Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, DC 20463

EXHIBITS SUBMITTED IN SUPPORT OF 2008 REQUEST BY THE SOCIALIST WORKERS PARTY, THE SOCIALIST WORKERS PARTY NATIONAL CAMPAIGN COMMITTEE AND COMMITTEE SUPPORTING CANDIDATES OF THE SOCIALIST WORKERS PARTY FOR AN ADVISORY OPINION

Date: October 30, 2008

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EXHIBITS SUBMITTED IN SUPPORT OF SUPPLEMENT TO THE 2008 REQUEST BY THE SOCIALIST WORKERS PARTY, THE SOCIALIST WORKERS PARTY NATIONAL CAMPAIGN COMMITTEE AND COMMITTEE SUPPORTING CANDIDATES OF THE SOCIALIST WORKERS PARTY FOR AN ADVISORY OPINION

Date: January 13, 2009

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Exhibit A

Exh. A - 12 pages

A - 1

FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 4, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-02

Michael Krinsky
Jaykumar Menon
Rabinowitz, Boudin, Standard, Krinsky & Lieberman
740 Broadway, Fifth Floor
New York, NY 1002-9518

Dear Mr. Krinsky and Mr. Menon:

This refers to your letters dated October 31, 2002 and February 14, 2003, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended, ("the Act") and Commission regulations to the continuation of a partial reporting exemption for the Socialist Workers Party National Campaign Committee and committees supporting candidates of the Socialist Workers Party ("SWP").[1]

PROCEDURAL BACKGROUND

Judicial origins of the exemption

The SWP National Campaign Committee and committees supporting SWP candidates were first granted a partial reporting exemption in a consent decree, dated

[1] The completed advisory request materials were not received until February 14. However, the date of your initial submission is accepted for purposes of tolling the time for the request of a continuation of the partial reporting exemption.

January 2, 1979, that resolved *Socialist Workers 1974 National Campaign Committee v. Federal Election Commission*, Civil Action No. 74-1338 (D.D.C. 1979). In that case, such committees brought an action for declaratory, injunctive and affirmative relief, alleging that specific disclosure sections of the Act operated to deprive them and their supporters of rights guaranteed by the First Amendment to the Constitution because of the likelihood of harassment resulting from such disclosure. The consent decree required the committees supporting SWP candidates to maintain records in accordance with the Act and to file reports in a timely manner. It also, however, exempted these committees from the provisions requiring the disclosure of: 1) the names, addresses, occupations, and principal places of business of contributors to SWP committees; 2) political committees or candidates supported by SWP committees; 3) lenders, endorsers or guarantors of loans to the SWP committees; and 4) persons to whom the SWP committees made expenditures.[2] The decree stated that its provisions would extend to the end of 1984, and established a procedure for the SWP committees to apply, prior to that date, for a renewal of the exemptions listed above.

On July 24, 1985, the court approved an updated settlement agreement with the same requirements and partial reporting exemption.[3] The court decree extended the exemption until the end of 1988, and again included a renewal procedure. However, the SWP missed the deadline for reapplication for the exemption.

Renewal of the exemptions through advisory opinions

In July 1990, SWP sought an extension of the partial reporting exemption through the advisory opinion process in lieu of obtaining a court decree. On August 21, 1990, the Commission issued Advisory Opinion 1990-13, which granted the same exemption provided for in the previous consent decrees. The advisory opinion provided that the exemption would be in effect through the next two presidential election cycles, i.e., through December 31, 1996. Additionally, the SWP committees could seek a renewal of the exemption by submitting an advisory opinion request by November 1, 1996 to present information as to harassment of SWP, or persons associated with SWP, during the 1990-1996 period. Advisory Opinion 1990-13.

On November 1, 1996, the committees again requested through the advisory opinion process a renewal of the exemption. In Advisory Opinion 1996-46, the Commission agreed to the renewal after examination of the evidence presented in affidavits that described the continuing harassment of SWP and its supporters. However,

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[2] The agreement also stated that if the Commission found reason to believe that the committees violated a provision of the Act, other that those for which an exemption was specified, but needed the withheld information to proceed, the Commission could apply to the court for an order requiring the production of such information.

[3] In view of the specific provisions of the 1979 amendments to the disclosure provisions, the agreement also makes reference to an exemption for reporting the identification of persons providing rebates, refunds or other assets to operating expenditures, and persons providing any dividend, interest or other receipts.

the Commission added a new condition to the renewal. This modification required that each committee entitled to the exemption must assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar year.[4] *See* Advisory Opinion 1996-46. This modified renewal extended the partial reporting exemption for the next six years, i.e., through December 31, 2002. The advisory opinion specified that at least sixty days prior to the expiration date, the requestor could submit a new advisory opinion request seeking another renewal of the exemption.

ACT AND COMMISSION REGULATIONS

The Act requires political committees to file reports with the Commission that identify individuals and other persons who make contributions over $200 during the applicable time periods, or who come within various other disclosure categories listed above in reference to the consent agreements. 2 U.S.C. 434(b)(3), (5), and (6); *see also* 2 U.S.C. 431(13). However, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court recognized that, under certain circumstances, the Act's disclosure requirements as applied to a minor party would be unconstitutional because the threat to the exercise of First Amendment rights resulting from disclosure would outweigh the insubstantial interest in disclosure by that entity. 424 U.S. at 71-72. Reasoning that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim" for a reporting exemption, the Court stated that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id* at 74. The Court elaborated on this standard, stating:

> The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

Id. at 74; *see also McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995).

The Supreme Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee (Ohio),* 459 U.S. 87 (1982), granting SWP an exemption from state campaign disclosure requirements. The Court referred to the introduction of proof of

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[4] The Commission required that the code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. The committee's records were required to correlate each code number with the name and other identification data of the contributor who is represented by that code.

specific incidents of private and government hostility toward SWP and its members within the four years preceding the trial in that case. The Court also referred to the long history of Federal governmental surveillance and disruption of SWP until at least 1976. *Brown*, 459 U.S. at 99-100. Noting the appellants' challenge to the relevance of evidence of Government harassment "in light of recent efforts to curb official misconduct," the Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility toward the SWP is ingrained and likely to continue." *Id.* at 101.

The Supreme Court in *Brown* also clarified the extent of the exemption recognized in *Buckley*, stating that the exemption included the disclosure of the names of recipients of disbursements as well as the names of contributors. The Court characterized the view that the exemption pertained only to contributors' names as "unduly narrow" and "inconsistent with the rationale for the exemption stated in *Buckley*." *Id.* at 95.

The United States Court of Appeals for the Second Circuit also applied the *Buckley* standard in exempting the campaign committee of the Communist Party presidential and vice presidential candidates from the requirements to disclose the identification of contributors and to maintain records of the name and addresses of contributors. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983). The court described the applicability of the standard, stating:

> [W]e note that Buckley did not impose unduly strict or burdensome requirements on the minority group seeking constitutional exemption. A minority party striving to avoid FECA's disclosure provisions does not carry a burden of demonstrating that harassment will certainly follow compelled disclosure of contributors' names. Indeed, when First Amendment rights are at stake and the specter of significant chill exists, courts have never required such a heavy burden to be carried because 'First Amendment freedoms need breathing space to survive.' (Citations omitted.) Breathing space is especially important in a historical context of harassment based on political belief. Our examination of the treatment historically accorded persons identified with the Communist Party and a survey of statutes still extant reveal that the disclosure sought would have the effect of restraining the First Amendment rights of supporters of the Committee to an extent unjustified by the minimal governmental interest in obtaining the information.

678 F.2d at 421-422.

Commission agreement to the consent decrees granting the previous exemptions to the SWP committees has been based upon the long history of systematic harassment of the SWP and those associating with it and the continuation of harassment. The Commission has required only a "reasonable probability that the compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or

private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the application of this standard to both contributors and recipients of disbursements.

The Commission in Advisory Opinions 1996-46 and 1990-13 noted that, in agreeing to the granting of the exemption and its renewal, it considered both "present" and historical harassment. The 1985 Stipulation of Settlement refers to the fact that the Commission had been ordered, "to develop a full factual record regarding the present nature and extent of harassment of the plaintiffs and their supporters resulting from the disclosure provisions." 1985 Stipulation of Settlement, p. 2. According to the 1985 Stipulation of Settlement, the renewal was based on evidentiary materials regarding the nature and extent of harassment during the previous five years. As referred to above, these two Advisory Opinions based their grant, in part, on the evidence of harassment since 1985. The very nature of the periodic extensions indicates that, after a number of years, it is necessary to reassess the SWP's situation to see if the reasonable probability of harassment still exists.[5]

EXAMINATION OF FACTUAL BACKGROUND

Electoral status of SWP

In the request for the exemption granted in the past two advisory opinions and in your present request, you have presented facts indicating SWP's status as a minor party since its founding in 1938. Despite running a presidential candidate in every election since 1948 and numerous other candidates for Federal, State and local offices, no SWP candidate has ever been elected to public office in a partisan election. You have presented data from the 2000 election indicating very low vote totals for SWP presidential and other Federal candidates.[6] Further, unlike several other minor parties, you state that SWP has never applied or qualified for national committee status. *See* 2 U.S.C 431(14) and Advisory Opinions 2001-13, 1998-2, 1995-16 and 1992-30.

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[5] In addition, the courts in *Brown* and *Hall-Tyner* rendered their decisions with reference to recent events or factors, as well as a history of harassment, i.e., recent incidents of harassments against the SWP and extant statutes directed against the Communist Party.

[6] The evidence you present, as well as information publicly available, indicates that no SWP candidate has come close to winning a Federal election in the six years since the last exemption was granted. SWP candidates for U.S. President received only 8,746 votes nationwide in 1996 and only 10,644 votes nationwide in 2000. Further, no SWP candidates on the ballot for U.S. Senate or House of Representatives received more than 15,000 votes in any election during that period, with the vast majority (thirty-five of thirty-seven candidates) receiving not even 5,000 votes. Additionally, the request provides information of a survey conducted by party leadership of the local campaign committees (of which 17 existed) that supported a candidate in 2000. According to this survey, only 354 people nationwide contributed funds to these committees, for an average of approximately twenty contributors per committee. There was only one contribution nationwide to that committee that was over $300.

History of government harassment

The request for the exemptions must be seen in the context of the relationship between the SWP and various Federal enforcement authorities, as well as SWP's relationship with other enforcement authorities and private parties. It is against this backdrop that the request and the supporting materials can properly be understood. Advisory Opinions 1996-46 and 1990-13 made reference to the long history of governmental harassment of the SWP. The advisory opinions described FBI investigative activities between 1941 and 1976 that included the extensive use of informants to gather information on SWP activities and on the personal lives of SWP members, warrantless electronic surveillance, surreptitious entry of SWP offices, other disruptive activities including attempts to embarrass SWP candidates and to foment strife within SWP and between SWP and others, and frequent interviews of employers and landlords of SWP members.

The advisory opinions also referred to statements made by Federal governmental officials in several agencies expressing the need for information about the SWP based on the officials' unfavorable perceptions of the SWP. These statements were made in affidavits submitted during 1987 in connection with *Socialist Workers Party v. Attorney General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction preventing the government from using, releasing, or disclosing information on the SWP that was unlawfully obtained or developed from unlawfully obtained material, except in response to a court order or a Freedom of Information Act request. The opinion also discussed incidents of private and local governmental harassment of SWP and those associating with it during the period from 1985 through 1996. These included private threats and acts of violence and vandalism, as well as harassment by local police.

Organization of current evidentiary record

In your current request you present over 80 exhibits including statements from various Party members and candidates, sometimes corroborated by local newspaper articles, police reports, court documents or other materials. The statements come from SWP members from different regions of the United States and are dated from 1997 to 2002. These statements are meant to attest to the hostility directed toward the SWP. They can be divided into three categories: 1) statements attesting to the fear possible SWP supporters have of providing identification when expressing SWP support, 2) statements and material attesting to hostility from private parties to SWP activity, and 3) statements and materials attesting to hostility from law enforcement sources to SWP activities.

Fears expressed by party supporters

The request contains eight statements by SWP officials relating the concerns of potential SWP supporters regarding public identification with SWP. These include statements by the 2000 Presidential and Vice Presidential SWP candidates

describing their experiences while campaigning and talking with potential supporters. It also includes statements from SWP workers who sell subscriptions to SWP newspapers. Several of the statements refer to individuals who expressed reluctance to buy subscriptions for fear of finding their names on lists maintained by enforcement authorities such as the FBI. See Exhibits L, M, and N. Your request also notes the refusal in 1997 of the Seattle Elections Commission to grant an exemption from its reporting requirements.[7] You provide statements from several SWP workers noting that several long-time contributors expressed reluctance to contribute again because now their names, addresses and professions would be public. See Exhibits H and I.

Harassment and violence from private sources

The largest number of exhibits in the request, over forty, consists of examples of harassment of SWP workers and candidates by private individuals and businesses. These are signed statements by SWP workers and candidates that concern their experiences while giving out SWP literature or selling SWP newspapers or gathering signatures for petitions. They include violence and threats of violence directed toward SWP workers and displays. *See,* for example, Exhibits 4, 19, 20, and 38. The request also includes well-documented accounts of attacks and vandalism against SWP headquarters and property. *See* Exhibit 5 (District of Columbia); Exhibit 12 (Houston, Texas); Exhibit 22 (Des Moines, Iowa); and Exhibit 50 (San Francisco, California). Your request also describes the receipt of hostile or threatening email, notes or phone messages at various SWP headquarters. *See* Exhibits 31, 64, and 74.

Additionally, you provide statements of SWP candidates who faced pressure or hostility at the work place once their employers became aware of their political activities. Some of the exhibits involve situations where rules concerning political activity in the workplace were violated. However, in several situations, employees faced sanctions simply because of their affiliation with SWP or their affirmation of its political beliefs. The most striking and well-documented example was the firing in 2001 of the SWP candidate for mayor of Miami. *See* Exhibit 15.

Relations with law enforcement authorities

The request also includes 25 exhibits describing interactions between SWP workers and local law enforcement authorities. The majority of these involve police or other law enforcement officials forcing SWP personnel to remove campaign and/or literature tables from streets or sidewalks or to cease the hand distribution of campaign or SWP materials. In one instance, local police charged SWP supporters manning a literature table with disorderly conduct and unlicensed vending. A judge later suspended the charges. *See* Exhibit 24. It is not certain that animus against SWP was the motivating factor in all these situations since it is not clear whether SWP workers were violating the

[7] Your request includes a 1998 decision of the Washington State Public Disclosure Commission, which by contrast, granted a reporting exemption to the SWP in regard to statewide activity by its sole statewide candidate.

laws of the localities. Nevertheless, prejudice against SWP is indicated in at least some of exhibits since there are cases where SWP activity was, according to evidence provided along with reports of the incidents, legal or protected within the jurisdiction involved. *See* Exhibits 25, 40, 41, 55, and 70. In one case, SWP successfully challenged in federal district court the constitutionality of a permit regulation as it was applied to SWP activities. *See* Exhibit 65.

