aimed at obtaining evidence of the commission or attempted commission of a crime.

The *Paton* case illustrates how the courts may place first amendment limits on FBI investigative activities when the internal standards for use of certain techniques are so permissive as to allow intrusion into areas protected by the first amendment. Other cases indicate that fed-

general crimes. *Id.* To date, Congress has not accepted the invitation. Congress has, however, enacted more flexible probable cause standards for electronic surveillance conducted for foreign intelligence and counterintelligence purposes. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811 (Supp. III 1979)).

³² Smith Guidelines, *supra* note 1, § III.

³³ 469 F. Supp. 773 (D.N.J. 1978).

³⁴ Mail cover is the examination and recording of information found on the outside cover of mail. 39 C.F.R. § 233.3(c)(1) (1983).

³⁵ *See* *United States v. Choate*, 576 F.2d 165, 173-80 (9th Cir. 1978).

³⁶ 469 F. Supp. at 782.

³⁷ 39 C.F.R. § 233.3 (1983). In explaining the new mail cover regulation, the Postal Service distinguished between two types of investigations:

(1) "domestic" national security investigations, conducted by the FBI, aimed at detecting terrorism, violence, or certain other activities conducted by domestic groups not believed to be acting under the control or at the instigation of a foreign power; *and*,

(2) "foreign" counterintelligence investigations, conducted by the counterintelligence components of the F.B.I. or the Department of Defense, aimed at detecting and taking countermeasures against espionage, terrorism, or other activities perpetrated by a hostile foreign power through its agents.

⁴⁴ Fed. Reg. 49,688 (1979) (emphasis in original). The new regulation authorized "national security" mail covers only for the second type of investigation. 39 C.F.R. § 233.3(c)(5)(1983).

eral courts are willing to find a justiciable first amendment issue when the FBI employs techniques such as the use of informants or undercover agents to infiltrate an organization engaged in constitutionally protected political activities.³⁸ Thus, even though the FBI guidelines are not themselves judicially enforceable, their provisions bear directly on issues of overbreadth and "chilling effect," which the courts may adjudicate on constitutional grounds.

B. Scope of the Smith Guidelines

Although the Smith guidelines profess to "provide guidance for all investigations by the FBI of crimes and crime-related activities,"³⁹ they do not regulate the use of specific techniques in a detailed manner. For example, in 1980 Attorney General Civiletti issued guidelines for the FBI's use of informants and undercover operations,⁴⁰ superseding the earlier Levi guidelines on FBI informants. The Smith guidelines, in turn, adopted the undercover and informant provisions of the Civiletti guidelines that address first amendment concerns. Other guidelines on specific techniques apply to all investigative components of the Department of Justice. For example, Department policy guidelines prescribe advance authorization requirements for consensual electronic monitoring; and guidelines issued pursuant to title II of the Privacy Protection Act of 1980 restrict the use of search warrants to obtain materials from disinterested third parties.⁴¹

Some guidelines are beyond public scrutiny. For example, Attorney General Levi and his successors have classified the guidelines for FBI investigations involving foreign intelligence, foreign counterintelligence, and international terrorism. Executive Order 12,333 authorizes FBI investigations of this type and requires that they be conducted in accordance with procedures established by the Attorney General.⁴² Ac-

³⁸ See, e.g., *Socialist Workers Party v. Attorney General*, 510 F.2d 253, 257 (2d Cir. 1974) (value of freedom of association justified enjoining transmission to Civil Service Commission of names of participants in Young Socialist convention); *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 770-71 (S.D.N.Y. 1972) (Bill of Rights protects against use of informers to interfere with, rather than monitor, first amendment activities).

³⁹ Smith Guidelines, *supra* note 1.

⁴⁰ The Attorney General's Guidelines on FBI Use of Informants and Confidential Sources (Dec. 2, 1980), *reprinted in* UNDERCOVER ACTIVITIES REPORT, *supra* note 5, at 517-30; The Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980), *reprinted in* UNDERCOVER ACTIVITIES REPORT, *supra* note 5, at 536-55.

⁴¹ Smith Guidelines, *supra* note 1, § IV.B.6 (advance authorization requirements); 28 C.F.R. § 59.4 (1983) (procedures relating to use of search warrants in obtaining materials from a "disinterested third party").

⁴² Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981). Section 1.14(a) of the order authorizes the FBI to conduct and coordinate "counterintelligence activities" and § 1.14(c) to "collect foreign intelligence or support foreign intelligence collection requirements of other agencies within the Intelligence Community." The term "counterintelligence" is defined in § 3.4(a) of the order to mean "information gathered and activities conducted to protect

ording to FBI Director Webster, the largest number of FBI terrorism investigations in 1982 fell "under the category of international terrorism," which included "groups who act on behalf of a foreign power or whose activities transcend national boundaries."⁴³ Although the following analysis concentrates on FBI law enforcement guidelines, the classified foreign intelligence and counterintelligence guidelines may raise similar issues.⁴⁴ Any consideration of constitutional or legislative standards for FBI investigations also must consider this area of the FBI's responsibilities.⁴⁵

II

FROM INTERNAL SECURITY TO CRIMINAL INTELLIGENCE

The implications of the Smith guidelines depend more on the underlying policy orientation of the FBI and the Justice Department than on the precise language used to set investigative standards.⁴⁶ The current guidelines reflect a significant shift from the FBI's pre-1976 internal security policies to a concept of criminal intelligence tied directly to law enforcement functions. Any consideration of legislative or constitutional issues raised by the Smith guidelines should take into account the development of a substantially new definition of the FBI's domestic security role.

against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs." The term "foreign intelligence" is defined in § 3.4(d) to mean "information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities." Section 2.3 of the order requires that collection of information concerning "United States persons" be undertaken in accordance with procedures approved by the Attorney General.

⁴³ *Domestic Security (Levi) Guidelines: Hearings Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 9 (1982) (testimony of William H. Webster, Director, FBI) [hereinafter cited as *1982 Senate Hearings*].

⁴⁴ Such issues were discussed at hearings on charter legislation for the U.S. intelligence community in 1978 and 1980. *National Intelligence Act of 1980: Hearings on S. 2284 Before the Senate Select Comm. on Intelligence*, 96th Cong., 2d Sess. (1980); *H.R. 6588, The National Intelligence Act of 1980: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 2d Sess. (1980); *National Intelligence Reorganization and Reform Act of 1978: Hearings on S. 2525 Before the Senate Select Comm. on Intelligence*, 95th Cong., 2d Sess. (1978).

⁴⁵ For an illustration of the type of FBI counterintelligence investigation of political activities in the United States on behalf of foreign powers that may raise first amendment issues, see the declassified version of the report prepared by the FBI Intelligence Division in 1983 on "Soviet Active Measures Relating to the U.S. Peace Movement." 129 CONG. REC. H1793-97 (daily ed. Mar. 24, 1983). The FBI submitted this report to the House Permanent Select Committee on Intelligence.

⁴⁶ See J. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* (1978). One historian warns against reform that is merely an "exercise in legal formalism." J. GARROW, *THE FBI AND MARTIN LUTHER KING, JR.* 220-27 (1981). Kenneth Culp Davis has suggested that legal thinking is often too "focused on the formality of law (words in statutes and in case law) and give[s] insufficient emphasis to the reality of law (what enforcement officers do in fact)." K. DAVIS, *POLICE DISCRETION* 69 (1975).