In Advisory Opinion 1996-46, SWP presented less than a handful of incidents that related to SWP interaction with governmental officials other than local police. In your 2002 request, you present only one such situation. Exhibit 43 describes an individual who, as a SWP member and SWP Presidential elector, applied for a position as a census worker and received a very high score in the Census Bureau's standardized test. The SWP member states that his file was forwarded to the FBI for a security evaluation and that other applicants had their files reviewed by the FBI. You assert that he would have been hired but for the lack of action on his file by the FBI because of its stated inability to locate his file. With respect to the incident, you do not present evidence similar to the affidavits submitted by Federal officials with regard to previous determinations. Consequently, it is difficult to assess whether administrative mischance or actual prejudice played a role in the loss of the file. However, it could be seen as significant, in view of past actions by the FBI with regard to the SWP and its supporters.[8]

ANALYSIS AND CONCLUSIONS

In applying the standard established by the court cases and court decrees described above in determining whether to renew the SWP's partial reporting exemption, the Commission must first determine whether SWP continues to maintain its status as a

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[8] Beginning in 1941, the FBI began a generalized investigation of the SWP that was to last at least until 1976. See Final Report of Special Master Judge Breitel in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980). Between the years 1960 and 1976, the FBI employed approximately 1300 informants who reported on the activities, discussions and debates of the SWP. In addition to reporting on what the Special Master described, with some qualifications, as "peaceful, lawful political activity" by the SWP and its adjunct, the Young Socialist Alliance ("YSA"), the informants also provided information as to the names, addresses, places and changes of employment of SWP members, and such personal data as information on "marital or cohabitational status, marital strife, health, travel plans, and personal habits." 642 F. Supp. at 1379-1381.

In the 1960's and 1970's, the SWP was the subject of FBI Counterintelligence Programs "designed to disrupt the SWP on a broad national basis." 642 F. Supp. at 1384. The disruption under these programs included attempts to embarrass SWP candidates, foment racial strife within the SWP, and cause strife between the SWP and others in a variety of political movements. 642 F. Supp. at 1385-1389. For a number of years, the FBI also conducted warrantless electronic surveillance of the SWP on an extensive basis and at least 204 surreptitious entries of SWP offices, principally to photograph or remove documents. The court noted that "there is no indication that the FBI obtained any documents showing any violence or any action to overthrow the Government." 642 F. Supp. at 1394.

Over a period of many years, the FBI maintained a list known successively as the Custodial Detention List, the Security Index, and the Administrative Index. The persons on this list were to be considered for apprehension and detention in time of war or national emergency. The FBI intended to include all SWP members on this list. The list was maintained by frequent interviews of landlords and employers of the members. 642 F. Supp. at 1395.

minor party. *See Buckley*, 424 U.S. at 68-74. As evidenced by low vote totals for SWP candidates and the small total amounts contributed to SWP and committees supporting SWP candidates, the Commission concludes that SWP continues to be a minor party. Having satisfied the minor party threshold, the Commission must balance three factors in analyzing your request. The first is the history of violence or harassment, or threats of violence or harassment, directed at the SWP or its supporters by Federal, state, or local law enforcement agencies or private parties. Second is evidence of continuing violence, harassment, or threats directed at the SWP or its supporters by these same organizations or persons since the last advisory opinion in 1996. These two factors must be balanced against the governmental interest in obtaining the information by determining whether the impact of the activities of the SWP and its supporters in connection with Federal elections is diminished by the low probability of the SWP winning an election. *See Hall-Tyner*, 678 F.2d at 422.

As evidenced by the various court cases and the information submitted in connection with previous advisory opinion requests and described briefly above, there is a long history of threats, violence, and harassment against the SWP and its supporters by Federal, state, or local law enforcement agencies and private parties. There is a sufficient record to establish that this history continues to have a chilling effect on possible membership in or association with SWP. One indication of this is the refusal of individuals to purchase or subscribe to SWP literature or circulations for fear of being included in lists maintained by the government identifying them as SWP supporters. *See* Exhibits L, M, and N.

A review of the information you have presented in connection with this AOR indicates that the SWP and persons publicly associated with it have experienced significant harassment from private sources in the 1997-2002 period. Such harassment appears to have been intended to intimidate the SWP and persons associated with it from engaging in their political activities and in expressing their political views. There is also some evidence of continuing harassment by local police, although here the evidence is not as great as that presented for the harassment from private parties and it is more difficult to evaluate. Based on the evidence presented, the hostility from other governmental sources still exists but continues to abate. As indicated above, massive Federal governmental surveillance and disruption were discontinued well before 1990. The incident involving the census position is difficult to assess without complete information, although it does present at least the possibility of a chilling effect on public association with the SWP. However, as stated above, the history of governmental harassment continues to have a present-day chilling effect that is not diminished by the abatement of governmental harassment.

As noted earlier, it must be stressed that the evidence presented in your request does not need to indicate a certainty that harassment would follow a revocation of the partial reporting exemption. The standard established in Advisory Opinions 1990-13 and 1996-46 and based on the case law cited earlier is that there only be "a reasonable probability that compelled disclosure" would result in "threats, harassment, or reprisals

from *either* Government offices *or* private parties" (emphasis added). The Commission considers the totality of the evidence for the 1997-2002 period, especially the evidence of continued harassment from private parties, and concludes that there is a reasonable probability that contributors to and vendors doing business with SWP and committees supporting SWP candidates would face threats, harassment, or reprisal if their names and information about them were disclosed.

Information provided in your request states that SWP and committees supporting its candidates receive very small total amounts of contributions and very low vote totals in partisan elections in which they are candidates. These low numbers indicate that the activities of SWP, its candidates, and committees supporting its candidates have little, if any, impact on Federal elections. Thus the governmental interest in obtaining the names and addresses of contributors to and vendors doing business with SWP and committees supporting SWP candidates in connection with Federal elections is diminished by the low probability of an SWP candidate winning an election.

As a result of its finding that SWP and the committees supporting SWP candidates have satisfied the factors established in the case law and prior advisory opinions, the Commission grants SWP and the committees supporting SWP candidates a further continuation of the partial reporting exemption provided for in the consent agreements as continued by Advisory Opinions 1990-13, and 1996-46. The condition established by the 1996-46 Opinion will also continue with the partial reporting exemption.[9]

Your request notes that the Act was amended in 1999, 2000, and 2002. You ask that the partial reporting exemption be applied to any new reporting obligations arising from these changes that may require SWP or committees supporting SWP candidates to disclose the names of their contributors and vendors. You identify the amended or new provisions as 2 U.S.C. 434(a)(6)(B) (candidate's notification of expenditure from personal funds), 434(a)(11)(B) (electronic availability of reports), 434(a)(12) (electronic filing standards), 434(e) (reporting by political committees), 434(f) (electioneering communication disclosure), 434(g) (independent expenditure reporting), and 434(h) (inaugural committee reporting). The Commission agrees that the partial exemption applies to SWP and candidate committees to the extent they are required to report the names of contributors and vendors under the amended or new sections of the Act that you

[9] Therefore, each unauthorized committee entitled to the exemption should assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar year. Similarly, each authorized committee of a SWP candidate should assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 during the election cycle. That code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. Consistent with the requirement that the committees comply with the recordkeeping provisions of the Act, the committee's records should correlate each code number with the name and other identifying data of the contributor who is represented by that code.

identify[10] except for 2 U.S.C. 434(a)(6)(B)[11] and 434(h).[12] Please note that SWP and the committees supporting SWP candidates must still comply with all other reporting obligations such as electronic filing and reporting their independent expenditures while omitting the names and information concerning contributors, donors and vendors.

Consistent with the length of the exemptions granted in 1990 and 1996, this partial reporting exemption applies to reports covering the next six years, i.e., through December 31, 2008. At least sixty days prior to December 31, 2008, the SWP may submit a new advisory opinion request seeking a renewal of the partial reporting exemption. If a request is submitted, the Commission will consider the factual information then presented as to harassment after 2002, or the lack thereof, and will make a decision at that time as to the renewal.

As in Advisory Opinion 1990-13 and 1996-46, the Commission emphasizes that the committees supporting the Federal candidates of the SWP must still comply with all of the remaining requirements of the Act and Commission regulations. The committees must file reports containing the information required by 2 U.S.C. 434(b) with the exception of the information specifically exempted, and the committees must keep and maintain records as required under 2 U.S.C. 432 with sufficient accuracy so as to be able to provide information, otherwise exempt from disclosure, in connection with a Commission investigation. In addition to complying with the requirements of the consent decrees, the committees must file all reports required under 2 U.S.C. 434(a) in a timely manner. The committees must also comply with the provisions of the Act governing the organization and registration of political committees. *See, e.g.*, 2 U.S.C. 432 and 433. Adherence to the disclaimer provisions of 2 U.S.C. 441d is also required. Finally, the committees must comply with the Act's contribution limitations and prohibitions. 2 U.S.C. 441a, 441b, 441c, 441e, 441f, 441g, 441i, and 441k.

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[10] If SWP or any committee supporting its candidates do not qualify as political committees and make an electioneering communication that must be reported under 2 U.S.C. 434(f), they must disclose the name of the broadcaster even though they would be exempt from disclosing names and addresses of donors and all other vendors. Additionally, your request concerns the granting of the partial exemption to both SWP and candidate committees. The partial exemption does not extend to individual SWP members who, as individuals, engage in activity that might require them to file reports of their own, for example, the filing of reports of electioneering communications under 2 U.S.C. 434(f) and independent expenditures under 2 U.S.C. 434(g).

[11] If a SWP candidate for the United States House of Representative or United States Senate makes sufficient expenditures from personal funds to require disclosure under 2 U.S.C. 434(a)(6)(B), the candidate must file FEC Form 10. This form does not require the candidate to disclose contributors other than the candidate nor does it require disclosure of vendors and therefore, is beyond the scope of the partial reporting exemption. Additionally, it is important for the SWP candidate to file this FEC Form 10 because it affects the opposing candidates' ability to accept contributions in excess of the contribution limitations under the Millionaires' Amendment at 2 U.S.C. 441a(i) and 441a-1.

[12] If the SWP or any candidate of the SWP is in a position to organize an inaugural committee, the analysis, and therefore the conclusion, of this advisory opinion would no longer be applicable.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosures: AOs 2001-13, 1998-2, 1996-46, 1995-16, 1992-30 and 1990-13

Exhibit B

Exh. B - 8 pages

B-1

FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 11, 1997

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-46

Michael Krinsky
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
740 Broadway at Astor Place
New York, NY 10003-9518

Dear Mr. Krinsky:

This responds to your letter dated November 1, 1996, as supplemented by your letter dated January 13, 1997, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the continuation of a partial reporting exemption for the Socialist Workers Party National Campaign Committee and committees supporting candidates of the Socialist Workers Party ("SWP").

The SWP National Campaign Committee and committees supporting SWP candidates were first granted a partial reporting exemption in a consent decree, dated January 2, 1979, that resolved *Socialist Workers 1974 National Campaign Committee v. Federal Election Commission*, Civil Action No. 74-1338 (D.D.C.). In that case, such committees brought an action for declaratory, injunctive and affirmative relief, alleging that specific disclosure sections of the Act operated to deprive them and their supporters of rights guaranteed by the First Amendment to the Constitution because of the likelihood of harassment resulting from such disclosure. The decree required the committees supporting SWP candidates to maintain records in accordance with the Act and to file reports in a timely manner. It also, however, exempted the committees from the provisions requiring the disclosure of the names, addresses, occupations, and principal places of business of contributors to SWP committees; of political committees or candidates supported by SWP committees; of lenders, endorsers or guarantors of loans to the SWP committees; and of persons to whom the SWP committees made expenditures.[1] The decree stated that its provisions would extend to the end of 1984, and set out a procedure for the SWP committees to apply, prior to that date, for a renewal of the exemptions.

On July 24, 1985, the court approved an updated settlement agreement with the same requirements and partial reporting exemption.[2] The court decree extended the exemption until the end of 1988, and again set out a renewal procedure. The SWP missed the deadline for reapplication for the exemption. In lieu of a renewal obtained from the court, the committees, in July 1990, sought a determination from the Commission of entitlement to the partial reporting exemption through the advisory opinion process.

On August 21, 1990, the Commission issued Advisory Opinion 1990-13, which granted the same exemption provided for in the previous consent decrees. The opinion provided that the exemption would last through the next two presidential election cycles, i.e., through December 31, 1996. The SWP committees could seek a renewal of the exemption by submitting an advisory opinion request by November 1, 1996, that would present information as to harassment of the SWP, or persons associated with the SWP, during the 1990-1996 period. Advisory Opinion 1990-13. The Commission received your request for a renewal on that date. You have asked that the exemption period last through the next two presidential election cycles, i.e., until December 31, 2004.

I. *Applicable Law*

The Act requires political committees to file reports with the Commission that identify individuals and other persons who make contributions over $200, or who come within various other disclosure categories listed above in reference to the consent agreements. 2 U.S.C. 434(b)(3), (5), and (6). See also 2 U.S.C. 431(13). The United States Supreme Court, however, in *Buckley v. Valeo*, 424 U.S. 1 (1976), recognized that, under certain circumstances, the Act's disclosure requirements as applied to a minor party would be unconstitutional because the threat to the exercise of First Amendment rights resulting from disclosure would outweigh the insubstantial interest in disclosure by that entity. 424 U.S. at 71-72. Asserting that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim" for a reporting exemption, the Court stated that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74. The Court elaborated on this standard, stating:

The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.
424 U.S. at 74.

The Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982), granting the SWP an exemption from state campaign disclosure requirements. The Court referred to the introduction of proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial in that case. The Court also referred to the long history of Federal governmental surveillance and disruption of the SWP until at least 1976. 459 U.S. at 99-100. Noting the appellants' challenge to

the relevance of evidence of Government harassment "in light of recent efforts to curb official misconduct," the Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility toward the SWP is ingrained and likely to continue." 459 U.S. at 101.

The Court in *Brown* also clarified the extent of the exemption recognized in Buckley, stating that the exemption included the disclosure of the names of recipients of disbursements as well as the names of contributors. The Court characterized the view that the exemption pertained only to contributors' names as "unduly narrow" and "inconsistent with the rationale for the exemption stated *in Buckley*."
459 U.S. at 95.

The United States Court of Appeals for the Second Circuit used the *Buckley* standard as a basis for exempting the campaign committee of the Communist Party presidential and vice presidential candidates from the requirements to disclose the identification of contributors and to maintain records of the name and addresses of contributors. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983). The court described the applicability of the standard, stating:

> [W]e note that Buckley did not impose unduly strict or burdensome requirements on the minority group seeking constitutional exemption. A minority party striving to avoid FECA's disclosure provisions does not carry a burden of demonstrating that harassment will certainly follow compelled disclosure of contributors' names. Indeed, when First Amendment rights are at stake and the spectre of significant chill exists, courts have never required such a heavy burden to be carried because 'First Amendment freedoms need breathing space to survive.' (Citations omitted.) Breathing space is especially important in a historical context of harassment based on political belief. Our examination of the treatment historically accorded persons identified with the Communist Party and a survey of statutes still extant reveal that the disclosure sought would have the effect of restraining the First Amendment rights of supporters of the Committee to an extent unjustified by the minimal governmental interest in obtaining the information.
> 678 F.2d at 421-422.

Commission agreement to the consent decrees granting the previous exemptions to the SWP committees has been based upon the long history of systematic harassment of the SWP and those associating with it and the continuation of harassment. The Commission has required only a "reasonable probability that the compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the application of this standard to both contributors and recipients of disbursements.

Advisory Opinion 1990-13 noted that, in agreeing to the granting of the exemption and its renewal, the Commission had considered both "present" and historical harassment. The 1979 Stipulation of Settlement refers to the fact that the Commission had been ordered "to develop a full factual record regarding the present nature and extent of harassment of the plaintiffs and their supporters resulting from the disclosure provisions." According to the 1985 Stipulation of

Settlement, the renewal was based on evidentiary materials regarding the nature and extent of harassment during the previous five years. As referred to above, Advisory Opinion 1990-13 based its grant on the evidence of harassment since 1985. The very nature of the periodic extensions indicates that, after a number of years, it is necessary to reassess the SWP's situation to see if the reasonable probability of harassment still exists.[3]

II. *Facts Presented*

In the request for the exemption granted in Advisory Opinion 1990-13 and in your present request, you have presented facts indicating SWP's status as a minor party since its founding in 1938. Despite running a presidential candidate in every election since 1948 and numerous other candidates for Federal, state, and local offices, no SWP candidate has ever been elected to public office in a partisan election. You have presented data from the 1992 and 1994 elections indicating very low vote totals for SWP presidential and senatorial candidates.