A. Pre-1976 Internal Security Policies

Before the Levi guidelines, the FBI Intelligence Division conducted internal security investigations of “subversive activities,” as well as foreign counterintelligence investigations of hostile intelligence agents and international terrorists. Although internal security investigations sometimes led to criminal prosecutions for acts of violence, their scope and purposes were broader. Through the mid-1970s, FBI internal security investigations emphasized collection of extensive political intelligence on organizations and individuals espousing revolutionary, racist, or otherwise “extremist” ideological viewpoints.⁴⁷ Before World War II, President Roosevelt asked FBI Director J. Edgar Hoover to gather intelligence about the domestic political influence of communist and fascist groups, and subsequent presidents maintained this assignment.⁴⁸ Congress reinforced the FBI’s internal security mandate with legislation such as the Smith Act of 1940⁴⁹ and the Voorhis Act,⁵⁰ which punished those who advocated violent overthrow of the government, and the Internal Security Act of 1950,⁵¹ which required registration of Communist groups and their members and provided for detention of “dangerous” individuals in a national emergency.

During the 1960s the FBI widened the scope of its internal security investigations to include investigations of the civil rights and antiwar movements. These investigations were aimed at gathering information

⁴⁷ SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, BOOK III, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess. 373-558 (1976) [hereinafter cited as CHURCH COMM. STAFF REPORTS]; GENERAL ACCOUNTING OFFICE, REPORT TO THE HOUSE COMM. ON THE JUDICIARY BY THE COMPTROLLER GENERAL OF THE UNITED STATES, FBI DOMESTIC INTELLIGENCE OPERATIONS—THEIR PURPOSE AND SCOPE: ISSUES THAT NEED TO BE RESOLVED (1976) [hereinafter cited as 1976 GAO REPORT].

⁴⁸ Director Webster has summarized that function:

Beginning with the pre-World War II mobilization, the President directed the FBI to keep track of “subversive” and “fifth column” groups in this country. This carried forward into the cold war era and concentrated primarily on long-established Marxist, Leninist, and Trotskyite groups. Because they were, in large part, political organizations, they were relatively easy to penetrate and monitor. They often had a formal organizational structure, sometimes with national, State, and local chapters. They selected identifiable officers, accepted new members readily, held open meetings, and prepared official publications. The typical investigation consisted primarily of monitoring the activities of these groups, identifying their members and reading their publications.

1982 Senate Hearings, *supra* note 43, at 10 (testimony of William H. Webster, Director, FBI).

⁴⁹ Smith Act of 1940, 18 U.S.C. § 2385 (1982).

⁵⁰ Voorhis Anti-Propaganda Act, 18 U.S.C. § 2386 (1982).

⁵¹ Internal Security Act of 1950, (Pub. L. No. 81-831, 64 Stat. 987) (1950) (codified as amended in scattered sections of 50 U.S.C.). For a discussion of the relationship of these statutes to FBI intelligence investigations, see CHURCH COMM. STAFF REPORTS, *supra* note 47, at 410-20, 427-28, 442-47.

on Communist or "extremist" influence in the groups and acquiring advance knowledge of any disruptive demonstrations or acts of violence. The FBI went beyond investigation and employed so-called COINTELPRO operations to disrupt groups and discredit or harass individuals. When Attorney General William Saxbe released a public report on COINTELPRO in 1974, he described some of these tactics as "abhorrent in a free society."⁵²

The Levi guidelines and accompanying administrative reforms abandoned the FBI's previous internal security policies.⁵³ In 1976 Director Clarence M. Kelley changed the framework of domestic security investigations by treating investigation of domestic terrorism as a matter of criminal law enforcement, rather than as a political intelligence matter. He shifted supervision of domestic terrorism investigations from the FBI's Intelligence Division to its Criminal Investigative Division. International terrorist groups, however, were to be investigated under the classified foreign counterintelligence guidelines. The FBI Intelligence Division devoted its attention to investigating hostile foreign intelligence operations, including Soviet efforts to influence domestic politics through the Communist Party and its front organizations.⁵⁴

B. The Criminal Intelligence Concept

After Director Webster took office in 1978, the term "criminal intelligence" became associated with FBI investigations of criminal enterprises engaged in racketeering or terrorist activities. The 1980 Civiletti guidelines distinguished between general crimes investigations "undertaken to detect, prevent and prosecute specific violations of federal law" and two types of "criminal intelligence investigations"—those "undertaken to obtain information concerning enterprises which are engaged in racketeering activities involving violence, extortion or public corruption" and those "undertaken for the purpose of obtaining information on activities that threaten the national security;" the Civiletti guidelines stated that these provisions were "consistent with the requirements of the proposed FBI Charter Act but do not depend upon passage of the Act for their effectiveness."⁵⁵

Attorney General Civiletti's decision to retain the Levi guidelines, however, was not fully consistent with the FBI charter bill, which used

⁵² CHURCH COMM. STAFF REPORTS, *supra* note 47, at 73.

⁵³ Director Webster has stated that "the thrust of the Levi Guidelines was to force a reexamination of our domestic security investigations—concentrating on conduct rather than ideology." 1982 Senate Hearings, *supra* note 48, at 10 (testimony of William H. Webster, Director, FBI).

⁵⁴ For a more detailed account of the reorganization of FBI intelligence functions in 1976 and the impact of the Levi guidelines, see J. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS (1979).

⁵⁵ Civiletti Guidelines, *supra* note 3, Introduction.

the enterprise concept to define the authority for FBI domestic security investigations. The authoritative commentary on the charter bill explained the differences between general crimes investigations and investigations of racketeering or terrorist enterprises:

As a practical matter, an investigation of a completed criminal act is normally confined to determining who committed that act and with securing evidence to establish the elements of the particular crime. It is, in this respect, self-defining. An investigation of an ongoing criminal enterprise must determine the size and composition of the group involved, its geographic dimensions, its past acts and intended criminal goals, and its capacity for harm. While a standard criminal investigation terminates with the decision to prosecute or not to prosecute, the investigation of a criminal enterprise does not necessarily end, even though one or more of the participants may have been prosecuted.

In addition, the organization provides life and continuity of operation that are not normally found in regular criminal activity. As a consequence, these investigations may continue for several years. In addition, as Justice Powell noted, the focus of such investigations "may be less precise than that directed against more conventional types of crime." *United States v. United States District Court*, 407 U.S. 297, 322 (1972). Unlike the usual criminal case, there may be no completed offense to provide a framework for the investigation.

It often requires the fitting together of bits and pieces of information, many meaningless by themselves, to ascertain if there is a mosaic of criminal activity. For this reason, the investigation is broader and less discriminate than usual, involving "the interrelation of various sources and types of information." [*Id.*]

At the same time, it is recognized that group investigations present special problems, particularly where they deal with politically motivated acts. As Justice Powell pointed out, "There is often a convergence of First and Fourth Amendment values not found in cases of 'ordinary' crime." [*Id.*] Thus, special care must be exercised in sorting out protected activities from those which may lead to violence or serious disruption of society. As a consequence, the charter establishes special safeguards for group investigations of special sensitivity, including tighter management controls and higher levels of review.⁵⁶

The Smith guidelines adopted a terrorist enterprise concept similar to the FBI charter proposal. The description of criminal intelligence investigations in the Smith guidelines is virtually the same as the above quoted commentary.⁵⁷

⁵⁶ S. 1612, 96th Cong., 1st Sess., 125 CONG. REC. 21,513 (1979) [hereinafter cited as FBI Charter Commentary].