Advisory Opinion 1990-13 discusses the long history of governmental harassment of the SWP. The opinion describes FBI investigative activities lasting from 1941 to 1976 that included the extensive use of informants to gather information on SWP activities and on the personal lives of SWP members, warrantless electronic surveillance, surreptitious entry of SWP offices, other disruptive activity, including attempts to embarrass SWP candidates and to foment strife within the SWP and between the SWP and others, and frequent interviews of employers and landlords of SWP members.[4]

The advisory opinion also referred to statements made by Federal governmental officials in several agencies expressing the need for information about the SWP based on the officials' unfavorable perceptions of the SWP. These statements were made in affidavits submitted during 1987 in connection with *Socialist Workers Party v. Attorney General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction preventing the government from using, releasing, or disclosing information on the SWP unlawfully obtained or developed from unlawfully obtained material, except in response to a court order or an FOIA request.[5]

The opinion also discussed incidents of private and local governmental harassment of the SWP and those associating with it during the period from 1985 through the beginning of 1990. These included private threats and private acts of violence and vandalism, as well as harassment by local police.

As evidence of continuing private and governmental harassment of the SWP and those associated with the SWP during the 1990-1996 period, you have provided descriptions with supporting signed declarations or other documentation as to approximately 70 incidents. Incidents of harassment from private sources included (but were not limited to) acts of vandalism against SWP offices and SWP-related bookstores; threats and acts of violence from persons identifying themselves as members of the Ku Klux Klan; threats and acts of violence by anti-Castro activists; negative actions by, or statements from, employers against persons apparently as a result of those persons' association with the SWP; and abusive behavior toward SWP candidates or other persons publicly associating with the SWP.

Specific examples of the above-described activities area as follows: (1) The windows of SWP headquarters in Detroit, St. Louis, Kansas City, and Chicago were broken, in two cases from thrown objects (a piece of asphalt and a rock). A bullet was fired through the window of the Des Moines headquarters in 1992. A swastika and a "White Power" slogan were spray-painted on the building that housed SWP offices and the Pathfinder bookstore in Birmingham (AL) in 1991. (2) In 1994, the SWP office in Philadelphia (PA) received an abusive letter that was clearly intended to intimidate from a person representing himself as the Grand Dragon of the Pennsylvania KKK (with letterhead stating "The Revolutionary Knights of the Ku Klux Klan," and a mailing address of the state headquarters, as well as a card with the same information). In 1990 and 1991, threatening phone messages were left on the SWP answering machine in Greensboro (NC) by persons identifying themselves as with the KKK. In 1991, two threatening stickers, one purportedly from the KKK, were placed on the entrances of the SWP's Greensboro offices. (3) Anti-Castro activists in Miami overturned SWP informational tables in Miami in 1993 and 1996, and physically assaulted SWP personnel at informational tables in New Jersey in 1995 and 1993. The SWP headquarters in Miami received a number of threatening phone calls in Spanish after radio appearances by SWP candidates in 1993.[6] (4) In 1995, a woman, who was a politically active socialist and had been an SWP congressional candidate, was denied employment at a mine in Utah. The Employee Relations Director had informed her of his investigation of her socialist political activities, and they appear to have been a disqualifying factor. (5) In several cities, individuals who were known as SWP supporters were subject to insults, written threats, and vandalism, from co-workers, related to their political stances and activities.

Your request includes descriptions and documentation of approximately 20 incidents involving police interactions with SWP workers. Many of these incidents entailed demands by police to remove informational tables or to cease other activities involving petition-signing or the distribution of printed materials in public places. The police would assert that the SWP workers were obstructing pedestrian traffic or acting without a permit or peddler's license. They would sometimes arrest or give citations to the SWP workers. In almost all of those cases, the local prosecutor would drop the charges or the cases would be dismissed. These incidents sometimes appear to involve actions by the police that were apparently motivated by a hostile feeling toward the SWP or the views expressed by the SWP.

Two examples of these cases are as follows: (1) In 1996, three SWP workers who were petitioning for the placement of SWP candidates for president and vice president on the state ballot were taken to the police station by the New York City Parks Department Police and charged with unlawful solicitation and illegal assembly. Their materials, including the petitions, were held by the police for a week and returned after protests by NYCLU and the SWP. The charges were later dismissed in court. (2) According to a 1991 letter from counsel for the New Jersey chapter of the ACLU to the Newark Corporation Counsel, three policemen, two of them mounted, intimidated SWP workers who had set up a literature table outside of local SWP headquarters. The officers blocked access to the table and the book store for over one-half hour and threatened and verbally abused the workers (including comments related to their political views). The workers decided to take down the table.

You present only a few incidents that relate to SWP interaction with governmental officials other than local police. The two most significant events relate to the job status of SWP members: (1) A

civilian employee at the Alameda Naval Aviation Depot was investigated by the Office of Special Counsel (OSC) for violations of the Hatch Act because he ran for the San Francisco Board of Supervisors in 1992, distributed campaign literature for candidates running in partisan elections, and held positions in the SWP. Although candidates for the Board of Supervisors did not run under party labels, OSC noted that the employee accepted the endorsement and support of the SWP. Even though OSC concluded that violations occurred, it decided not to seek disciplinary action against the employee while noting that subsequent violations would be considered knowing and willful. The employee maintained that he should not have been considered a partisan candidate, that the investigation occurred only after his superiors at Alameda became concerned with the content of his views, and that other employees thought to have violated the Hatch Act were merely warned without a referral to OSC. (2) In 1991, the security clearance of an Air Force enlisted man was suspended, and he was transferred from his job as a computer programmer with the nuclear targeting staff to a job as a clerk at the base housing office. The airman was a member of the SWP's affiliate, the Young Socialist Alliance (YSA). The suspension occurred on the day he returned to work from a YSA convention. A subsequent Air Force letter notified the airman of the opening of a security investigation (to resolve the question of his clearance) based on his involvement in socialist organizations, unreported contact with a foreign national (referring to contact at the convention), and perceived questionable loyalty, honesty, and reliability in his previous workcenter. In reply to this letter, the airman disputed the charge as to the foreign national and noted his favorable reviews by supervisors and his initiative on the job. The airman resigned before the end of the investigation as a result of his inability to obtain a promotion in the field under which he enlisted, which would have required regaining his security clearance.

A review of the information presented by you indicates that the SWP and persons publicly associated with it have experienced a significant amount of harassment from private sources in the 1990-1996 period. Such harassment appears to have been intended to intimidate the SWP and persons associated with it from engaging in their political activities and in expressing their political views. There is also evidence of continuing harassment by local police, similar to incidents discussed in the 1990 opinion.

Based on the evidence presented, the hostility from other governmental sources appears to have abated. As indicated above, massive Federal governmental surveillance and disruption was discontinued well before 1990. Moreover, you do not present evidence similar to the affidavits filed by Federal officials in 1987, referred to above, indicating negative attitudes toward the SWP and the need to gather information on it. The incidents involving the naval employee and the airman are difficult to assess without complete information, although the airman's situation presents the possibility of a chilling effect on public association with the SWP.

Nevertheless, the continuation of harassment from private and local police sources during the 1990-1996 period, coupled with the long history of harassment of the SWP, is still sufficient evidence that there is a reasonable probability that the compelled public disclosure of previously exempted information will subject the persons in the exempted categories to threats or harassment from various sources. The Commission, therefore, grants the committees supporting the candidates of the SWP the exemption provided for in the consent agreements and in Advisory Opinion 1990-13, with one new condition described below. Consistent with the length

of the exemption granted in 1990, this exemption is to last for the reports covering the next six years, i.e., through December 31, 2002.[7] At least sixty days prior to December 31, 2002, the SWP may submit a new advisory opinion request seeking a renewal of the exemption. If a request is submitted, the Commission will consider the factual information then presented as to harassment after 1996, or the lack thereof, and will make a decision at that time as to the renewal.

As in Advisory Opinion 1990-13, the Commission emphasizes that the committees supporting the Federal office candidates of the SWP must still comply with all of the remaining requirements of the Act and Commission regulations. The committees must file reports containing the information required by 2 U.S.C. 434(b) with the exception of the information specifically exempted, and the committees must keep and maintain records as required under 2 U.S.C. 432 with sufficient accuracy so as to be able to provide information, otherwise exempt from disclosure, in connection with a Commission investigation. In addition to complying with the requirements of the decrees, the committees must file all reports required under 2 U.S.C. 434(a) in a timely manner. The committees must also comply with the provisions of the Act governing the organization and registration of political committees. See, e.g., 2 U.S.C. 432 and 433. Adherence to the disclaimer provisions of 2 U.S.C. 441d is also required. Finally, the committees must comply with the Act's contribution limitations and prohibitions. 2 U.S.C. 441a, 441b, 441c, 441e, 441f, and 441g.

As indicated above, the Commission adds one new condition to the reporting requirements. In partial reporting exemptions granted to an SWP campaign committee and various SWP candidates for state or local office, the agencies administering campaign disclosure in the States of Washington and Iowa have required that the committees assign a code number to each contributor whose name and address is not being disclosed. The Iowa agency required that the committee keep books and records that would correlate the code numbers with the names and contributions. The Commission believes that a requirement of assigning a code number for each contributor and reporting that code number when disclosing a contribution by that person would enable a reviewer of that report (i.e., either the Commission staff or a member of the public) to determine whether contributions in excess of the limits of 2 U.S.C. 441a are being made. At the same time, such a requirement would not diminish the anonymity that is already given to contributors under Advisory Opinion 1990-13 and the consent decrees. Therefore, each committee entitled to the exemption should assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar year. That code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. Consistent with the requirement that the committees comply with the recordkeeping provisions of the Act, the committee's records should correlate each code number with the name and other identification data of the contributor who is represented by that code.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

John Warren McGarry
Chairman

Enclosure (AO 1990-13)

1 Nevertheless, the agreement also stated that if the Commission found reason to believe that the committees violated a provision of the Act, other than those for which an exemption was specified, but needed the withheld information in order to proceed, the Commission could apply to the court for an order requiring the production of such information.
2 In view of the specific provisions of the 1979 amendments to the disclosure provisions, the agreement also makes reference to an exemption for reporting the identification of persons providing rebates, refunds or other offsets to operating expenditures, and persons providing any dividend, interest or other receipt.
3 In addition, the courts in *Brown and Hall-Tyner* rendered their decisions with reference to recent or current events or factors, as well as a history of harassment, i.e., recent incidents of harassment against the SWP and extant statutes directed against the Communist Party.
4 As noted in the opinion, these activities were set out in the Final Report of Special Master Judge Breitel in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980) and in *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357 (S.D.N.Y. 1986), a case in which the Federal District Court awarded judgment against the United States under the Federal Tort Claims Act for disruption activities, surreptitious entries, and use of informants by the FBI.
5 See Advisory Opinion 1990-13 for a further discussion of the implications of the unfavorable statements.
6 You also provide a declaration from an SWP congressional candidate from Florida who noted that some of her airline co- workers asked that SWP newspapers not be delivered to their homes and that they be hand-delivered at work instead, or that the newspapers be mailed in envelopes.
7 As stated above, you have asked for an exemption period that is similar to the previous period because that period was to last through the next two presidential election cycles. Nevertheless, the more important aspect of this exemption is the actual length of time, and that is why six years, not eight, is being granted. Moreover, in view of the apparent abatement in governmental harassment, a longer time interval between the dates when the Commission reviews its grant of the partial exemption is unwarranted.

Exh. C - 6 pages

Exhibit C

C - 1

BEFORE THE SEATTLE
ETHICS AND ELECTIONS COMMISSION

In the Matter of	)	
	)	No. [redacted]
CHRIS HOEPPNER AND HIS CAMPAIGN COMMITTEE	)	
	)	DECISION AND ORDER GRANTING
Application for Modification of Reporting Requirements	)	AMENDED REQUEST FOR MODIFICATION
	)	

Decision and Order Granting Amended Request for Modification

This matter came on for hearing at a Special Meeting of the Seattle Ethics and Elections Commission, held on July 14, 2005, upon the written request of Chris Hoeppner, candidate for Mayor, and the Socialist Worker's Party, for modification of certain campaign disclosure requirements as provided for under Seattle Municipal Code ("SMC") Chapter 2.04. Because the election for office of Mayor is non-partisan and there is no provision in the Seattle Municipal Code ("SMC") for registration or application by a political party, this matter will be treated as if filed by Mr. Hoeppner and his campaign committee as required under SMC 2.04.320. Hereafter Mr. Hoeppner and his political campaign committee shall be referred to as "Applicants." Specifically, Applicants requested "an exemption from the requirements of SMC 2.04 for disclosure of the names and addresses of contributors, vendors, and employers of contributors and vendors." Letter dated June 24, 2005 from James E. Lobsenz to Wayne Barnett, p. 1.

Present at the hearing were James E. Lobsenz, attorney for the Applicants; Commissioners Paul Dayton, Bruce Heller, Gregg Hirakawa, Mel Kang, Robert Mahon, Nancy Miller and Michele Radosevich; Assistant City Attorney Sandra Cohen and the Executive Director Wayne Barnett. The Commission accepted documentary evidence submitted by the Campaign and heard remarks from Mr. Lobsenz and Mr. Barnett.

Findings of Fact:

1. Chris Hoeppner is publicly associated with, and is a registered member of, the Socialist Workers Party ("SWP"), a minor political party. Hoeppner intends to run on a platform identifying his association with and advancing the views espoused by the SWP. The party advocates establishing a workers and farmers government and joining the worldwide struggle for socialism.

2. The Socialist Workers Party is a minor political party in the United States that never has come close to winning a campaign in the United States. Letter dated June 24, 2005 from James E. Lobsenz to Wayne Barnett, p. 5. It

espouses dissident views Although there are no recent incidents of threats, harassment or reprisals in the Seattle area, SWP members have been subject to recent threats and harassment by private persons in other areas of the country because of the viewpoints for which that party is known. For example, on September 11, 2004, a SWP campaign office in Hazelton Pennsylvania was firebombed when someone threw a brick wrapped in incendiary material through the front window. In June 2004, SWP campaign headquarters in San Francisco received a message on its answering machine stating, "This message is for the Socialist Workers Party. I just wanted to let you know that you are all (inaudible) subversive literature, and you are all going to pay for it." In May 2004, SWP campaign headquarters in San Francisco received a message stating "I've seen some of your recent literature. . . anyway, you're talking about what the occupation, quote-unquote, is like in Iraq. You don't say anything about the good that's being done over there. We'll be keeping an eye on you." Letter dated June 24, 2005 from James E. Lobsenz to Wayne Barnett, pp. 15-16.

3. The viewpoints publicly advocated by Applicants are the same or similar to those espoused by Linda Averill, a candidate for Seattle City Council in this election cycle associated with the Freedom Socialist Party, a minor political party which has been subjected to recent threats and harassment via personal contact, telephone messages, and email within the past two years in the Seattle area. Ms. Averill and her campaign committee were granted a limited exemption from the disclosure requirements of SMC 2.04.320 by Order of this Commission dated June 28, 2005.

4. The facts found in paragraphs 1, 2, and 3 above lead the Commission to find Applicants have shown a reasonable probability that the compelled disclosure of the Campaign's contributors' and vendors' names will subject the contributors and vendors to threats, harassment, or reprisals from either government officials or private parties.

5. Applicants have agreed to use a coded numbering system whereby the Campaign would assign a single code number to each contributor and each person to whom expenditures are made and to report amounts contributed and paid according to those code numbers. Applicants have also agreed to provide disclosure of the zip codes of contributors and vendors.