⁵⁷ Smith Guidelines, *supra* note 1, § III. The guidelines add the statement, "Members of

C. Terrorist Enterprise Investigations

Terrorist enterprise investigations, treated as criminal rather than political intelligence gathering under the Smith guidelines, are confined to matters of legitimate "law enforcement interest" and must "be based on a reasonable factual predicate and . . . have a valid law enforcement purpose."⁵⁸ Their "immediate purpose . . . is to obtain information concerning the nature and structure of the enterprise . . . with a view to the longer range objective of detection, prevention, and prosecution of the criminal activities of the enterprise."⁵⁹ They must "be terminated when all logical leads have been exhausted and no legitimate law enforcement interest justifies their continuance."⁶⁰ The guidance for use of investigative techniques stresses law enforcement considerations: "Whether a highly intrusive technique should be used depends on the seriousness of the crime and the strength of the information indicating the existence of crime."⁶¹

The Smith guidelines completed the transition from pre-1976 internal security investigations of domestic subversion to policies that integrate domestic security-terrorism investigations with federal criminal law enforcement. Although the Levi guidelines triggered this change in policy, their language retained provisions reflecting an internal security approach. The Levi guidelines authorized domestic security investigations

to ascertain information on the activities of individuals, or the activities of groups, which involve or will involve the use of force or violence and which involve or will involve the violation of federal law, for the purpose of:

- (1) overthrowing the government of the United States or the government of a State;
- (2) substantially interfering, in the United States, with the activities of a foreign government or its authorized representatives;
- (3) substantially impairing for the purpose of influencing U.S. government policies or decisions:
 - (a) the functioning of the government of the United States;

groups or organizations acting in concert to violate the law present a grave threat to society."⁵⁸
Id.

⁵⁸ Smith Guidelines, *supra* note 1, § I. Similar language in the Civiletti guidelines provided:

A key principle . . . is that individuals and organizations should be free from law enforcement scrutiny that is undertaken without a valid factual predicate and without a valid law enforcement purpose. Such investigative activity poses the risk of undue injury to reputation and increases the chance that an investigative target may be prosecuted for improper reasons.

Civiletti Guidelines, *supra* note 3, Introduction. "[A]n investigation should be promptly terminated upon completion of all reasonable and logical investigative steps." *Id.* § I.A.

⁵⁹ Smith Guidelines, *supra* note 1, § III.A.3.

⁶⁰ *Id.* § I.

⁶¹ *Id.* § IV.A.

- (b) the functioning of the government of a State; or
 - (c) interstate commerce.
- (4) depriving persons of their civil rights under the Constitution, laws, or treaties of the United States.⁶²

The outdated reference to “overthrowing the government,” and the authority to investigate activities that “will involve the use of force or violence” would have permitted interpretations of the Levi guidelines based on earlier internal security policies. Moreover, the Levi guidelines failed to discuss the specific purposes or scope of domestic security investigations or their relationship to law enforcement. The Smith guidelines, on the other hand, make clear that the FBI’s domestic security role is criminal law enforcement against terrorist violence and not the collection of political intelligence about the expression of unorthodox opinions.

The new guidelines were also designed to overcome the reluctance of some FBI agents to open domestic security investigations in cases that “seemed rather clearly to meet the standards of the old guidelines.” This reluctance made it “difficult to develop and maintain ongoing intelligence” about a criminal enterprise after prosecution of a specific crime. From a law enforcement perspective, therefore, the purpose of the Smith guidelines was “to reaffirm the need for criminal intelligence in domestic security/terrorism matters” and, in the process, “to simplify the rules, to clarify ambiguities and to minimize the differences in the various guidelines governing our criminal investigations so that Agents could apply the rules as the needs of the situation require.”⁶³

III

FULL DOMESTIC SECURITY-TERRORISM INVESTIGATIONS

The Smith guidelines made few changes in the threshold standards for opening full domestic security-terrorism investigations. The principal differences from the Levi guidelines were the use of language drawn from the Civiletti criminal investigative guidelines and the addition of provisions to clear up ambiguities. The term “full investigation” refers to an investigation that may last for a year before review and may employ the full range of investigative techniques, subject to constitutional and statutory restrictions and any other applicable guidelines, such as those dealing with undercover operations. The Smith guidelines also provide for preliminary inquiries, which are shorter and less intrusive

⁶² Levi Guidelines, *supra* note 2, § I.A.

⁶³ *Hearing on Attorney General's Guidelines For Domestic Security Investigations (Smith Guidelines) Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess., app., exhibit D, at 76 (1983) (Testimony by William H. Webster, Director, Federal Bureau of Investigation Before the Subcommittee on Constitutional Rights of the House Committee on the Judiciary concerning Domestic Security Investigation Guidelines on April 27, 1983) [hereinafter cited as Webster House Testimony].

than full investigations.⁶⁴

A. Threshold Standards

The Levi guidelines provided the following criteria for opening a full domestic security investigation:

Full investigations must be authorized by FBI Headquarters. They may only be authorized on the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve *or will involve* the use of force or violence and which involve or will involve the violation of federal law for one or more of the purposes enumerated in IA(1)-IA(4). The following factors must be considered in determining whether a full investigation should be undertaken:

- (1) the magnitude of the threatened harm;
- (2) the likelihood it will occur;
- (3) the immediacy of the threat; and
- (4) the danger to privacy and free expression posed by a full investigation.⁶⁵

The four enumerated purposes were set forth at the beginning of the Levi guidelines.⁶⁶ The Smith guidelines provide that a full domestic security-terrorism investigation "may be authorized by the Director or designated Assistant Director upon a written recommendation setting forth the facts or circumstances reasonably indicating the existence of an enterprise as described in this subsection."⁶⁷ The threshold standard containing this description states:

A domestic security/terrorism investigation may be initiated when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States. The standard of "reasonable indication" is identical to that governing the initiation of a general crimes investigation under Part II. In determining whether an investigation should be conducted, the FBI shall consider all of the circumstances including: (1) the magnitude of the threatened harm; (2) the likelihood it will occur; (3) the immediacy of the threat; and (4) the danger to privacy and free expression posed by

⁶⁴ See *infra* notes 98-106 and accompanying text.

⁶⁵ Levi Guidelines, *supra* note 2, § I (emphasis added). The italicized words are omitted in most published texts of the guidelines due to a typographical error in the copy originally released in 1976 by the Department of Justice. The accurate text has been used for internal FBI manual purposes, and the Justice Department explained the discrepancy at a Senate Judiciary Committee hearing in 1978. *FBI Statutory Charter: Hearings Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 94-95 (1978) [hereinafter cited as *1978 Senate Hearings*].

⁶⁶ See *supra* note 63 and accompanying text.

⁶⁷ Smith Guidelines, *supra* note 1, § III.B.4.a.

an investigation.⁶⁸

Investigations are to be “concerned with the investigation of entire enterprises, rather than individual participants and specific criminal acts.”⁶⁹ This is the same approach taken in the charter bill and the guidelines for racketeering investigations. The differences between the political or social goals of criminal violence⁷⁰ and the purposes for criminal violence enumerated in the Levi guidelines do not mean that the scope of investigations under the Smith guidelines is wider; the broadest purpose in the Levi guidelines was to investigate all individuals and groups that may be engaged in activities that involve or will involve the use of force or violence in violation of federal law for the purpose of “depriving persons of their civil rights.”⁷¹

The most obvious change is the Smith guidelines’ use of the “reasonable indication” standard instead of the “specific and articulable facts” formula of the Levi guidelines.⁷² The “reasonable indication” standard was originally proposed in the FBI charter bill, where it was used for all three types of FBI law enforcement investigations—general crimes, racketeering enterprise, and terrorist enterprise.⁷³ The section on general crimes investigations in the Smith guidelines, which is retained almost verbatim from the Civiletti guidelines, provides:

The standard of “reasonable indication” is substantially lower than probable cause. In determining whether there is reasonable indication of a federal criminal violation, a Special Agent may take into account any facts or circumstances that a prudent investigator would consider. However, the standard does not require specific facts or circumstances indicating a past, current, or impending violation. There must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient.⁷⁴

After issuance of the Smith guidelines, the Justice Department stated that the threshold requirement was “not expressed . . . in terms of a ‘reasonable suspicion’ [or] in terms of probabilities or degrees of certainty that individuals or organizations are engaged or have engaged in crime.”⁷⁵ According to the Justice Department, the standard requires “a reasonable indication that the enterprise to be investigated is organized for the purpose of achieving its ends through criminal activity.”⁷⁶

⁶⁸ *Id.* § III.B.1.a.

⁶⁹ *Id.* § III.B.

⁷⁰ *See id.* § III.B.

⁷¹ Levi Guidelines, *supra* note 2, § I.A.4.

⁷² Attorney General Levi borrowed the “specific and articulable facts” formula from the Supreme Court’s decision in *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁷³ FBI Charter Bill, *supra* note 4, § 533(b).

⁷⁴ Smith Guidelines, *supra* note 1, § II.C.1; *cf.* Civiletti Guidelines, *supra* note 3, § I.

⁷⁵ Letter from Robert A. McConnell, Assistant Attorney General for Legislative Affairs, to Senator Walter D. Huddleston (Apr. 7, 1983) (on file at *Cornell Law Review*).

⁷⁶ *Id.*

B. Investigation Before Crimes Occur

The most serious ambiguity in the Smith guidelines, as in the Levi guidelines before them, involves the standard for opening an investigation before any crime occurs. The guidelines leave unclear whether facts or circumstances meeting the terrorist enterprise standard would also constitute evidence of a criminal conspiracy. The general crimes investigation section of the guidelines addresses this issue directly:

Where a criminal act may be committed in the future, preparation for that act can, of course, amount to a current criminal violation under the conspiracy or attempt provisions of federal criminal law, if there are present the requisite agreement and overt act, or substantial steps toward completion of the criminal act and intention to complete the act. With respect to criminal activity that may occur in the future but does not yet involve a current criminal conspiracy or attempt, particular care is necessary to assure that there exist facts and circumstances amounting to a reasonable indication that a crime will occur.⁷⁷

The guidelines for the two types of criminal intelligence investigations differ on this point. The racketeering enterprise threshold requires a reasonable indication "that two or more persons are engaged in a *continuing course of conduct* for the purpose of obtaining monetary or commercial gains or profits wholly or in part through racketeering activity."⁷⁸ The domestic security-terrorism guidelines refer to persons engaged "in an enterprise" rather than "in a continuing course of conduct."

The reason for this difference is suggested by the commentary on the FBI charter bill, which used the term "continuing enterprise" for both racketeering and terrorist enterprise investigations. Despite the common terminology in the bill, the commentary referred to "a group engaged in racketeering activities," as contrasted with a group having "a serious intent to engage in terrorist activities." The commentary offered the following explanation for initiating an investigation when "no terrorist act has occurred":

Obviously, a prior record of violence is an important factor in determining whether an investigation for future crimes is warranted. But the government may also look to other factors such as informant information, the stockpiling of weapons, an announced intent to engage in violence, and the full range of considerations that historically have been available to law enforcement officers.

. . . If the investigation begins prematurely, it may deal with marginal or speculative threats to society or with entirely innocent conduct. If commenced too late, it becomes difficult if not impossible

⁷⁷ Smith Guidelines, *supra* note 1, § II.C.2; *cf.* Civiletti Guidelines, *supra* note 3, § I.C.2.

⁷⁸ Smith Guidelines, *supra* note 1, § III.A.2.b (emphasis added).

to gather information that is needed for the government to respond effectively.

. . . .

. . . The better approach is to recognize that the government must proceed with the utmost caution in such cases and perhaps to require a stronger factual basis for investigation if the enterprise has not previously engaged in terrorist crimes.⁷⁹

This explanation and the Smith guidelines presume that politically motivated terrorist crimes, such as bombings or kidnappings, require more authority for investigation before a crime occurs than is the case with other offenses.

The question remains, however, whether criminal intelligence investigations rather than general crimes investigations are needed in such cases. The FBI may initiate a general crimes investigation before a crime occurs, when "facts or circumstances reasonably indicate that a federal crime . . . will be committed"; and the investigation "may be conducted to prevent . . . such criminal activity."⁸⁰ There is little justification for opening a criminal intelligence investigation if a more narrowly focused general crimes investigation can serve the preventive function by looking for confirmation that a crime is likely to take place. Perhaps the reason for authorizing criminal intelligence investigations of potential terrorist groups that have not yet committed crimes is that the word "will" in the general crimes guidelines suggests that "a greater likelihood of criminal activity is necessary to support such investigation" of future crimes.⁸¹

C. Scope and Duration of Investigations

Criminal intelligence investigations are more flexible than general crimes investigations because they permit the FBI to open cases before crimes occur and because they allow for investigations that are wider in scope and longer in duration. The Smith guidelines explain the need for this flexibility in the investigation of "an ongoing criminal enterprise" because the organization under investigation has "a life and continuity of operation not normally found in a regular criminal activity."⁸² In cases where no crime has yet been committed, however, it is unclear whether the broad scope and long duration of a domestic security-terrorist investigation are justified.

In language similar to the racketeering enterprise provisions, the Smith guidelines for the scope of domestic security-terrorism investigations provide:

⁷⁹ FBI Charter Commentary, *supra* note 56, at 21,513.

⁸⁰ Smith Guidelines, *supra* note 1, § I.C.(1).

⁸¹ FBI Charter Commentary, *supra* note 56, at 21,513.

⁸² Smith Guidelines, *supra* note 1, § III.

A domestic security/terrorism investigation initiated under these guidelines may collect such information as:

- (i) the members of the enterprise and other persons likely to be knowingly acting in furtherance of its criminal objectives, provided that the information concerns such persons' activities on behalf or in furtherance of the enterprise;
- (ii) the finances of the enterprise;
- (iii) the geographical dimensions of the enterprise; and
- (iv) past and future activities and goals of the enterprise.⁸³

This wide scope for collection of criminal intelligence applies if a group has been connected to acts of terrorist violence. In that case all activities and goals of the enterprise may be relevant to a criminal intelligence assessment of how to detect and prevent the crimes to which the group is linked. When it is probable that an individual is aiding and abetting a group's terrorist crimes, it may be useful to monitor that individual's activities in furtherance of both the legal and illegal goals of the group. This type of criminal intelligence may produce information about lawful political advocacy and peaceful protest demonstrations. The FBI, however, may use such information only for making law enforcement decisions concerning the detection, prevention, and prosecution of violent crimes. The guidelines do not suggest a need for such wide-ranging information when no crime has yet occurred.

Another facet of the extended scope of a terrorist enterprise investigation is its ability "to cross organizational lines . . . without regard to what [a] particular group or element of [a] group might call itself."⁸⁴ According to Director Webster, it no longer will be necessary "to provide a separate justification for investigation of so-called 'front groups' if there is any information indicating that the members of such groups are also knowing members of the criminal enterprise."⁸⁵ Webster's reference to "front groups" is somewhat misleading in that the guidelines do not permit investigation of an entire group merely because some of its members are part of a terrorist enterprise.⁸⁶

The duration of a domestic security-terrorism investigation de-

⁸³ *Id.*

⁸⁴ 1982 Senate Hearings, *supra* note 43, at 11 (testimony of William H. Webster, Director, FBI).