Conclusions of Law:

6. SMC 2.04.320 provides for an exemption from disclosure requirements under SMC Chapter 2.04 as follows:

> A. An exemption from the disclosure requirements of this chapter shall be granted by the [Commission] to a political association or political committee if such political association or political committee has applied

from either government officials or private parties, and that as a result of such disclosure it is reasonably probable that advocacy of a dissident view will be hindered and the right to free association chilled.

7. The Socialist Workers Party's status as a minority political party, [illegible] that the reasonable probability of threats, harassment and reprisals ... his contributors and vendors would adversely impact rights of association and advocacy of dissident views under the First Amendment of the United States Constitution. No evidence that has been presented to this Commission overcomes this legal presumption in this case.

8. Applicants have made a proper showing under SMC 2.04.320 for an exemption from disclosure requirements.

NOW THEREFORE

IT IS ORDERED that the amended request for modification is GRANTED, with the condition that the Applicants shall provide four categories of coded information, representing the names, addresses, employers and occupations, of contributors and vendors where the underlying information is otherwise required by Seattle Municipal Code Chapter 2.04, and shall provide the zip codes of contributors and vendors.

The Campaign shall make available its public disclosure reports for public inspection during the eight days before election, but not its books of account; except that, if the Commission determines a review of the Campaign's books of account is necessary, the records shall be made available to an independent third party mutually agreed to by the Campaign and the Commission.

Dated this 10th day of August, 2005.

FOR THE SEATTLE ETHICS AND ELECTIONS COMMISSION

Bruce Heller, Chair.
Seattle Ethics and Elections Commission

C-4

BEFORE THE SEATTLE
ETHICS AND ELECTIONS COMMISSION

In the Matter of	)	
	)	[redacted]
CHRIS HOEPPNER AND HIS CAMPAIGN COMMITTEE	)	
	)	DECISION AND ORDER GRANTING
Application for Modification of Reporting Requirements	)	AMENDED REQUEST FOR MODIFICATION
	)	

Decision and Order Granting Amended Request for Modification

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Present at the hearing were James E. Lobsenz, attorney for the Applicants; Commissioners Paul Dayton, Bruce Heller, Gregg Hirakawa, Mel Kang, Robert Mahon, Nancy Miller and Michele Radosevich; Assistant City Attorney Sandra Cohen and the Executive Director Wayne Barnett. The Commission accepted documentary evidence submitted by the Campaign and heard remarks from Mr. Lobsenz and Mr. Barnett.

Findings of Fact:

1. Chris Hoeppner is publicly associated with, and is a registered member of, the Socialist Workers Party ("SWP"), a minor political party. Hoeppner intends to run on a platform identifying his association with and advancing the views espoused by the SWP. The party advocates establishing a workers and farmers government and joining the worldwide struggle for socialism.

2. The Socialist Workers Party is a minor political party in the United States that never has come close to winning a campaign in the United States. Letter dated June 24, 2005 from James E. Lobsenz to Wayne Barnett, p. 5. It

espouses dissident views. Although there are no recent incidents of threats, harassment or reprisals in the Seattle area, SWP members have been subject to recent threats and harassment by private persons in other areas of the country because of the viewpoints for which that party is known. For example, on September 11, 2004, a SWP campaign office in Hazelton Pennsylvania was firebombed when someone threw a brick wrapped in incendiary material through the front window. In June 2004, SWP campaign headquarters in San Francisco received a message on its answering machine stating, "This message is for the Socialist Workers Party. I just wanted to let you know that you are all (inaudible) subversive literature, and you are all going to pay for it." In May 2004, SWP campaign headquarters in San Francisco received a message stating "I've seen some of your recent literature. . . anyway, you're talking about what the occupation, quote-unquote, is like in Iraq. You don't say anything about the good that's being done over there. We'll be keeping an eye on you." Letter dated June 24, 2005 from James E. Lobsenz to Wayne Barnett, pp. 15-16.

3. The viewpoints publicly advocated by Applicants are the same or similar to those espoused by Linda Averill, a candidate for Seattle City Council in this election cycle associated with the Freedom Socialist Party, a minor political party which has been subjected to recent threats and harassment via personal contact, telephone messages, and email within the past two years in the Seattle area. Ms. Averill and her campaign committee were granted a limited exemption from the disclosure requirements of SMC 2.04.320 by Order of this Commission dated June 28, 2005.

4. The facts found in paragraphs 1, 2, and 3 above lead the Commission to find Applicants have shown a reasonable probability that the compelled disclosure of the Campaign's contributors' and vendors' names will subject the contributors and vendors to threats, harassment, or reprisals from either government officials or private parties.

5. Applicants have agreed to use a coded numbering system whereby the Campaign would assign a single code number to each contributor and each person to whom expenditures are made and to report amounts contributed and paid according to those code numbers. Applicants have also agreed to provide disclosure of the zip codes of contributors and vendors.

Conclusions of Law:

6. SMC 2.04.320 provides for an exemption from disclosure requirements under SMC Chapter 2.04 as follows:

> A. An exemption from the disclosure requirements of this chapter shall be granted by the [Commission] to a political association or political committee if such political association or political committee has applied

in writing to the [Commission] for such exemption and has demonstrated by a reasonable probability that the compelled disclosure of contributors' names will subject the contributors to threats, harassment, or reprisals from either government officials or private parties, and that as a result of such disclosure it is reasonably probable that advocacy of a dissident view will be hindered and the right to free association chilled.

7. The Socialist Workers Party's status as a minority political party, and Chris Hoeppner's public association therewith, supports the legal presumption identified in *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), that the reasonable probability of threats, harassment and reprisals to his contributors and vendors would adversely impact rights of association and advocacy of dissident views under the First Amendment of the United States Constitution. No evidence that has been presented to this Commission overcomes this legal presumption in this case.

8. Applicants have made a proper showing under SMC 2.04.320 for an exemption from disclosure requirements.

NOW THEREFORE

IT IS ORDERED that the amended request for modification is GRANTED, with the condition that the Applicants shall provide four categories of coded information, representing the names, addresses, employers and occupations, of contributors and vendors where the underlying information is otherwise required by Seattle Municipal Code Chapter 2.04, and shall provide the zip codes of contributors and vendors.

The Campaign shall make available its public disclosure reports for public inspection during the eight days before election, but not its books of account; except that, if the Commission determines a review of the Campaign's books of account is necessary, the records shall be made available to an independent third party mutually agreed to by the Campaign and the Commission.

Dated this _____day of August, 2005.

FOR THE SEATTLE ETHICS AND ELECTIONS COMMISSION

_____

Bruce Heller, Chair,
Seattle Ethics and Elections Commission

Exh. D - 7 pages

Exhibit D

D-1

DECLARATION

I, John Studer, submit the following list of election results for Socialist Workers candidates for public office since 2002, in support of the application to the Federal Elections Commission for an advisory opinion that the Socialist Workers Party, the Socialist Workers Party's National Campaign Committee, and the committees supporting the candidates of the Socialist Workers Party are entitled to an exemption from certain disclosure provisions of the Federal Elections Campaign Act.

1. I prepared the accompanying list.

2. Since January 1, 2002, the Socialist Workers candidates have won no elections.

3. In addition to candidates for federal office, since January 2002, the Socialist Workers Party has run candidates in the states of Alabama, California, Florida, Georgia, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, and Texas, and the municipalities of Atlanta, Georgia; Birmingham, Alabama; Boston, Massachusetts; Cleveland, Ohio; Des Moines, Iowa; Hazleton, Pennsylvania; Houston, Texas; Los Angeles, California; Miami, Florida; Newark, New Jersey; New York, New York; Philadelphia and Pittsburgh, Pennsylvania; St. Paul, Minnesota; San Francisco, California; Seattle, Washington; and Washington, D.C. Whenever there were applicable reporting requirements in these locations, elections authorities accepted the filing, including the SWP's claimed exemption.

I declare under penalty of perjury that the foregoing is true and correct. Executed October 11, 2008 in Philadelphia, Pennsylvania.

John Studer
October 11, 2008

D-2

Socialist Workers Presidential Ticket

2004: Róger Calero for president
Arrin Hawkins for vice-president

- on the ballot in 14 states: Colorado, Florida, Iowa, Louisiana, Minnesota, Mississippi, Nebraska, New Jersey, New York, Utah, Vermont, Washington, and Wisconsin.
- 10,791 votes in those 14 states; 0.01%

2008: Róger Calero for president
Alyson Kennedy for vice-president

- On the ballot in 10 states: Colorado, Delaware, Florida, Iowa, Louisiana, Minnesota, New Jersey, New York, Vermont, and Washington. Official write-in status pending in California, Connecticut, and Georgia.

D-3

Socialist Workers Candidates for U.S. Senate

2004

Candidate	State	Vote total	Percentage
Edwin Fruit	Iowa	1,874	0.13%
Martín Koppel	New York	14,811	0.22%

In addition to the above two states where Socialist Workers candidates for U.S. Senate were on the ballot, there were also write-in campaigns in Alabama, California, Colorado, Florida, Georgia, Illinois, Pennsylvania, and Washington. No vote totals are available for these write-in candidates.

2006

Candidate	State	Vote total	Percentage
Angela Lariscy	New Jersey	3,433	0.15%
Róger Calero	New York	6,697	0.16%

In addition to the above two states where Socialist Workers candidates for U.S. Senate were on the ballot, there were also write-in campaigns in California, Florida, Minnesota, Pennsylvania, Texas, and Washington. No vote totals are available for these write-in candidates.

D-4

Socialist Workers Candidates for U.S. House of Representatives

2002

Candidate	State	Vote total	Percentage
Edwin Fruit	Iowa	569	0.002%

In addition to the above state where Socialist Workers candidates for U.S. Congress were on the ballot, there were also write-in campaigns in California, Colorado, Georgia, Illinois, New York, Pennsylvania, Texas and Washington. No vote totals are available for these write-in candidates.

2004

Candidate	State	Vote total	Percentage
Ved Dookhun	New Jersey	2,089	1.30%
Angel Lariscy	New Jersey	887	0.56%

In addition to the above state where Socialist Workers candidates for U.S. Congress were on the ballot, there were also write-in campaigns in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Michigan, Minnesota, Nebraska, New York, Pennsylvania, Texas, and for Delegate to the House of Representatives in Washington, D.C. No vote totals are available for these write-in candidates.

2006

Candidate	State	Vote total	Percentage
Helen Meyers	Iowa	3,591	1.61%
Brian Williams	New Jersey	1,049	1.05%

In addition to the above state where Socialist Workers candidates for U.S. Congress were on the ballot, there were also write-in campaigns in California, Florida, Georgia, Illinois, Massachusetts, Minnesota, New York, Pennsylvania, Texas, and for Delegate to the House of Representatives in Washington, D.C. No vote totals are available for these write-in candidates.

In addition to federal candidates, the Socialist Workers Party ran candidates for numerous state and municipal offices, most of them write-in candidates

2002

Alabama: Governor; **California:** Governor, Lt. Governor, Secretary of State; **District of Columbia:** Mayor; **Florida:** Governor, Lt. Governor, Commissioner of Agriculture; **Illinois:** Governor, Lt. Governor, Secretary of State; **Massachusetts:** Governor, Lt. Governor; **Michigan:** Governor; **Minnesota:** Governor, Lt. Governor; **Nebraska:** Governor; **New York:** Governor, Lt. Governor, Comptroller; **Ohio:** Governor, Lt. Governor, Attorney General; **Pennsylvania:** Governor, Lt. Governor; and **Texas:** Governor.

2003

Alabama: Mayor, Birmingham; **California:** Governor, District Attorney, San Francisco, Mayor, San Francisco; **Iowa:** Mayor, Des Moines; **Massachusetts:** City Council, Boston; **Minnesota:** City Council, St. Paul; **New Jersey:** State Senator; **Pennsylvania:** Mayor, Hazleton; Mayor, Philadelphia, City Council, Philadelphia, County Executive, Pittsburgh; **Texas:** Mayor, Houston; and **Washington:** City Council, Seattle.

2004

Massachusetts: State representative, Suffolk County; **Ohio:** Board of Education, Cleveland; **Pennsylvania:** State Senate, Philadelphia, General Assembly, Hazleton; and **Washington, D.C.:** City Council.

2005

Alabama: City Council, Birmingham, School Board, Birmingham; **California:** City Treasurer, San Francisco, City Attorney, San Francisco, Assessor-Recorder, San Francisco, City Council, Los Angeles; **Florida:** Mayor, Miami, City Commission, Miami; **Georgia:** Mayor, Atlanta, City Council, Atlanta; **Iowa:** City Council, Des Moines; **Massachusetts:** Mayor, Boston, City Council, Boston; **Minnesota:** Mayor, St. Paul, School Board, St. Paul; **New Jersey:** Governor, State Assembly; **New York:** Mayor, Comptroller, Manhattan Borough President, Bronx Borough President; **Pennsylvania:** City Attorney, Philadelphia, City Controller, Philadelphia, Mayor, Pittsburgh, City Council, Pittsburgh; and **Washington:** Mayor, Seattle, City Council, Seattle, King County Executive.

2006

Alabama: Governor, Commissioner of Agriculture; **California:** Governor, Secretary of State, Board of Education, San Francisco; **Florida:** Governor, State Representative; **Georgia:** Governor, Lt. Governor; **Iowa:** Governor, Lt. Governor, Secretary of Agriculture; **Massachusetts:** Governor; **Minnesota:** Governor, Lt. Governor; **New Jersey:** Mayor, Newark; **New York:** Governor, Lt. Governor,

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Attorney General, Comptroller; **Pennsylvania:** Governor, Lt. Governor, State Representative; **Texas:** Governor; and **Washington, D.C.:** Mayor, City Council.

2007

California: District Attorney, San Francisco; **Iowa:** Mayor, Des Moines, City Council, Des Moines; and **Pennsylvania:** Mayor, Philadelphia, City Council, Philadelphia; Mayor, Pittsburgh.

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In 2008 the Socialist Workers Party is running the following candidates in addition to its presidential ticket:

California: Lea Sherman, U.S. Congress, 8th CD; Gerardo Sánchez, U.S. Congress 12th C.D.; Michael Ortega, U.S. Congress 34th C.D.; Arlene Rubenstein, U.S. Congress 37th C.D.

Florida: Omari Musa, U.S. Congress 21st C.D.; Margaret Trowe, U.S. Congress 17th C.D.

Georgia: Eleanor García, U.S. Senate; Jeanne Fitzmaurice, U.S. Congress 4th C.D.; Jacob Perasso, U.S. Congress 5th C.D.

Illinois: Betsy Farley, U.S. Senate; John Hawkins, U.S. Congress, 1st C.D.; Laura Anderson, U.S. Congress 4th C.D.; Dennis Richter, U.S. Congress 7th C.D.

Iowa: Frank Forrestal, U.S. Congress, 3rd C.D.

Massachusetts: Laura Garza, U.S. Senate; William Leonard, State Senate, 2nd Suffolk District.

Minnesota: Ernest Mailot, U.S. Senate; Tom Fiske, U.S. Congress 4th C.D.; Rebecca Williamson, U.S. Congress 5th C.D.

New Jersey: Sara Lobman, U.S. Senate; Michael Taber, U.S. Congress

New York: Martín Koppel, U.S. Congress 15th C.D.; Dan Fein, U.S. Congress 10th C.D.; Ben Joyce, U.S. Congress 7th C.D.; Maura Deluca, U.S. Congress 16th C.D.

Pennsylvania: Osborne Hart, U.S. Congress 2nd C.D.

Texas: Jacquie Henderson, U.S. Senate; Amanda Ulman, U.S. Congress 9th C.D.; Steven Warshell, U.S. Congress 18th C.D.; Anthony Dutrow, State Representative District 138.

Washington: Chris Hoeppner, Governor; Mary Martin, U.S. Congress 7th C.D.

Washington, D.C.: Seth Dellinger, Delegate to U.S. Congress; Sam Manuel, City Council At-Large.

Exh. E - 1 page

Exhibit E

E - 1

DECLARATION

I, Lea Sherman, make this declaration in support of the application to the Federal Elections Commission for an advisory opinion that the SWP, the SWP's National Campaign Committee, and the committees supporting candidates of the SWP are entitled to an exemption from certain disclosure provisions of the Federal Election Campaign Act.

I make this statement on the basis of my personal knowledge:

1. I am the current treasurer of the Socialist Workers National Campaign Committee and have been its treasurer since October, 2007.
2. I reviewed the numbers of contributors to the committee and the total number of contributors of $300 or more, a randomly low dollar amount for the 2008 campaign until October 25.
3. So far in 2008, 243 people contributed funds to the committee. There were nine contributions over $300 to the committee.
4. I also reviewed the numbers of contributors to the committee in 2004. In 2004, 321 people contributed funds to the committee. There were 17 contributions over $300 to the committee.
5. The Socialist Workers Party has not received any "bundled" contributions that would require disclosure, and does not foresee receiving any such contributions. A bundled contribution is a contribution to a candidate committee or party committee or a leadership PAC that is either forwarded to the committee from a contributor by a registered lobbyist (or a PAC controlled by a registered lobbyist), or is received from a contributor but credited to a registered lobbyist (or a PAC controlled by a registered lobbyist). The law requires a committee to disclose the name, address and employer of each person who made two or more bundled contributions in an aggregate amount of more than $15,000.
6. The Socialist Workers Party does not have any registered lobbyist. It never has had any registered lobbyists nor does it plan to.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 25, 2008 in San Francisco, California.

Lea Sherman

Lea Sherman
October 25, 2008

Exh. F - 46 pages

Exhibit F

THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS

F-2

PREAMBLE

These Guidelines are issued under the authority of the Attorney General as provided in sections 509, 510, 533, and 534 of title 28, United States Code, and Executive Order 12333. They apply to domestic investigative activities of the Federal Bureau of Investigation (FBI) and other activities as provided herein.

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INTRODUCTION

As the primary investigative agency of the federal government, the Federal Bureau of Investigation (FBI) has the authority and responsibility to investigate all violations of federal law that are not exclusively assigned to another federal agency. The FBI is further vested by law and by Presidential directives with the primary role in carrying out investigations within the United States of threats to the national security. This includes the lead domestic role in investigating international terrorist threats to the United States, and in conducting counterintelligence activities to meet foreign entities' espionage and intelligence efforts directed against the United States. The FBI is also vested with important functions in collecting foreign intelligence as a member agency of the U.S. Intelligence Community. The FBI accordingly plays crucial roles in the enforcement of federal law and the proper administration of justice in the United States, in the protection of the national security, and in obtaining information needed by the United States for the conduct of its foreign affairs. These roles reflect the wide range of the FBI's current responsibilities and obligations, which require the FBI to be both an agency that effectively detects, investigates, and prevents crimes, and an agency that effectively protects the national security and collects intelligence.

The general objective of these Guidelines is the full utilization of all authorities and investigative methods, consistent with the Constitution and laws of the United States, to protect the United States and its people from terrorism and other threats to the national security, to protect the United States and its people from victimization by all crimes in violation of federal law, and to further the foreign intelligence objectives of the United States. At the same time, it is axiomatic that the FBI must conduct its investigations and other activities in a lawful and reasonable manner that respects liberty and privacy and avoids unnecessary intrusions into the lives of law-abiding people. The purpose of these Guidelines, therefore, is to establish consistent policy in such matters. They will enable the FBI to perform its duties with effectiveness, certainty, and confidence, and will provide the American people with a firm assurance that the FBI is acting properly under the law.

The issuance of these Guidelines represents the culmination of the historical evolution of the FBI and the policies governing its domestic operations subsequent to the September 11, 2001, terrorist attacks on the United States. Reflecting decisions and directives of the President and the Attorney General, inquiries and enactments of Congress, and the conclusions of national commissions, it was recognized that the FBI's functions needed to be expanded and better integrated to meet contemporary realities:

> [C]ontinuing coordination . . . is necessary to optimize the FBI's performance in both national security and criminal investigations . . . . [The] new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old "wall" between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very

different FBI from the one we had on September 10, 2001. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 466, 452 (2005).)

In line with these objectives, the FBI has reorganized and reoriented its programs and missions, and the guidelines issued by the Attorney General for FBI operations have been extensively revised over the past several years. Nevertheless, the principal directives of the Attorney General governing the FBI's conduct of criminal investigations, national security investigations, and foreign intelligence collection have persisted as separate documents involving different standards and procedures for comparable activities. These Guidelines effect a more complete integration and harmonization of standards, thereby providing the FBI and other affected Justice Department components with clearer, more consistent, and more accessible guidance for their activities, and making available to the public in a single document the basic body of rules for the FBI's domestic operations.

These Guidelines also incorporate effective oversight measures involving many Department of Justice and FBI components, which have been adopted to ensure that all FBI activities are conducted in a manner consistent with law and policy.

The broad operational areas addressed by these Guidelines are the FBI's conduct of investigative and intelligence gathering activities, including cooperation and coordination with other components and agencies in such activities, and the intelligence analysis and planning functions of the FBI.

A. FBI RESPONSIBILITIES – FEDERAL CRIMES, THREATS TO THE NATIONAL SECURITY, FOREIGN INTELLIGENCE

Part II of these Guidelines authorizes the FBI to carry out investigations to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence. The major subject areas of information gathering activities under these Guidelines – federal crimes, threats to the national security, and foreign intelligence – are not distinct, but rather overlap extensively. For example, an investigation relating to international terrorism will invariably crosscut these areas because international terrorism is included under these Guidelines' definition of "threat to the national security," because international terrorism subject to investigation within the United States usually involves criminal acts that violate federal law, and because information relating to international terrorism also falls within the definition of "foreign intelligence." Likewise, counterintelligence activities relating to espionage are likely to concern matters that constitute threats to the national security, that implicate violations or potential violations of federal espionage laws, and that involve information falling under the definition of "foreign intelligence."

While some distinctions in the requirements and procedures for investigations are necessary in different subject areas, the general design of these Guidelines is to take a uniform

approach wherever possible, thereby promoting certainty and consistency regarding the applicable standards and facilitating compliance with those standards. Hence, these Guidelines do not require that the FBI's information gathering activities be differentially labeled as "criminal investigations," "national security investigations," or "foreign intelligence collections," or that the categories of FBI personnel who carry out investigations be segregated from each other based on the subject areas in which they operate. Rather, all of the FBI's legal authorities are available for deployment in all cases to which they apply to protect the public from crimes and threats to the national security and to further the United States' foreign intelligence objectives. In many cases, a single investigation will be supportable as an exercise of a number of these authorities – i.e., as an investigation of a federal crime or crimes, as an investigation of a threat to the national security, and/or as a collection of foreign intelligence.

1. Federal Crimes

The FBI has the authority to investigate all federal crimes that are not exclusively assigned to other agencies. In most ordinary criminal investigations, the immediate objectives include such matters as: determining whether a federal crime has occurred or is occurring, or if planning or preparation for such a crime is taking place; identifying, locating, and apprehending the perpetrators; and obtaining the evidence needed for prosecution. Hence, close cooperation and coordination with federal prosecutors in the United States Attorneys' Offices and the Justice Department litigating divisions are essential both to ensure that agents have the investigative tools and legal advice at their disposal for which prosecutorial assistance or approval is needed, and to ensure that investigations are conducted in a manner that will lead to successful prosecution. Provisions in many parts of these Guidelines establish procedures and requirements for such coordination.

2. Threats to the National Security

The FBI's authority to investigate threats to the national security derives from the executive order concerning U.S. intelligence activities, from delegations of functions by the Attorney General, and from various statutory sources. See, e.g., E.O. 12333; 50 U.S.C. 401 et seq.; 50 U.S.C. 1801 et seq. These Guidelines (Part VII.S) specifically define threats to the national security to mean: international terrorism; espionage and other intelligence activities, sabotage, and assassination, conducted by, for, or on behalf of foreign powers, organizations, or persons; foreign computer intrusion; and other matters determined by the Attorney General, consistent with Executive Order 12333 or any successor order.

Activities within the definition of "threat to the national security" that are subject to investigation under these Guidelines commonly involve violations (or potential violations) of federal criminal laws. Hence, investigations of such threats may constitute an exercise both of the FBI's criminal investigation authority and of the FBI's authority to investigate threats to the national security. As with criminal investigations generally, detecting and solving the crimes, and eventually arresting and prosecuting the perpetrators, are likely to be among the objectives of

investigations relating to threats to the national security. But these investigations also often serve important purposes outside the ambit of normal criminal investigation and prosecution, by providing the basis for, and informing decisions concerning, other measures needed to protect the national security. These measures may include, for example: excluding or removing persons involved in terrorism or espionage from the United States; recruitment of double agents; freezing assets of organizations that engage in or support terrorism; securing targets of terrorism or espionage; providing threat information and warnings to other federal, state, local, and private agencies and entities; diplomatic or military actions; and actions by other intelligence agencies to counter international terrorism or other national security threats.

In line with this broad range of purposes, investigations of threats to the national security present special needs to coordinate with other Justice Department components, including particularly the Justice Department's National Security Division, and to share information and cooperate with other agencies with national security responsibilities, including other agencies of the U.S. Intelligence Community, the Department of Homeland Security, and relevant White House (including National Security Council and Homeland Security Council) agencies and entities. Various provisions in these Guidelines establish procedures and requirements to facilitate such coordination.

3. Foreign Intelligence

As with the investigation of threats to the national security, the FBI's authority to collect foreign intelligence derives from a mixture of administrative and statutory sources. See, e.g., E.O. 12333; 50 U.S.C. 401 et seq.; 50 U.S.C. 1801 et seq.; 28 U.S.C. 532 note (incorporating P.L. 108-458 §§ 2001-2003). These Guidelines (Part VII.E) define foreign intelligence to mean "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons, or international terrorists."

The FBI's foreign intelligence collection activities have been expanded by legislative and administrative reforms subsequent to the September 11, 2001, terrorist attacks, reflecting the FBI's role as the primary collector of foreign intelligence within the United States, and the recognized imperative that the United States' foreign intelligence collection activities become more flexible, more proactive, and more efficient in order to protect the homeland and adequately inform the United States' crucial decisions in its dealings with the rest of the world:

> The collection of information is the foundation of everything that the Intelligence Community does. While successful collection cannot ensure a good analytical product, the failure to collect information . . . turns analysis into guesswork. And as our review demonstrates, the Intelligence Community's human and technical intelligence collection agencies have collected far too little information on many of the issues we care about most. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 351 (2005).)

These Guidelines accordingly provide standards and procedures for the FBI's foreign intelligence collection activities that meet current needs and realities and optimize the FBI's ability to discharge its foreign intelligence collection functions.

The authority to collect foreign intelligence extends the sphere of the FBI's information gathering activities beyond federal crimes and threats to the national security, and permits the FBI to seek information regarding a broader range of matters relating to foreign powers, organizations, or persons that may be of interest to the conduct of the United States' foreign affairs. The FBI's role is central to the effective collection of foreign intelligence within the United States because the authorized domestic activities of other intelligence agencies are more constrained than those of the FBI under applicable statutes and Executive Order 12333. In collecting foreign intelligence, the FBI will generally be guided by nationally-determined intelligence requirements, including the National Intelligence Priorities Framework and the National HUMINT Collection Directives, or any successor directives issued under the authority of the Director of National Intelligence (DNI). As provided in Part VII.F of these Guidelines, foreign intelligence requirements may also be established by the President or Intelligence Community officials designated by the President, and by the Attorney General, the Deputy Attorney General, or an official designated by the Attorney General.

The general guidance of the FBI's foreign intelligence collection activities by DNI-authorized requirements does not, however, limit the FBI's authority to conduct investigations supportable on the basis of its other authorities – to investigate federal crimes and threats to the national security – in areas in which the information sought also falls under the definition of foreign intelligence. The FBI conducts investigations of federal crimes and threats to the national security based on priorities and strategic objectives set by the Department of Justice and the FBI, independent of DNI-established foreign intelligence collection requirements.

Since the authority to collect foreign intelligence enables the FBI to obtain information pertinent to the United States' conduct of its foreign affairs, even if that information is not related to criminal activity or threats to the national security, the information so gathered may concern lawful activities. The FBI should accordingly operate openly and consensually with U.S. persons to the extent practicable when collecting foreign intelligence that does not concern criminal activities or threats to the national security.

B. THE FBI AS AN INTELLIGENCE AGENCY

The FBI is an intelligence agency as well as a law enforcement agency. Its basic functions accordingly extend beyond limited investigations of discrete matters, and include broader analytic and planning functions. The FBI's responsibilities in this area derive from various administrative and statutory sources. See, e.g., E.O. 12333; 28 U.S.C. 532 note (incorporating P.L. 108-458 §§ 2001-2003) and 534 note (incorporating P.L. 109-162 § 1107). Enhancement of the FBI's intelligence analysis capabilities and functions has consistently been recognized as a key priority in the legislative and administrative reform efforts following the

September 11, 2001, terrorist attacks:

> [Counterterrorism] strategy should . . . encompass specific efforts to . . . enhance the depth and quality of domestic intelligence collection and analysis . . . . [T]he FBI should strengthen and improve its domestic [intelligence] capability as fully and expeditiously as possible by immediately instituting measures to . . . significantly improve strategic analytical capabilities . . . . (Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 351 & H.R. Rep. No. 792, 107th Cong., 2d Sess. 4-7 (2002) (errata print).)

> A "smart" government would *integrate* all sources of information to see the enemy as a whole. Integrated all-source analysis should also inform and shape strategies to collect more intelligence. . . . The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to "connect the dots." (Final Report of the National Commission on Terrorist Attacks Upon the United States 401, 408 (2004).)

Part IV of these Guidelines accordingly authorizes the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The functions authorized under that Part include: (i) development of overviews and analyses concerning threats to and vulnerabilities of the United States and its interests, (ii) research and analysis to produce reports and assessments concerning matters relevant to investigative activities or other authorized FBI activities, and (iii) the operation of intelligence systems that facilitate and support investigations through the compilation and analysis of data and information on an ongoing basis.

C. OVERSIGHT

The activities authorized by these Guidelines must be conducted in a manner consistent with all applicable laws, regulations, and policies, including those protecting privacy and civil liberties. The Justice Department's National Security Division and the FBI's Inspection Division, Office of General Counsel, and Office of Integrity and Compliance, along with other components, share the responsibility to ensure that the Department meets these goals with respect to national security and foreign intelligence matters. In particular, the National Security Division's Oversight Section, in conjunction with the FBI's Office of General Counsel, is responsible for conducting regular reviews of all aspects of FBI national security and foreign intelligence activities. These reviews, conducted at FBI field offices and headquarter units, broadly examine such activities for compliance with these Guidelines and other applicable requirements.

Various features of these Guidelines facilitate the National Security Division's oversight functions. Relevant requirements and provisions include: (i) required notification by the FBI to the National Security Division concerning full investigations that involve foreign intelligence collection or investigation of United States persons in relation to threats of the national security, (ii) annual reports by the FBI to the National Security Division concerning the FBI's foreign

intelligence collection program, including information on the scope and nature of foreign intelligence collection activities in each FBI field office, and (iii) access by the National Security Division to information obtained by the FBI through national security or foreign intelligence activities and general authority for the Assistant Attorney General for National Security to obtain reports from the FBI concerning these activities.

Pursuant to these Guidelines, other Attorney General guidelines, and institutional assignments of responsibility within the Justice Department, additional Department components – including the Criminal Division, the United States Attorneys' Offices, and the Office of Privacy and Civil Liberties – are involved in the common endeavor with the FBI of ensuring that the activities of all Department components are lawful, appropriate, and ethical as well as effective. Examples include the involvement of both FBI and prosecutorial personnel in the review of undercover operations involving sensitive circumstances, notice requirements for investigations involving sensitive investigative matters (as defined in Part VII.N of these Guidelines), and notice and oversight provisions for enterprise investigations, which may involve a broad examination of groups implicated in the gravest criminal and national security threats. These requirements and procedures help to ensure that the rule of law is respected in the Department's activities and that public confidence is maintained in these activities.