⁸⁵ *Id.*

⁸⁶ Assistant Attorney General Jensen explained that the enterprise concept will permit agents to address as one criminal enterprise all those persons who knowingly provide support to a group's criminal objectives, whether or not they are formal members of the "group" which may actually engage in criminal violence. This concept will also permit FBI agents to focus upon violent factions of a larger organization without placing the entire organization under investigation.

Statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, U.S. Dep't of Justice, Before the Subcomm. on Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives, Concerning the Attorney General's Guidelines on Domestic Secur-

depends on a group's history of violent acts. To clarify an ambiguity in the Levi guidelines, Attorney General Smith expressly permitted investigations to continue even if a violent group has not been active for some time:

Each investigation should be reviewed at least annually to insure that the threshold standard is satisfied and that continued allocation of investigative resources is warranted. In some cases, the enterprise may meet the threshold standard but be temporarily inactive in the sense that it has not engaged in recent acts of violence, nor is there any immediate threat of harm—yet the composition, goals and prior history of the group suggests [sic] the need for continuing federal interest. Under those circumstances, the investigation may be continued but reasonable efforts should be made to limit the coverage to information which might indicate a change in the status or criminal objectives of the enterprise.⁸⁷

Director Webster recommended this change in the Levi guidelines to make clear to FBI personnel that they need not terminate a full investigation merely because a group remains passive for a year.⁸⁸ This provision does not indicate intent to allow for continuance of an investigation initiated in the absence of a prior crime.

Limitations on the scope of criminal intelligence gathering are appropriate not only when a violent group becomes passive, but also when an enterprise has not yet carried out its violent intentions. In either case "information which might indicate a change" in the group's criminal

ity/Terrorism Investigations 3 (Apr. 27, 1983) (hearing unpublished) (on file at *Cornell Law Review*) [hereinafter cited as Jensen House Testimony].

Director Webster's instructions to the field stressed that

persons who provide safehouses, money, weapons or otherwise knowingly support the criminal activities of the terrorist enterprise can be investigated as part of the same criminal enterprise The new approach recognizes that terrorist groups today have a fluid membership and often lack organizational structure, yet function as a single enterprise directed toward a common goal.

Airtel from FBI Director D. Webster to All SACs, Re: Attorney General's Guidelines for the Conduct of Domestic Security/Terrorism Investigations 2 (Mar. 17, 1983) (Effective Mar. 21, 1983) (on file at *Cornell Law Review*) [hereinafter cited as Webster Instructions].

⁸⁷ Smith Guidelines, *supra* note 1, § III.B.4.d.

⁸⁸ 1982 Senate Hearings, *supra* note 43, at 11-12. Director Webster's instructions to the field stated:

There has been a tendency in the past to close domestic security investigations and terminate informant coverage when the violent activity of the group has been dormant for a period of time. If the organization became active again, it was often a difficult and time-consuming process to redevelop informant coverage. The new Guidelines permit the FBI to monitor organizations who may be temporarily inactive, but whose prior record or stated objectives indicate a need for continuing federal interest, so long as the threshold standard for investigation is satisfied. Under those circumstances, the investigation may be placed in a pending status but informant coverage can be maintained to the extent necessary to determine whether there is any change in the criminal objectives of the enterprise.

Webster Instructions, *supra* note 86, at 4-5.

objectives should fulfill criminal intelligence requirements. If Justice Department policy dictates the opening of a criminal intelligence investigation before terrorist violence occurs, limits on the type of information collected in such investigations would reduce the likelihood that the courts might find impermissible overbreadth.

IV PRELIMINARY INQUIRIES

In addition to full investigations, the Smith guidelines authorize preliminary inquiries when facts or circumstances reasonably indicating criminal activity are not available.⁸⁹ The Levi guidelines authorized limited preliminary domestic security investigations to determine whether there was a factual basis for opening a full investigation.⁹⁰ The new guidelines abolish separate preliminary inquiries for domestic security purposes. Instead, as in the Civiletti guidelines for general crimes and racketeering enterprise investigations,⁹¹ the Smith guidelines authorize only general crimes preliminary inquiries.

A. Internal Security Inquiries

Elimination of separate preliminary inquiries for domestic security or criminal intelligence purposes is another sign of the distance between the Smith guidelines and pre-1976 internal security policies. Before the adoption of the Levi guidelines, the FBI conducted numerous preliminary inquiries for domestic intelligence purposes based largely on political expression or association. These inquiries contributed to the FBI's extensive files on individuals and groups at the fringes of domestic political life, but provided little valuable law enforcement information.⁹²

⁸⁹ Smith Guidelines, *supra* note 1, § II.B.

⁹⁰ Levi Guidelines, *supra* note 2, § II.C.

⁹¹ Civiletti Guidelines, *supra* note 3, § I.D.

⁹² 1976 GAO REPORT, *supra* note 47, at 138-47. One of the FBI's last statements defending the pre-1976 policy explained the political intelligence rationale for such widespread inquiries:

The doctrines and objectives of Marxist-Leninist revolutionary organizations and similar groups have provided a basis for the conduct of intelligence investigations concerning them predicated upon a reasonable belief that government has a legitimate interest in collecting information to assess the extent to which such organizations may contribute to future crises which affect its ability to function. . . .

. . . . Limiting domestic intelligence investigations to preventing force and violence could restrict the gathering of intelligence information useful for anticipating threats to national security of a more subtle nature. This is the case because, in our view, such a limitation would protect from governmental inquiry those plotting to undermine our institutions during their preliminary stages of organization and preparation and thus inhibit the development of an intelligence collage upon which to base meaningful analyses and predictions as to the future threats to the stability of our society.

Preliminary inquiries played an important part in developing political intelligence information prior to 1976. The FBI felt it was "incumbent on any intelligence agency to resolve allegations of subversive activity or extremism made against individuals . . . [W]here an allegation is made and we establish no affiliation [with an extremist or subversive organization] or potential dangerousness, we accomplish a positive result not a negative."⁹³ In some cases, the FBI opened preliminary inquiries not only in response to allegations, but also as a means of screening all individuals in a suspect class. For example, the FBI opened preliminary inquiries about all black student leaders in 1971 to determine which of them belonged to groups like the Black Panther Party.⁹⁴

The Levi guidelines restricted the techniques allowed in preliminary or limited domestic security investigations. Most important, the FBI could not recruit new informants or place them in groups, although the guidelines did allow inquiry of existing sources and use of previously established informants. The Levi guidelines also barred mail covers.⁹⁵ The overall terms of the Levi guidelines, however, did not necessarily require a change from the sweeping pre-1976 preliminary inquiry practices. Inquiries could "be undertaken on the basis of allegations or other information that an individual or a group [might] be engaged in activities" that would justify a full investigation.⁹⁶ In practice, the interpretation of this authorization depended on restrictive FBI and Justice Department policies that sharply reduced the number of domestic security investigations and inquiries after 1976.⁹⁷

B. General Crimes Inquiries

The Smith guidelines conform to post-1976 policies that have placed exclusive reliance on law enforcement considerations and have moved away from internal security or political intelligence criteria. The standards for preliminary inquiries are set forth in the general crimes guidelines:

On some occasions the FBI may receive information or an allegation not warranting a full investigation—because there is not yet a "reasonable indication" of criminal activities—but whose responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads. In such circumstances, though the factual predicate for an investigation has not been met, the FBI may initiate an "inquiry" involving some measured review,

⁹³ *Id.* at 214.

⁹⁴ CHURCH COMM. STAFF REPORTS, *supra* note 47, at 527.