I. GENERAL AUTHORITIES AND PRINCIPLES

A. SCOPE

These Guidelines apply to investigative activities conducted by the FBI within the United States or outside the territories of all countries. They do not apply to investigative activities of the FBI in foreign countries, which are governed by the Attorney General's Guidelines for Extraterritorial FBI Operations.

B. GENERAL AUTHORITIES

1. The FBI is authorized to conduct investigations to detect, obtain information about, and prevent and protect against federal crimes and threats to the national security and to collect foreign intelligence, as provided in Part II of these Guidelines.

2. The FBI is authorized to provide investigative assistance to other federal agencies, state, local, or tribal agencies, and foreign agencies as provided in Part III of these Guidelines.

3. The FBI is authorized to conduct intelligence analysis and planning as provided in Part IV of these Guidelines.

4. The FBI is authorized to retain and share information obtained pursuant to these Guidelines as provided in Part VI of these Guidelines.

C. USE OF AUTHORITIES AND METHODS

1. Protection of the United States and Its People

The FBI shall fully utilize the authorities provided and the methods authorized by these Guidelines to protect the United States and its people from crimes in violation of federal law and threats to the national security, and to further the foreign intelligence objectives of the United States.

2. Choice of Methods

a. The conduct of investigations and other activities authorized by these Guidelines may present choices between the use of different investigative methods that are each operationally sound and effective, but that are more or less intrusive, considering such factors as the effect on the privacy and civil liberties of individuals and potential damage to reputation. The least intrusive method feasible is to be used in such situations. It is recognized,

however, that the choice of methods is a matter of judgment. The FBI shall not hesitate to use any lawful method consistent with these Guidelines, even if intrusive, where the degree of intrusiveness is warranted in light of the seriousness of a criminal or national security threat or the strength of the information indicating its existence, or in light of the importance of foreign intelligence sought to the United States' interests. This point is to be particularly observed in investigations relating to terrorism.

b. United States persons shall be dealt with openly and consensually to the extent practicable when collecting foreign intelligence that does not concern criminal activities or threats to the national security.

3. Respect for Legal Rights

All activities under these Guidelines must have a valid purpose consistent with these Guidelines, and must be carried out in conformity with the Constitution and all applicable statutes, executive orders, Department of Justice regulations and policies, and Attorney General guidelines. These Guidelines do not authorize investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. These Guidelines also do not authorize any conduct prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

4. Undisclosed Participation in Organizations

Undisclosed participation in organizations in activities under these Guidelines shall be conducted in accordance with FBI policy approved by the Attorney General.

5. Maintenance of Records under the Privacy Act

The Privacy Act restricts the maintenance of records relating to certain activities of individuals who are United States persons, with exceptions for circumstances in which the collection of such information is pertinent to and within the scope of an authorized law enforcement activity or is otherwise authorized by statute. 5 U.S.C. 552a(e)(7). Activities authorized by these Guidelines are authorized law enforcement activities or activities for which there is otherwise statutory authority for purposes of the Privacy Act. These Guidelines, however, do not provide an exhaustive enumeration of authorized FBI law enforcement activities or FBI activities for which there is otherwise statutory authority, and no restriction is implied with respect to such activities carried out by the FBI pursuant to other

authorities. Further questions about the application of the Privacy Act to authorized activities of the FBI should be addressed to the FBI Office of the General Counsel, the FBI Privacy and Civil Liberties Unit, or the Department of Justice Office of Privacy and Civil Liberties.

D. NATURE AND APPLICATION OF THE GUIDELINES

1. Repealers

These Guidelines supersede the following guidelines, which are hereby repealed:

a. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (May 30, 2002) and all predecessor guidelines thereto.

b. The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (October 31, 2003) and all predecessor guidelines thereto.

c. The Attorney General's Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence (November 29, 2006).

d. The Attorney General Procedure for Reporting and Use of Information Concerning Violations of Law and Authorization for Participation in Otherwise Illegal Activity in FBI Foreign Intelligence, Counterintelligence or International Terrorism Intelligence Investigations (August 8, 1988).

e. The Attorney General's Guidelines for Reporting on Civil Disorders and Demonstrations Involving a Federal Interest (April 5, 1976).

2. Status as Internal Guidance

These Guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

3. Departures from the Guidelines

Departures from these Guidelines must be approved by the Director of the FBI, by the Deputy Director of the FBI, or by an Executive Assistant Director designated

by the Director. If a departure is necessary without such prior approval because of the immediacy or gravity of a threat to the safety of persons or property or to the national security, the Director, the Deputy Director, or a designated Executive Assistant Director shall be notified as soon thereafter as practicable. The FBI shall provide timely written notice of departures from these Guidelines to the Criminal Division and the National Security Division, and those divisions shall notify the Attorney General and the Deputy Attorney General. Notwithstanding this paragraph, all activities in all circumstances must be carried out in a manner consistent with the Constitution and laws of the United States.

4. Other Activities Not Limited

These Guidelines apply to FBI activities as provided herein and do not limit other authorized activities of the FBI, such as the FBI's responsibilities to conduct background checks and inquiries concerning applicants and employees under federal personnel security programs, the FBI's maintenance and operation of national criminal records systems and preparation of national crime statistics, and the forensic assistance and administration functions of the FBI Laboratory.

II. INVESTIGATIONS AND INTELLIGENCE GATHERING

This Part of the Guidelines authorizes the FBI to conduct investigations to detect, obtain information about, and prevent and protect against federal crimes and threats to the national security and to collect foreign intelligence.

When an authorized purpose exists, the focus of activities authorized by this Part may be whatever the circumstances warrant. The subject of such an activity may be, for example, a particular crime or threatened crime; conduct constituting a threat to the national security; an individual, group, or organization that may be involved in criminal or national security-threatening conduct; or a topical matter of foreign intelligence interest.

Investigations may also be undertaken for protective purposes in relation to individuals, groups, or other entities that may be targeted for criminal victimization or acquisition, or for terrorist attack or other depredations by the enemies of the United States. For example, the participation of the FBI in special events management, in relation to public events or other activities whose character may make them attractive targets for terrorist attack, is an authorized exercise of the authorities conveyed by these Guidelines. Likewise, FBI counterintelligence activities directed to identifying and securing facilities, personnel, or information that may be targeted for infiltration, recruitment, or acquisition by foreign intelligence services are authorized exercises of the authorities conveyed by these Guidelines.

The identification and recruitment of human sources – who may be able to provide or obtain information relating to criminal activities, information relating to terrorism, espionage, or other threats to the national security, or information relating to matters of foreign intelligence interest – is also critical to the effectiveness of the FBI's law enforcement, national security, and intelligence programs, and activities undertaken for this purpose are authorized and encouraged.

The scope of authorized activities under this Part is not limited to "investigation" in a narrow sense, such as solving particular cases or obtaining evidence for use in particular criminal prosecutions. Rather, these activities also provide critical information needed for broader analytic and intelligence purposes to facilitate the solution and prevention of crime, protect the national security, and further foreign intelligence objectives. These purposes include use of the information in intelligence analysis and planning under Part IV, and dissemination of the information to other law enforcement, Intelligence Community, and White House agencies under Part VI. Information obtained at all stages of investigative activity is accordingly to be retained and disseminated for these purposes as provided in these Guidelines, or in FBI policy consistent with these Guidelines, regardless of whether it furthers investigative objectives in a narrower or more immediate sense.

In the course of activities under these Guidelines, the FBI may incidentally obtain information relating to matters outside of its areas of primary investigative responsibility. For example, information relating to violations of state or local law or foreign law may be

incidentally obtained in the course of investigating federal crimes or threats to the national security or in collecting foreign intelligence. These Guidelines do not bar the acquisition of such information in the course of authorized investigative activities, the retention of such information, or its dissemination as appropriate to the responsible authorities in other agencies or jurisdictions. Part VI of these Guidelines includes specific authorizations and requirements for sharing such information with relevant agencies and officials.

This Part authorizes different levels of information gathering activity, which afford the FBI flexibility, under appropriate standards and procedures, to adapt the methods utilized and the information sought to the nature of the matter under investigation and the character of the information supporting the need for investigation.

Assessments, authorized by Subpart A of this Part, require an authorized purpose but not any particular factual predication. For example, to carry out its central mission of preventing the commission of terrorist acts against the United States and its people, the FBI must proactively draw on available sources of information to identify terrorist threats and activities. It cannot be content to wait for leads to come in through the actions of others, but rather must be vigilant in detecting terrorist activities to the full extent permitted by law, with an eye towards early intervention and prevention of acts of terrorism before they occur. Likewise, in the exercise of its protective functions, the FBI is not constrained to wait until information is received indicating that a particular event, activity, or facility has drawn the attention of those who would threaten the national security. Rather, the FBI must take the initiative to secure and protect activities and entities whose character may make them attractive targets for terrorism or espionage. The proactive investigative authority conveyed in assessments is designed for, and may be utilized by, the FBI in the discharge of these responsibilities. For example, assessments may be conducted as part of the FBI's special events management activities.

More broadly, detecting and interrupting criminal activities at their early stages, and preventing crimes from occurring in the first place, is preferable to allowing criminal plots and activities to come to fruition. Hence, assessments may be undertaken proactively with such objectives as detecting criminal activities; obtaining information on individuals, groups, or organizations of possible investigative interest, either because they may be involved in criminal or national security-threatening activities or because they may be targeted for attack or victimization by such activities; and identifying and assessing individuals who may have value as human sources. For example, assessment activities may involve proactively surfing the Internet to find publicly accessible websites and services through which recruitment by terrorist organizations and promotion of terrorist crimes is openly taking place; through which child pornography is advertised and traded; through which efforts are made by sexual predators to lure children for purposes of sexual abuse; or through which fraudulent schemes are perpetrated against the public.

The methods authorized in assessments are generally those of relatively low intrusiveness, such as obtaining publicly available information, checking government records,

and requesting information from members of the public. These Guidelines do not impose supervisory approval requirements in assessments, given the types of techniques that are authorized at this stage (e.g., perusing the Internet for publicly available information). However, FBI policy will prescribe supervisory approval requirements for certain assessments, considering such matters as the purpose of the assessment and the methods being utilized.

Beyond the proactive information gathering functions described above, assessments may be used when allegations or other information concerning crimes or threats to the national security is received or obtained, and the matter can be checked out or resolved through the relatively non-intrusive methods authorized in assessments. The checking of investigative leads in this manner can avoid the need to proceed to more formal levels of investigative activity, if the results of an assessment indicate that further investigation is not warranted.

Subpart B of this Part authorizes a second level of investigative activity, predicated investigations. The purposes or objectives of predicated investigations are essentially the same as those of assessments, but predication as provided in these Guidelines is needed – generally, allegations, reports, facts or circumstances indicative of possible criminal or national security-threatening activity, or the potential for acquiring information responsive to foreign intelligence requirements – and supervisory approval must be obtained, to initiate predicated investigations. Corresponding to the stronger predication and approval requirements, all lawful methods may be used in predicated investigations. A classified directive provides further specification concerning circumstances supporting certain predicated investigations.

Predicated investigations that concern federal crimes or threats to the national security are subdivided into preliminary investigations and full investigations. Preliminary investigations may be initiated on the basis of any allegation or information indicative of possible criminal or national security-threatening activity, but more substantial factual predication is required for full investigations. While time limits are set for the completion of preliminary investigations, full investigations may be pursued without preset limits on their duration.

The final investigative category under this Part of the Guidelines is enterprise investigations, authorized by Subpart C, which permit a general examination of the structure, scope, and nature of certain groups and organizations. Enterprise investigations are a type of full investigations. Hence, they are subject to the purpose, approval, and predication requirements that apply to full investigations, and all lawful methods may be used in carrying them out. The distinctive characteristic of enterprise investigations is that they concern groups or organizations that may be involved in the most serious criminal or national security threats to the public – generally, patterns of racketeering activity, terrorism or other threats to the national security, or the commission of offenses characteristically involved in terrorism as described in 18 U.S.C. 2332b(g)(5)(B). A broad examination of the characteristics of groups satisfying these criteria is authorized in enterprise investigations, including any relationship of the group to a foreign power, its size and composition, its geographic dimensions and finances, its past acts and goals, and its capacity for harm.

A. ASSESSMENTS

1. Purposes

Assessments may be carried out to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence.

2. Approval

The conduct of assessments is subject to any supervisory approval requirements prescribed by FBI policy.

3. Authorized Activities

Activities that may be carried out for the purposes described in paragraph 1. in an assessment include:

a. seeking information, proactively or in response to investigative leads, relating to:

   i. activities constituting violations of federal criminal law or threats to the national security,

   ii. the involvement or role of individuals, groups, or organizations in such activities; or

   iii. matters of foreign intelligence interest responsive to foreign intelligence requirements;

b. identifying and obtaining information about potential targets of or vulnerabilities to criminal activities in violation of federal law or threats to the national security;

c. seeking information to identify potential human sources, assess the suitability, credibility, or value of individuals as human sources, validate human sources, or maintain the cover or credibility of human sources, who may be able to provide or obtain information relating to criminal activities in violation of federal law, threats to the national security, or matters of foreign intelligence interest; and

d. obtaining information to inform or facilitate intelligence analysis and planning as described in Part IV of these Guidelines.

4. **Authorized Methods**

Only the following methods may be used in assessments:

a. Obtain publicly available information.

b. Access and examine FBI and other Department of Justice records, and obtain information from any FBI or other Department of Justice personnel.

c. Access and examine records maintained by, and request information from, other federal, state, local, or tribal, or foreign governmental entities or agencies.

d. Use online services and resources (whether nonprofit or commercial).

e. Use and recruit human sources in conformity with the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources.

f. Interview or request information from members of the public and private entities.

g. Accept information voluntarily provided by governmental or private entities.

h. Engage in observation or surveillance not requiring a court order.

i. Grand jury subpoenas for telephone or electronic mail subscriber information.

B. PREDICATED INVESTIGATIONS

1. Purposes

Predicated investigations may be carried out to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence.

2. Approval

The initiation of a predicated investigation requires supervisory approval at a level or levels specified by FBI policy. A predicated investigation based on paragraph 3.c. (relating to foreign intelligence) must be approved by a Special Agent in Charge or by an FBI Headquarters official as provided in such policy.

3. Circumstances Warranting Investigation

A predicated investigation may be initiated on the basis of any of the following circumstances:

a. An activity constituting a federal crime or a threat to the national security has or may have occurred, is or may be occurring, or will or may occur and the investigation may obtain information relating to the activity or the involvement or role of an individual, group, or organization in such activity.

b. An individual, group, organization, entity, information, property, or activity is or may be a target of attack, victimization, acquisition, infiltration, or recruitment in connection with criminal activity in violation of federal law or a threat to the national security and the investigation may obtain information that would help to protect against such activity or threat.

c. The investigation may obtain foreign intelligence that is responsive to a foreign intelligence requirement.