⁹⁵ Levi Guidelines, *supra* note 2, § II.G.

⁹⁶ *Id.* § II.C.

⁹⁷ GENERAL ACCOUNTING OFFICE, REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, FBI DOMESTIC INTELLIGENCE OPERATIONS: AN UNCERTAIN FUTURE 22 (1977).

contact, or observation activities in response to the allegation or information indicating the possibility of criminal activity.

This authority to conduct inquiries short of a full investigation allows the government to respond in a measured way to ambiguous or incomplete information and to do so with as little intrusion as the needs of the situation permit. This is especially important in such areas as white-collar crime where no complainant is involved or when an allegation or information is received from a source of unknown reliability. It is contemplated that such inquiries would be of short duration and be confined solely to obtaining the information necessary to make an informed judgment as to whether a full investigation is warranted.⁹⁸

The only change from the Civiletti general crimes guidelines is to lengthen the initial duration from sixty to ninety days, matching the initial length under the Levi guidelines. Thereafter, FBI Headquarters may grant thirty-day extensions based on "a written request and statement of reasons why further investigative steps are warranted when there is no 'reasonable indication' of criminal activity."⁹⁹

The reliance that the Smith guidelines place on general crimes inquiries resolves an FBI concern that the Levi guidelines had prohibited the recruitment of new informants in preliminary domestic security investigations.¹⁰⁰ The Smith guidelines place no similar restriction on preliminary general crimes inquiries. The general guidance for use of techniques provides:

Before employing an investigative technique in an inquiry, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether an intrusive technique should be used in an inquiry depends on the seriousness of the possible crime and the strength of the information indicating the possible existence of the crime. However, the techniques used in an inquiry should generally be less intrusive than those employed in a full investigation. It is recognized that choice of technique is a matter of judgment.¹⁰¹

After listing techniques, such as limited interviews and photographic surveillance, that may be used without prior authorization from a supervisory agent, the guidelines provide: "Where a technique is highly intrusive, a supervisory agent shall approve its use in the inquiry stage only in compelling circumstances and when other investigative means

⁹⁸ Smith Guidelines, *supra* note 1, § II.B.1.

⁹⁹ *Id.* § II.B.3.

¹⁰⁰ 1982 Senate Hearings, *supra* note 43, at 9 (testimony of William H. Webster, Director, FBI).

¹⁰¹ Smith Guidelines, *supra* note 1, § II.B.4.

are not likely to be successful.”¹⁰² According to Director Webster, the term “highly intrusive” includes pen registers, consensual monitoring of telephone conversations, the use of locator devices, and the use of an informant “in a manner that involves a significant intrusion into one’s private affairs.” The Director has explained that the guidelines do not define the term “highly intrusive,” “because the intrusiveness of a particular technique will often depend on the manner and circumstances in which it is employed.” In addition to the guidelines’ restrictive language on use of intrusive techniques, Director Webster has stated that a general crimes inquiry “focuses on specific persons and offenses and is directed primarily toward determining whether a full criminal investigation is warranted” and that this framework “confines our collection efforts largely to evidence that would establish the elements of a crime.”¹⁰³

A change in the Smith guidelines on investigative techniques also limits the discretion to infiltrate organizations as part of a preliminary inquiry. The Civiletti guidelines did not specifically limit this technique in general crimes inquiries. The Smith guidelines added a new requirement: “Undisclosed participation in the activities of an organization by an undercover employee or cooperating private individual in a manner that may influence the exercise of rights protected by the First Amendment must be approved by FBIHQ, with notification to Department of Justice.”¹⁰⁴ This provision established a uniform headquarters approval requirement whenever new or established informants infiltrate groups in either a preliminary inquiry or a full investigation. Infiltrating groups in a preliminary inquiry was a sensitive issue in the FBI charter bill. Even though the bill placed no express limit on such techniques in inquiries, the commentary stated that “infiltration of groups by new sources or by undercover Agents” would not be permitted in an inquiry conducted pursuant to the authority for terrorist enterprise investigations.¹⁰⁵ Whether the Smith guidelines resolve this issue may depend on whether general crimes inquiries in practice turn out to be, as Director Webster has described, “more limited in scope and purpose than the preliminary investigation formerly authorized under the [Levi] Guidelines.”¹⁰⁶

¹⁰² *Id.* § II.B.6.

¹⁰³ Webster House Testimony, *supra* note 62, at 76-77. Instructions to FBI field offices describe “compelling circumstances” as “circumstances requiring the use of such techniques to determine the validity of information or allegations concerning possible serious criminal activity such as a threat to life or substantial property interests, the destruction or alteration of evidence, or the serious impairment or hindrance of an investigation.” Webster Instructions, *supra* note 86, at 3.

¹⁰⁴ Smith Guidelines, *supra* note 1, § IV.B.3.

¹⁰⁵ FBI Charter Commentary, *supra* note 56, at 25,513.

¹⁰⁶ Webster Instructions, *supra* note 86, at 2.

V

INVESTIGATIONS BASED ON ADVOCACY

The provision in the Smith guidelines authorizing FBI investigations on the basis of statements advocating criminal activity has prompted considerable controversy. The guidelines provide:

In its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct. It is important that such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States. When, however, statements advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence, an investigation under these Guidelines may be warranted unless it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm.¹⁰⁷

In comparison, the Levi guidelines did not specifically address the question of investigation based on statements alone, although investigations were to be "designed and conducted so as not to limit the full exercise of rights protected by the Constitution and laws of the United States."¹⁰⁸

In the view of one federal court, the new authorization is too broad. Shortly after issuance of the Smith guidelines, the U.S. District Court for the Northern District of Illinois ruled¹⁰⁹ that the new guidelines conflicted with a settlement reached in earlier litigation that established standards for FBI domestic security investigations in Chicago.¹¹⁰ The settlement had incorporated the Levi guidelines and stated that the FBI "shall not conduct an investigation solely on the basis of activities protected by the First Amendment."¹¹¹ Citing the Supreme Court's decision in *Brandenburg v. Ohio*, the district court interpreted "activities protected by the First Amendment" as including advocacy that is not "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."¹¹² Concluding that the provision in the new guidelines authorizing investigation when "statements advocate criminal activity" permitted investigations that may not meet the *Brandenburg* test,¹¹³ the court enjoined implementation of the Smith guidelines within Chicago. The district court based its ruling on the terms of the 1981 settlement, not on a determination that the Smith guidelines were unconstitutional.¹¹⁴ The court expressed no opinion on

¹⁰⁷ Smith Guidelines, *supra* note 1, § I.

¹⁰⁸ Levi Guidelines, *supra* note 2, § II.B.

¹⁰⁹ *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 575 (N.D. Ill. 1983).

¹¹⁰ *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182 (N.D. Ill. 1981).

¹¹¹ 561 F. Supp. at 583 (appendix).

¹¹² 561 F. Supp. at 578 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

¹¹³ *Id.* at 578-79.

¹¹⁴ *Id.* at 579.

the merits of the constitutional argument that an activity protected from criminal sanctions may not be protected from the "more limited" power to investigate.¹¹⁵ Moreover, instead of focusing on interpretations of previous FBI guidelines, especially as discussed in testimony on the charter bill, or the official explanations of the intent of the Smith guidelines, the district court relied on the record of the settlement, which it found had incorporated the *Brandenburg* standard.¹¹⁶

A three-judge panel of the Court of Appeals for the Seventh Circuit affirmed the decision of the district court but lifted the injunction as unnecessary in the absence of "substantial and imminent danger of action by the FBI violating the *Brandenburg* principle as embodied in the consent decree."¹¹⁷ A dissenting opinion warned that the FBI might be foreclosed from initiating less intrusive preliminary inquiries on the basis of statements alone.¹¹⁸ However, the majority opinion took special note of the distinction made in both the consent decree and the Smith guidelines between "preliminary inquiries" and "investigations." The consent decree applied the *Brandenburg* principle only to "investigations."¹¹⁹

The following provision in the 1980 Civiletti guidelines closely paralleled the language of the Chicago settlement and was included in the FBI charter bill:

No investigation may be based solely on the lawful expression of religious or political views by an individual or group, the lawful exercise of the right to peaceably assemble and to petition the Government, or the lawful exercise of any other right secured by the Constitution or by the laws of the United States.¹²⁰

Testimony at hearings on the FBI charter discussed the provision's intended meaning. One FBI official stated: "We cannot start an investigation based on rhetoric . . . We need some sort of actual activity."¹²¹ Another explained:

We don't mean to suggest that statements [advocating terrorist violence] are entirely irrelevant to the Bureau's interest. If there is any activity that is now tied to that statement, when taken with other circumstances, it can provide an adequate basis for investigation.

What we are trying to do . . . is distinguish between simple expression of ideology and statements or conduct that pose a threat.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Alliance to End Repression v. City of Chicago*, Nos. 83-1853, 83-1854, slip op. at 10 (7th Cir. Feb. 23, 1984).

¹¹⁸ *Id.* at 16.

¹¹⁹ *Id.* at 3.

¹²⁰ Civiletti Guidelines, *supra* note 3, § I.A.

¹²¹ *FBI Charter Act of 1979: Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 1, at 57 (1979) [hereinafter cited as *FBI Charter Hearings*].

That is very difficult to do¹²²

Testimony also indicated that the FBI would have to remain flexible in its administration of preliminary inquiries because there is admittedly an uncertain

line between political rhetoric and a statement that expresses an unambiguous intention to commit a crime. As that statement, even if it is public, becomes more specific, and would give some indication that the persons, in fact, intend to commit a particular crime, it may well provide the basis certainly for a preliminary inquiry.¹²³

A Justice Department official tried to clarify the difference between rhetoric and activity by explaining that "activity" could mean "a meeting was held where there were [sic] serious discussion about blowing something up or someone was recruited to the group who had demolition background . . . [or] there was a communication, a letter written to somebody that was looking toward violence and criminal terrorist acts."¹²⁴

The charter testimony illustrates the difficulty of interpreting a ban against investigations based solely on the exercise of first amendment rights. The Smith guidelines compounded that difficulty by emphasizing that statements advocating criminal activity may justify an investigation unless there is clearly "no prospect of harm."¹²⁵ Under this provision, the FBI need not find "an apparent intent to engage in crime"¹²⁶ in order to proceed with an investigation so long as the circumstances or context indicate the possibility of a crime in the future. Apparently the FBI can conduct on this basis full criminal intelligence investigations, not just preliminary inquiries or general crimes investigations of specific potential offenses. A literal reading of the provision on advocacy, however, would conflict with the overall thrust of the Smith guidelines by allowing a return to domestic political intelligence investigations based on ideology or rhetoric.

The FBI and the Justice Department have sought to allay this concern. Director Webster's implementing directive emphasized the need for "a credible threat of harm" and the use of preliminary inquiries "[t]o the extent possible."¹²⁷ In his testimony before the House Subcommittee on Constitutional Rights, Assistant Attorney General Jensen stated:

¹²² *Id.* at 58.

¹²³ *Id.* at 82.

¹²⁴ *Id.* at 113. Several Senators expressed the view that the FBI should investigate domestic "subversive" groups such as the Socialist Workers Party because of their advocacy of revolutionary doctrines. *Id.* at 69-70. FBI officials testified that the charter would not permit investigations based on "abstract ideology" or "such nebulous terms as . . . whether or not one is subversive." *Id.* at 69-70, 90-91.

¹²⁵ Smith Guidelines, *supra* note 1, § I.

¹²⁶ *Id.*

¹²⁷ Webster Instructions, *supra* note 86, at 5.

We would stress that lawful and peaceful political dissent is not subject to investigation under the revised guidelines, just as it was not subject to investigation under the prior guidelines. As specific safeguards, the revised Guidelines and implementing instructions expressly prohibit investigations premised solely upon the proper exercise of First Amendment rights, make it clear that statements must be viewed in context before any inquiry will be authorized, and provide that when response is appropriate the normal procedure will be by way of a preliminary inquiry. However, it is important to make clear that agents must follow up when confronted with statements which present a credible threat of criminal activity.¹²⁸

In his testimony before the same Subcommittee, Director Webster added that "it would be unwise to foreclose the possibility of a full investigation [based] on advocacy alone, particularly a general crimes investigation, where statements suggest a serious and immediate prospect of harm."¹²⁹ The implication is that Director Webster will not authorize criminal intelligence investigations solely on the basis of advocacy, despite the apparent authority to do so under the Smith guidelines.

The following provision regarding public demonstrations in the section on domestic security-terrorism investigations supports the Justice Department's contention that the Smith guidelines respect constitutional limits: "In the absence of any information indicating planned violence by a group or enterprise, mere speculation that force or violence might occur during the course of an otherwise peaceable demonstration is not sufficient grounds for initiation of an investigation under this section."¹³⁰ Alternative authorities for investigating civil disturbances include the provisions for general crimes investigations¹³¹ and the separate Levi guidelines for reporting on civil disorders involving a federal interest.¹³² These provisions, taken together with the various statements made by Justice Department officials, indicate a sensitivity to first amendment rights by those responsible for drafting and implementing the Smith guidelines.¹³³

The new guidelines leave open the question of whether the FBI

¹²⁸ Jensen House Testimony, *supra* note 85, at 5.

¹²⁹ Webster House Testimony, *supra* note 62, at 62.

¹³⁰ Smith Guidelines, *supra* note 1, § III.B.1.c.

¹³¹ *Id.* § II.

¹³² The additional reporting guidelines, which are still in effect, function to strictly limit FBI investigations. They are reprinted in *FBI Statutory Charter: Hearings On S. 1612 Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 27-33 (1978).

¹³³ The Smith guidelines do not incorporate recommendations by the Director of the Secret Service to "maximize the flexibility available to the FBI" so that information could be obtained about "potentially dangerous groups who have not overtly expressed their intentions," and to "permit the collection of information enabling us to determine that a particular group poses no danger to our protectees as well as those groups that are a danger." 1982 *Senate Hearings*, *supra* note 43, at 138.

may compile publicly available information about political advocacy. The guidelines state: "Nothing in these Guidelines is intended to prohibit the FBI from collecting and maintaining publicly available information consistent with the Privacy Act."¹³⁴ This provision raised more questions than it answered, as indicated by Director Webster's implementing instructions:

FBI Headquarters is currently consulting with the [Department of Justice] concerning interpretation of this provision in an effort to ascertain the bounds of this collection effort and to determine administrative procedures for processing the information collected. All field offices are instructed to limit their collection of publicly available information to cases under preliminary inquiry or full investigation in accordance with the Guidelines. Further instructions with regards to implementation of this provision will be forthcoming.¹³⁵

In prior congressional testimony, Director Webster had discussed the FBI's "inability to review periodicals or other publications of organizations that are not under investigation."¹³⁶ Because the Privacy Act "prohibits agencies from maintaining records on how one exercises first amendment rights unless it is in connection with an authorized law enforcement activity," the FBI "cannot collect that information unless the group is under active investigation." Although he said it made "little sense to deny us information that is available to the general public," Director Webster continued to adhere to a strict interpretation of the Privacy Act.¹³⁷

In light of this record, the conclusion that the Smith guidelines conflict substantially with the settlement provision prohibiting investigations in Chicago based solely on activities protected by the first amendment seems unfounded.¹³⁸ Attorney General Smith's announcement of the guidelines stated that "constitutionally-protected advocacy of unpopular ideas or political dissent alone cannot serve as the basis for an investigation."¹³⁹ Assistant Attorney General Jensen testified that the intent of the new guidelines was "to retain the safeguards for lawful and peaceful political dissent which formed the core of the 1976 Guidelines."¹⁴⁰ A review of the guidelines as a whole, in the context of past

¹³⁴ Smith Guidelines, *supra* note 1, § I.