4. Preliminary and Full Investigations

A predicated investigation relating to a federal crime or threat to the national security may be conducted as a preliminary investigation or a full investigation. A predicated investigation that is based solely on the authority to collect foreign intelligence may be conducted only as a full investigation.

a. Preliminary investigations

i. Predication Required for Preliminary Investigations

A preliminary investigation may be initiated on the basis of information or an allegation indicating the existence of a circumstance described in paragraph 3.a.-.b.

ii. Duration of Preliminary Investigations

A preliminary investigation must be concluded within six months of its initiation, which may be extended by up to six months by the Special Agent in Charge. Extensions of preliminary investigations beyond a year must be approved by FBI Headquarters.

iii. **Methods Allowed in Preliminary Investigations**

All lawful methods may be used in a preliminary investigation except for methods within the scope of Part V.A.11.-.13. of these Guidelines.

b. **Full Investigations**

i. **Predication Required for Full Investigations**

A full investigation may be initiated if there is an articulable factual basis for the investigation that reasonably indicates that a circumstance described in paragraph 3.a.-.b. exists or if a circumstance described in paragraph 3.c. exists.

ii. **Methods Allowed in Full Investigations**

All lawful methods may be used in a full investigation.

5. **Notice Requirements**

a. An FBI field office shall notify FBI Headquarters and the United States Attorney or other appropriate Department of Justice official of the initiation by the field office of a predicated investigation involving a sensitive investigative matter. If the investigation is initiated by FBI Headquarters, FBI Headquarters shall notify the United States Attorney or other appropriate Department of Justice official of the initiation of such an investigation. If the investigation concerns a threat to the national security, an official of the National Security Division must be notified. The notice shall identify all sensitive investigative matters involved in the investigation.

b. The FBI shall notify the National Security Division of:

i. the initiation of any full investigation of a United States person relating to a threat to the national security; and

ii. the initiation of any full investigation that is based on paragraph 3.c. (relating to foreign intelligence).

c. The notifications under subparagraphs a. and b. shall be made as soon as practicable, but no later than 30 days after the initiation of an investigation.

d. The FBI shall notify the Deputy Attorney General if FBI Headquarters disapproves a field office's initiation of a predicated investigation relating to a threat to the national security on the ground that the predication for the investigation is insufficient.

C. ENTERPRISE INVESTIGATIONS

1. Definition

A full investigation of a group or organization may be initiated as an enterprise investigation if there is an articulable factual basis for the investigation that reasonably indicates that the group or organization may have engaged or may be engaged in, or may have or may be engaged in planning or preparation or provision of support for:

a. a pattern of racketeering activity as defined in 18 U.S.C. 1961(5);

b. international terrorism or other threat to the national security;

c. domestic terrorism as defined in 18 U.S.C. 2331(5) involving a violation of federal criminal law;

d. furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law; or

e. an offense described in 18 U.S.C. 2332b(g)(5)(B) or 18 U.S.C. 43.

2. Scope

The information sought in an enterprise investigation may include a general examination of the structure, scope, and nature of the group or organization including: its relationship, if any, to a foreign power; the identity and relationship of its members, employees, or other persons who may be acting in furtherance of its objectives; its finances and resources; its geographical dimensions; and its past and future activities and goals.

3. Notice and Reporting Requirements

a. The responsible Department of Justice component for the purpose of notification and reports in enterprise investigations is the National Security Division, except that, for the purpose of notifications and reports in an enterprise investigation relating to a pattern of racketeering activity that does not involve an offense or offenses described in 18 U.S.C. 2332b(g)(5)(B), the responsible Department of Justice component is the

Organized Crime and Racketeering Section of the Criminal Division.

b. An FBI field office shall notify FBI Headquarters of the initiation by the field office of an enterprise investigation.

c. The FBI shall notify the National Security Division or the Organized Crime and Racketeering Section of the initiation of an enterprise investigation, whether by a field office or by FBI Headquarters, and the component so notified shall notify the Attorney General and the Deputy Attorney General. The FBI shall also notify any relevant United States Attorney's Office, except that any investigation within the scope of Part VI.D.1.d of these Guidelines (relating to counterintelligence investigations) is to be treated as provided in that provision. Notifications by the FBI under this subparagraph shall be provided as soon as practicable, but no later than 30 days after the initiation of the investigation.

d. The Assistant Attorney General for National Security or the Chief of the Organized Crime and Racketeering Section, as appropriate, may at any time request the FBI to provide a report on the status of an enterprise investigation and the FBI will provide such reports as requested.

III. ASSISTANCE TO OTHER AGENCIES

The FBI is authorized to provide investigative assistance to other federal, state, local, or tribal, or foreign agencies as provided in this Part.

The investigative assistance authorized by this Part is often concerned with the same objectives as those identified in Part II of these Guidelines – investigating federal crimes and threats to the national security, and collecting foreign intelligence. In some cases, however, investigative assistance to other agencies is legally authorized for purposes other than those identified in Part II, such as assistance in certain contexts to state or local agencies in the investigation of crimes under state or local law, see 28 U.S.C. 540, 540A, 540B, and assistance to foreign agencies in the investigation of foreign law violations pursuant to international agreements. Investigative assistance for such legally authorized purposes is permitted under this Part, even if it is not for purposes identified as grounds for investigation under Part II.

The authorities provided by this Part are cumulative to Part II and do not limit the FBI's investigative activities under Part II. For example, Subpart B.2 in this Part authorizes investigative activities by the FBI in certain circumstances to inform decisions by the President concerning the deployment of troops to deal with civil disorders, and Subpart B.3 authorizes investigative activities to facilitate demonstrations and related public health and safety measures. The requirements and limitations in these provisions for conducting investigations for the specified purposes do not limit the FBI's authority under Part II to investigate federal crimes or threats to the national security that occur in the context of or in connection with civil disorders or demonstrations.

A. THE INTELLIGENCE COMMUNITY

The FBI may provide investigative assistance (including operational support) to authorized intelligence activities of other Intelligence Community agencies.

B. FEDERAL AGENCIES GENERALLY

1. In General

The FBI may provide assistance to any federal agency in the investigation of federal crimes or threats to the national security or in the collection of foreign intelligence, and investigative assistance to any federal agency for any other purpose that may be legally authorized, including investigative assistance to the Secret Service in support of its protective responsibilities.

2. The President in Relation to Civil Disorders

a. At the direction of the Attorney General, the Deputy Attorney General, or

the Assistant Attorney General for the Criminal Division, the FBI shall collect information relating to actual or threatened civil disorders to assist the President in determining (pursuant to the authority of the President under 10 U.S.C. 331-33) whether use of the armed forces or militia is required and how a decision to commit troops should be implemented. The information sought shall concern such matters as:

i. The size of the actual or threatened disorder, both in number of people involved or affected and in geographic area.

ii. The potential for violence.

iii. The potential for expansion of the disorder in light of community conditions and underlying causes of the disorder.

iv. The relationship of the actual or threatened disorder to the enforcement of federal law or court orders and the likelihood that state or local authorities will assist in enforcing those laws or orders.

v. The extent of state or local resources available to handle the disorder.

b. Investigations under this paragraph will be authorized only for a period of 30 days, but the authorization may be renewed for subsequent 30 day periods.

c. Notwithstanding Subpart E.2 of this Part, the methods that may be used in an investigation under this paragraph are those described in subparagraphs a.-.d., subparagraph f. (other than pretext interviews or requests), or subparagraph g. of Part II.A.4 of these Guidelines. The Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division may also authorize the use of other methods described in Part II.A.4.

3. Public Health and Safety Authorities in Relation to Demonstrations

a. At the direction of the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division, the FBI shall collect information relating to demonstration activities that are likely to require the federal government to take action to facilitate the activities and provide public health and safety measures with respect to those activities. The information sought in such an investigation shall be that needed to facilitate an adequate federal response to ensure public health and safety

and to protect the exercise of First Amendment rights, such as:

i. The time, place, and type of activities planned.

ii. The number of persons expected to participate.

iii. The expected means and routes of travel for participants and expected time of arrival.

iv. Any plans for lodging or housing of participants in connection with the demonstration.

b. Notwithstanding Subpart E.2 of this Part, the methods that may be used in an investigation under this paragraph are those described in subparagraphs a.-.d., subparagraph f. (other than pretext interviews or requests), or subparagraph g. of Part II.A.4 of these Guidelines. The Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division may also authorize the use of other methods described in Part II.A.4.

C. STATE, LOCAL, OR TRIBAL AGENCIES

The FBI may provide investigative assistance to state, local, or tribal agencies in the investigation of matters that may involve federal crimes or threats to the national security, or for such other purposes as may be legally authorized.

D. FOREIGN AGENCIES

1. At the request of foreign law enforcement, intelligence, or security agencies, the FBI may conduct investigations or provide assistance to investigations by such agencies, consistent with the interests of the United States (including national security interests) and with due consideration of the effect on any United States person. Investigations or assistance under this paragraph must be approved as provided by FBI policy. The FBI shall notify the National Security Division concerning investigation or assistance under this paragraph where: (i) FBI Headquarters approval for the activity is required pursuant to the approval policy adopted by the FBI for purposes of this paragraph, and (ii) the activity relates to a threat to the national security. Notification to the National Security Division shall be made as soon as practicable but no later than 30 days after the approval. Provisions regarding notification to or coordination with the Central Intelligence Agency by the FBI in memoranda of understanding or agreements with the Central Intelligence Agency may also apply to activities under this paragraph.

2. The FBI may not provide assistance to foreign law enforcement, intelligence, or

security officers conducting investigations within the United States unless such officers have provided prior notification to the Attorney General as required by 18 U.S.C. 951.

3. The FBI may conduct background inquiries concerning consenting individuals when requested by foreign government agencies.

4. The FBI may provide other material and technical assistance to foreign governments to the extent not otherwise prohibited by law.

E. APPLICABLE STANDARDS AND PROCEDURES

1. Authorized investigative assistance by the FBI to other agencies under this Part includes joint operations and activities with such agencies.

2. All lawful methods may be used in investigative assistance activities under this Part.

3. Where the methods used in investigative assistance activities under this Part go beyond the methods authorized in assessments under Part II.A.4 of these Guidelines, the following apply:

   a. Supervisory approval must be obtained for the activity at a level or levels specified in FBI policy.

   b. Notice must be provided concerning sensitive investigative matters in the manner described in Part II.B.5.

   c. A database or records system must be maintained that permits, with respect to each such activity, the prompt retrieval of the status of the activity (open or closed), the dates of opening and closing, and the basis for the activity. This database or records system may be combined with the database or records system for predicated investigations required by Part VI.A.2.

IV. INTELLIGENCE ANALYSIS AND PLANNING

The FBI is authorized to engage in analysis and planning. The FBI's analytic activities enable the FBI to identify and understand trends, causes, and potential indicia of criminal activity and other threats to the United States that would not be apparent from the investigation of discrete matters alone. By means of intelligence analysis and strategic planning, the FBI can more effectively discover crimes, threats to the national security, and other matters of national intelligence interest and can provide the critical support needed for the effective discharge of its investigative responsibilities and other authorized activities. For example, analysis of threats in the context of special events management, concerning public events or activities that may be targeted for terrorist attack, is an authorized activity under this Part.

In carrying out its intelligence functions under this Part, the FBI is authorized to draw on all lawful sources of information, including but not limited to the results of investigative activities under these Guidelines. Investigative activities under these Guidelines and other legally authorized activities through which the FBI acquires information, data, or intelligence may properly be utilized, structured, and prioritized so as to support and effectuate the FBI's intelligence mission. The remainder of this Part provides further specification concerning activities and functions authorized as part of that mission.

A. STRATEGIC INTELLIGENCE ANALYSIS

The FBI is authorized to develop overviews and analyses of threats to and vulnerabilities of the United States and its interests in areas related to the FBI's responsibilities, including domestic and international criminal threats and activities; domestic and international activities, circumstances, and developments affecting the national security; and matters relevant to the conduct of the United States' foreign affairs. The overviews and analyses prepared under this Subpart may encompass present, emergent, and potential threats and vulnerabilities, their contexts and causes, and identification and analysis of means of responding to them.

B. REPORTS AND ASSESSMENTS GENERALLY

The FBI is authorized to conduct research, analyze information, and prepare reports and assessments concerning matters relevant to authorized FBI activities, such as reports and assessments concerning: types of criminals or criminal activities; organized crime groups; terrorism, espionage, or other threats to the national security; foreign intelligence matters; or the scope and nature of criminal activity in particular geographic areas or sectors of the economy.

C. INTELLIGENCE SYSTEMS

The FBI is authorized to operate intelligence, identification, tracking, and information

systems in support of authorized investigative activities, or for such other or additional purposes as may be legally authorized, such as intelligence and tracking systems relating to terrorists, gangs, or organized crime groups.

V. AUTHORIZED METHODS

A. PARTICULAR METHODS

All lawful investigative methods may be used in activities under these Guidelines as authorized by these Guidelines. Authorized methods include, but are not limited to, those identified in the following list. The methods identified in the list are in some instances subject to special restrictions or review or approval requirements as noted:

1. The methods described in Part II.A.4 of these Guidelines.

2. Mail covers.

3. Physical searches of personal or real property where a warrant or court order is not legally required because there is no reasonable expectation of privacy (e.g., trash covers).

4. Consensual monitoring of communications, including consensual computer monitoring, subject to legal review by the Chief Division Counsel or the FBI Office of the General Counsel. Where a sensitive monitoring circumstance is involved, the monitoring must be approved by the Criminal Division or, if the investigation concerns a threat to the national security or foreign intelligence, by the National Security Division.

5. Use of closed-circuit television, direction finders, and other monitoring devices, subject to legal review by the Chief Division Counsel or the FBI Office of the General Counsel. (The methods described in this paragraph usually do not require court orders or warrants unless they involve physical trespass or non-consensual monitoring of communications, but legal review is necessary to ensure compliance with all applicable legal requirements.)

6. Polygraph examinations.

7. Undercover operations. In investigations relating to activities in violation of federal criminal law that do not concern threats to the national security or foreign intelligence, undercover operations must be carried out in conformity with the Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations. In investigations that are not subject to the preceding sentence because they concern threats to the national security or foreign intelligence, undercover operations involving religious or political organizations must be reviewed and approved by FBI Headquarters, with participation by the National Security Division in the review process.

8. Compulsory process as authorized by law, including grand jury subpoenas and

other subpoenas, National Security Letters (15 U.S.C. 1681u, 1681v; 18 U.S.C. 2709; 12 U.S.C. 3414(a)(5)(A); 50 U.S.C. 436), and Foreign Intelligence Surveillance Act orders for the production of tangible things (50 U.S.C. 1861-63).

9. Accessing stored wire and electronic communications and transactional records in conformity with chapter 121 of title 18, United States Code (18 U.S.C. 2701–2712).

10. Use of pen registers and trap and trace devices in conformity with chapter 206 of title 18, United States Code (18 U.S.C. 3121-3127), or the Foreign Intelligence Surveillance Act (50 U.S.C. 1841-1846).

11. Electronic surveillance in conformity with chapter 119 of title 18, United States Code (18 U.S.C. 2510-2522), the Foreign Intelligence Surveillance Act, or Executive Order 12333 § 2.5.

12. Physical searches, including mail openings, in conformity with Rule 41 of the Federal Rules of Criminal Procedure, the Foreign Intelligence Surveillance Act, or Executive Order 12333 § 2.5. A classified directive provides additional limitation on certain searches.

13. Acquisition of foreign intelligence information in conformity with title VII of the Foreign Intelligence Surveillance Act.

B. SPECIAL REQUIREMENTS

Beyond the limitations noted in the list above relating to particular investigative methods, the following requirements are to be observed:

1. Contacts with Represented Persons

Contact with represented persons may implicate legal restrictions and affect the admissibility of resulting evidence. Hence, if an individual is known to be represented by counsel in a particular matter, the FBI will follow applicable law and Department procedure concerning contact with represented individuals in the absence of prior notice to counsel. The Special Agent in Charge and the United States Attorney or their designees shall consult periodically on applicable law and Department procedure. Where issues arise concerning the consistency of contacts with represented persons with applicable attorney conduct rules, the United States Attorney's Office should consult with the Professional Responsibility Advisory Office.