¹³⁵ Webster Instructions, *supra* note 86, at 5.

¹³⁶ 1982 Senate Hearings, *supra* note 43, at 12 (testimony of William H. Webster, Director, FBI).

¹³⁷ *Id.*

¹³⁸ See *supra* notes 110-15 and accompanying text.

¹³⁹ Department of Justice Press Release, March 7, 1983, reprinted in *Hearing on Attorney General's Guidelines for Domestic Security Investigations (Smith Guidelines) Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess., app., Exhibit A, at 47 (1983).

¹⁴⁰ Jensen House Testimony, *supra* note 86, at 2.

policies, tends to confirm these statements as accurate reflections of the overall policy established for FBI domestic security investigations.

VI CONCLUDING OBSERVATIONS

The foregoing analysis of the revised FBI guidelines adopted in 1983 by Attorney General Smith indicates the similarities between the new guidelines and the 1979 FBI charter proposal. At the hearings held by the Senate Select Committee established in 1982 to investigate the ABSCAM case and other FBI undercover policies, Director Webster testified that he continued to support the concept of a statutory charter for the FBI and that the FBI was "living by" the terms of the charter bill introduced in 1979.¹⁴¹ He added that "almost all our internal regulations follow the draft charter as if it were in place."¹⁴² The most important common factor is the continued policy discouraging investigations for domestic political intelligence purposes. The reaffirmation of the essential elements of Attorney General Levi's policy by two succeeding administrations with different perspectives suggests the establishment of a long-term consensus on the FBI's proper role.

There are still those who challenge this consensus and argue for a resumption of investigations based upon ideology and for purposes other than criminal law enforcement.¹⁴³ Some also would merge foreign counterintelligence and domestic security investigations and revive the term "subversion" as the standard for gathering domestic intelligence.¹⁴⁴ Perhaps the best answer to their arguments, and the best defense of the post-1976 FBI policies, came from Attorney General Robert H. Jackson. In an address to a conference of United States Attorneys in 1940, he warned that the concept of subversive activities was "dangerous to civil liberty" because there were "no definite [sic] standards to determine what constitutes a 'subversive activity,' such as we have for murder or larceny."¹⁴⁵ Attorney General Jackson continued:

Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as "subversive" by those whose property interests might be burdened or affected thereby. Those who are in office are apt to regard as "subversive" the activities of any of those who would

¹⁴¹ *Law Enforcement Undercover Activities: Hearings Before the Senate Select Comm. to Study Law Enforcement Undercover Activities of Components of the Department of Justice*, 97th Cong., 2d Sess. 1041 (1982).

¹⁴² *Id.*

¹⁴³ G. LEWY, *THE FEDERAL LOYALTY-SECURITY PROGRAM: THE NEED FOR REFORM* 59-68 (1983).

¹⁴⁴ *MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION* 930-42 (C. Heatherly ed. 1981).

¹⁴⁵ Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 19 (1940).

bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term "Republican" and the term "Democrat" were epithets with sinister meaning to denote persons of radical tendencies that were "subversive" of the order of things then dominant.¹⁴⁶

The FBI must maintain its nonpolitical character in order to preserve public and congressional confidence. This is particularly relevant in the area of sensitive undercover investigative techniques that may affect the reputations of individuals and that "can easily inhibit valuable, protected expression."¹⁴⁷

A statutory charter for the FBI, covering both its law enforcement functions and its foreign intelligence and counterintelligence responsibilities, would give added protection against the use of the FBI for domestic political intelligence purposes. The absence of such legislation invites reliance on claims of "inherent authority" that, as Director Webster observed, were "a major contributor to some of the sad events" associated with FBI domestic intelligence operations in the past.¹⁴⁸ The extent to which FBI investigations must come within the scope of statutory authority is unclear, as is the scope of presidential power to order FBI investigations without statutory authorization.¹⁴⁹ An FBI charter would help resolve the "continuing debate and controversy about the sources and extent of the Bureau's investigative authority."¹⁵⁰

The Levi, Civiletti, and Smith guidelines have also demonstrated that judicial enforcement is not essential to effective formal standards and procedures for FBI investigations. The Levi guidelines did achieve the objective of curbing FBI domestic political intelligence investigations; and the other guidelines largely codified preexisting FBI internal regulations and practices. Thus, the purpose of a charter need not be to create enforceable legal rights, but rather to enunciate congressional support of the nonpolitical nature of the FBI's role. Enforcement would then come through congressional oversight of compliance rather than private litigation. This conceptual framework was reflected in the 1979 charter bill and reaffirmed in the recommendations of the Senate Select Committee that examined FBI undercover operations in 1982.¹⁵¹

¹⁴⁶ *Id.* at 19-20.

¹⁴⁷ UNDERCOVER ACTIVITIES REPORT, *supra* note 5, at 385.

¹⁴⁸ 1978 Senate Hearings, *supra* note 65, at 35.

¹⁴⁹ See J. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS 73-76 (1979); R. MORGAN, DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA 104-14 (1980).

¹⁵⁰ FBI Charter Hearings, *supra* note 126, at 12.

¹⁵¹ The Select Committee recommended against legislating judicially enforceable restrictions on undercover techniques because of a desire not to void criminal convictions on technical violations, a fear that standards might be diluted to minimize the risk of violations, and a concern about excessive litigation and undue disclosure of sensitive law enforcement data. UNDERCOVER ACTIVITIES REPORT, *supra* note 5, at 396-97.

Despite wide agreement on the basic principles of an FBI charter, there are serious obstacles to congressional action. Not the least of these problems is the natural desire of legislators to regulate the investigative process in detail.¹⁵² The experience with the Levi, Civiletti, and Smith guidelines suggests that such details as the verbal formulas for investigative thresholds or the precise controls over investigative techniques are less important than the definition of the FBI's mandate. The consensus developed under Director Webster may not survive his term in office, which expires in 1988. That may be the most important reason for using the Smith guidelines as the basis for renewed consideration of an FBI charter that gives the force of law to fundamental standards that foreclose investigations for domestic political intelligence purposes.

¹⁵² Former Attorney General Griffin B. Bell, under whom the FBI charter bill was drafted, has recalled:

After long, complex negotiations, we had presented to the Senate a draft of that charter. We looked on it as an exhaustive attempt to protect citizens' liberties from unjustified invasions by FBI agents without sacrificing citizens' security by shackling agents so tightly they could not perform their missions. Some senators began to redo sections that had taken months to work out.

Flying back from giving an out-of-town speech, I was asked by a reporter on board the plane about the prospects for adoption of the charter. Here, I thought, was the opportunity to serve notice that the administration had gone as far as it could. I told the reporter, and he wrote in the next day's edition of his newspaper, that if the Senate tinkered too much with the proposal, I would rather have no charter at all and let the FBI operate under guidelines first issued by my predecessor, Attorney General Edward H. Levi.