2. **Use of Classified Investigative Technologies**

Inappropriate use of classified investigative technologies may risk the compromise of such technologies. Hence, in an investigation relating to activities in violation of federal criminal law that does not concern a threat to the national security or foreign intelligence, the use of such technologies must be in conformity with the Procedures for the Use of Classified Investigative Technologies in Criminal Cases.

C. OTHERWISE ILLEGAL ACTIVITY

1. Otherwise illegal activity by an FBI agent or employee in an undercover operation relating to activity in violation of federal criminal law that does not concern a threat to the national security or foreign intelligence must be approved in conformity with the Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations. Approval of otherwise illegal activity in conformity with those guidelines is sufficient and satisfies any approval requirement that would otherwise apply under these Guidelines.

2. Otherwise illegal activity by a human source must be approved in conformity with the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources.

3. Otherwise illegal activity by an FBI agent or employee that is not within the scope of paragraph 1. must be approved by a United States Attorney's Office or a Department of Justice Division, except that a Special Agent in Charge may authorize the following:

   a. otherwise illegal activity that would not be a felony under federal, state, local, or tribal law;

   b. consensual monitoring of communications, even if a crime under state, local, or tribal law;

   c. the controlled purchase, receipt, delivery, or sale of drugs, stolen property, or other contraband;

   d. the payment of bribes;

   e. the making of false representations in concealment of personal identity or the true ownership of a proprietary; and

   f. conducting a money laundering transaction or transactions involving an aggregate amount not exceeding $1 million.

However, in an investigation relating to a threat to the national security or foreign intelligence collection, a Special Agent in Charge may not authorize an activity that may constitute a violation of export control laws or laws that concern the proliferation of weapons of mass destruction. In such an investigation, a Special Agent in Charge may authorize an activity that may otherwise violate prohibitions of material support to terrorism only in accordance with standards established by the Director of the FBI and agreed to by the Assistant Attorney General for National Security.

4. The following activities may not be authorized:

   a. Acts of violence.

   b. Activities whose authorization is prohibited by law, including unlawful investigative methods, such as illegal electronic surveillance or illegal searches.

   Subparagraph a., however, does not limit the right of FBI agents or employees to engage in any lawful use of force, including the use of force in self-defense or defense of others or otherwise in the lawful discharge of their duties.

5. An agent or employee may engage in otherwise illegal activity that could be authorized under this Subpart without the authorization required by paragraph 3. if necessary to meet an immediate threat to the safety of persons or property or to the national security, or to prevent the compromise of an investigation or the loss of a significant investigative opportunity. In such a case, prior to engaging in the otherwise illegal activity, every effort should be made by the agent or employee to consult with the Special Agent in Charge, and by the Special Agent in Charge to consult with the United States Attorney's Office or appropriate Department of Justice Division where the authorization of that office or division would be required under paragraph 3., unless the circumstances preclude such consultation. Cases in which otherwise illegal activity occurs pursuant to this paragraph without the authorization required by paragraph 3. shall be reported as soon as possible to the Special Agent in Charge, and by the Special Agent in Charge to FBI Headquarters and to the United States Attorney's Office or appropriate Department of Justice Division.

6. In an investigation relating to a threat to the national security or foreign intelligence collection, the National Security Division is the approving component for otherwise illegal activity for which paragraph 3. requires approval beyond internal FBI approval. However, officials in other components may approve otherwise illegal activity in such investigations as authorized by the Assistant Attorney General for National Security.

VI. RETENTION AND SHARING OF INFORMATION

A. RETENTION OF INFORMATION

1. The FBI shall retain records relating to activities under these Guidelines in accordance with a records retention plan approved by the National Archives and Records Administration.

2. The FBI shall maintain a database or records system that permits, with respect to each predicated investigation, the prompt retrieval of the status of the investigation (open or closed), the dates of opening and closing, and the basis for the investigation.

B. INFORMATION SHARING GENERALLY

1. **Permissive Sharing**

Consistent with law and with any applicable agreements or understandings with other agencies concerning the dissemination of information they have provided, the FBI may disseminate information obtained or produced through activities under these Guidelines:

a. within the FBI and to other components of the Department of Justice;

b. to other federal, state, local, or tribal agencies if related to their responsibilities and, in relation to other Intelligence Community agencies, the determination whether the information is related to the recipient's responsibilities may be left to the recipient;

c. to congressional committees as authorized by the Department of Justice Office of Legislative Affairs;

d. to foreign agencies if the information is related to their responsibilities and the dissemination is consistent with the interests of the United States (including national security interests) and the FBI has considered the effect such dissemination may reasonably be expected to have on any identifiable United States person;

e. if the information is publicly available, does not identify United States persons, or is disseminated with the consent of the person whom it concerns;

f. if the dissemination is necessary to protect the safety or security of persons or property, to protect against or prevent a crime or threat to the national

security, or to obtain information for the conduct of an authorized FBI investigation; or

g. if dissemination of the information is otherwise permitted by the Privacy Act (5 U.S.C. 552a).

2. Required Sharing

The FBI shall share and disseminate information as required by statutes, treaties, Executive Orders, Presidential directives, National Security Council directives, Homeland Security Council directives, and Attorney General-approved policies, memoranda of understanding, or agreements.

C. INFORMATION RELATING TO CRIMINAL MATTERS

1. Coordination with Prosecutors

In an investigation relating to possible criminal activity in violation of federal law, the agent conducting the investigation shall maintain periodic written or oral contact with the appropriate federal prosecutor, as circumstances warrant and as requested by the prosecutor. When, during such an investigation, a matter appears arguably to warrant prosecution, the agent shall present the relevant facts to the appropriate federal prosecutor. Information on investigations that have been closed shall be available on request to a United States Attorney or his or her designee or an appropriate Department of Justice official.

2. Criminal Matters Outside FBI Jurisdiction

When credible information is received by an FBI field office concerning serious criminal activity not within the FBI's investigative jurisdiction, the field office shall promptly transmit the information or refer the complainant to a law enforcement agency having jurisdiction, except where disclosure would jeopardize an ongoing investigation, endanger the safety of an individual, disclose the identity of a human source, interfere with a human source's cooperation, or reveal legally privileged information. If full disclosure is not made for the reasons indicated, then, whenever feasible, the FBI field office shall make at least limited disclosure to a law enforcement agency or agencies having jurisdiction, and full disclosure shall be made as soon as the need for restricting disclosure is no longer present. Where full disclosure is not made to the appropriate law enforcement agencies within 180 days, the FBI field office shall promptly notify FBI Headquarters in writing of the facts and circumstances concerning the criminal activity. The FBI shall make periodic reports to the Deputy Attorney General on such nondisclosures and incomplete disclosures, in a form suitable to protect the identity of human sources.

3. **Reporting of Criminal Activity**

a. When it appears that an FBI agent or employee has engaged in criminal activity in the course of an investigation under these Guidelines, the FBI shall notify the United States Attorney's Office or an appropriate Department of Justice Division. When it appears that a human source has engaged in criminal activity in the course of an investigation under these Guidelines, the FBI shall proceed as provided in the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources. When information concerning possible criminal activity by any other person appears in the course of an investigation under these Guidelines, the FBI shall initiate an investigation of the criminal activity if warranted, and shall proceed as provided in paragraph 1. or 2.

b. The reporting requirements under this paragraph relating to criminal activity by FBI agents or employees or human sources do not apply to otherwise illegal activity that is authorized in conformity with these Guidelines or other Attorney General guidelines or to minor traffic offenses.

D. INFORMATION RELATING TO NATIONAL SECURITY AND FOREIGN INTELLIGENCE MATTERS

The general principle reflected in current laws and policies is that there is a responsibility to provide information as consistently and fully as possible to agencies with relevant responsibilities to protect the United States and its people from terrorism and other threats to the national security, except as limited by specific constraints on such sharing. The FBI's responsibilities in this area include carrying out the requirements of the Memorandum of Understanding Between the Intelligence Community, Federal Law Enforcement Agencies, and the Department of Homeland Security Concerning Information Sharing (March 4, 2003), or any successor memorandum of understanding or agreement. Specific requirements also exist for internal coordination and consultation with other Department of Justice components, and for provision of national security and foreign intelligence information to White House agencies, as provided in the ensuing paragraphs.

1. **Department of Justice**

a. The National Security Division shall have access to all information obtained by the FBI through activities relating to threats to the national security or foreign intelligence. The Director of the FBI and the Assistant Attorney General for National Security shall consult concerning these activities whenever requested by either of them, and the FBI shall provide such reports and information concerning these activities as the Assistant

Attorney General for National Security may request. In addition to any reports or information the Assistant Attorney General for National Security may specially request under this subparagraph, the FBI shall provide annual reports to the National Security Division concerning its foreign intelligence collection program, including information concerning the scope and nature of foreign intelligence collection activities in each FBI field office.

b. The FBI shall keep the National Security Division apprised of all information obtained through activities under these Guidelines that is necessary to the ability of the United States to investigate or protect against threats to the national security, which shall include regular consultations between the FBI and the National Security Division to exchange advice and information relevant to addressing such threats through criminal prosecution or other means.

c. Subject to subparagraphs d. and e., relevant United States Attorneys' Offices shall have access to and shall receive information from the FBI relating to threats to the national security, and may engage in consultations with the FBI relating to such threats, to the same extent as the National Security Division. The relevant United States Attorneys' Offices shall receive such access and information from the FBI field offices.

d. In a counterintelligence investigation – i.e., an investigation relating to a matter described in Part VII.S.2 of these Guidelines – the FBI's provision of information to and consultation with a United States Attorney's Office are subject to authorization by the National Security Division. In consultation with the Executive Office for United States Attorneys and the FBI, the National Security Division shall establish policies setting forth circumstances in which the FBI will consult with the National Security Division prior to informing relevant United States Attorneys' Offices about such an investigation. The policies established by the National Security Division under this subparagraph shall (among other things) provide that:

   i. the National Security Division will, within 30 days, authorize the FBI to share with the United States Attorneys' Offices information relating to certain espionage investigations, as defined by the policies, unless such information is withheld because of substantial national security considerations; and

   ii. the FBI may consult freely with United States Attorneys' Offices concerning investigations within the scope of this subparagraph during an emergency, so long as the National Security Division is

notified of such consultation as soon as practical after the consultation.

e. Information shared with a United States Attorney's Office pursuant to subparagraph c. or d. shall be disclosed only to the United States Attorney or any Assistant United States Attorneys designated by the United States Attorney as points of contact to receive such information. The United States Attorneys and designated Assistant United States Attorneys shall have appropriate security clearances and shall receive training in the handling of classified information and information derived from the Foreign Intelligence Surveillance Act, including training concerning the secure handling and storage of such information and training concerning requirements and limitations relating to the use, retention, and dissemination of such information.

f. The disclosure and sharing of information by the FBI under this paragraph is subject to any limitations required in orders issued by the Foreign Intelligence Surveillance Court, controls imposed by the originators of sensitive material, and restrictions established by the Attorney General or the Deputy Attorney General in particular cases. The disclosure and sharing of information by the FBI under this paragraph that may disclose the identity of human sources is governed by the relevant provisions of the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources.

2. **White House**

In order to carry out their responsibilities, the President, the Vice President, the Assistant to the President for National Security Affairs, the Assistant to the President for Homeland Security Affairs, the National Security Council and its staff, the Homeland Security Council and its staff, and other White House officials and offices require information from all federal agencies, including foreign intelligence, and information relating to international terrorism and other threats to the national security. The FBI accordingly may disseminate to the White House foreign intelligence and national security information obtained through activities under these Guidelines, subject to the following standards and procedures:

a. Requests to the FBI for such information from the White House shall be made through the National Security Council staff or Homeland Security Council staff including, but not limited to, the National Security Council Legal and Intelligence Directorates and Office of Combating Terrorism, or through the President's Intelligence Advisory Board or the Counsel to the President.

b. Compromising information concerning domestic officials or political organizations, or information concerning activities of United States persons intended to affect the political process in the United States, may be disseminated to the White House only with the approval of the Attorney General, based on a determination that such dissemination is needed for foreign intelligence purposes, for the purpose of protecting against international terrorism or other threats to the national security, or for the conduct of foreign affairs. However, such approval is not required for dissemination to the White House of information concerning efforts of foreign intelligence services to penetrate the White House, or concerning contacts by White House personnel with foreign intelligence service personnel.

c. Examples of types of information that are suitable for dissemination to the White House on a routine basis include, but are not limited to:

i. information concerning international terrorism;

ii. information concerning activities of foreign intelligence services in the United States;

iii. information indicative of imminent hostilities involving any foreign power;

iv. information concerning potential cyber threats to the United States or its allies;

v. information indicative of policy positions adopted by foreign officials, governments, or powers, or their reactions to United States foreign policy initiatives;

vi. information relating to possible changes in leadership positions of foreign governments, parties, factions, or powers;

vii. information concerning foreign economic or foreign political matters that might have national security ramifications; and

viii. information set forth in regularly published national intelligence requirements.

d. Communications by the FBI to the White House that relate to a national security matter and concern a litigation issue for a specific pending case must be made known to the Office of the Attorney General, the Office of

the Deputy Attorney General, or the Office of the Associate Attorney General. White House policy may specially limit or prescribe the White House personnel who may request information concerning such issues from the FBI.

e. The limitations on dissemination of information by the FBI to the White House under these Guidelines do not apply to dissemination to the White House of information acquired in the course of an FBI investigation requested by the White House into the background of a potential employee or appointee, or responses to requests from the White House under Executive Order 10450.

3. **Special Statutory Requirements**

a. Dissemination of information acquired under the Foreign Intelligence Surveillance Act is, to the extent provided in that Act, subject to minimization procedures and other requirements specified in that Act.

b. Information obtained through the use of National Security Letters under 15 U.S.C. 1681v may be disseminated in conformity with the general standards of this Part. Information obtained through the use of National Security Letters under other statutes may be disseminated in conformity with the general standards of this Part, subject to any applicable limitations in their governing statutory provisions: 12 U.S.C. 3414(a)(5)(B); 15 U.S.C. 1681u(f); 18 U.S.C. 2709(d); 50 U.S.C. 436(e).

VII. DEFINITIONS

A. CONSENSUAL MONITORING: monitoring of communications for which a court order or warrant is not legally required because of the consent of a party to the communication.

B. EMPLOYEE: an FBI employee or an employee of another agency working under the direction and control of the FBI.

C. FOR OR ON BEHALF OF A FOREIGN POWER: the determination that activities are for or on behalf of a foreign power shall be based on consideration of the extent to which the foreign power is involved in:

1. control or policy direction;

2. financial or material support; or

3. leadership, assignments, or discipline.

D. FOREIGN COMPUTER INTRUSION: the use or attempted use of any cyber-activity or other means, by, for, or on behalf of a foreign power to scan, probe, or gain unauthorized access into one or more U.S.-based computers.

E. FOREIGN INTELLIGENCE: information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons, or international terrorists.

F. FOREIGN INTELLIGENCE REQUIREMENTS:

1. national intelligence requirements issued pursuant to authorization by the Director of National Intelligence, including the National Intelligence Priorities Framework and the National HUMINT Collection Directives, or any successor directives thereto;

2. requests to collect foreign intelligence by the President or by Intelligence Community officials designated by the President; and

3. directions to collect foreign intelligence by the Attorney General, the Deputy Attorney General, or an official designated by the Attorney General.

G. FOREIGN POWER:

1. a foreign government or any component thereof, whether or not recognized by the United States;

2. a faction of a foreign nation or nations, not substantially composed of United States persons;

3. an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

4. a group engaged in international terrorism or activities in preparation therefor;

5. a foreign-based political organization, not substantially composed of United States persons; or

6. an entity that is directed or controlled by a foreign government or governments.

H. HUMAN SOURCE: a Confidential Human Source as defined in the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources.

I. INTELLIGENCE ACTIVITIES: any activity conducted for intelligence purposes or to affect political or governmental processes by, for, or on behalf of a foreign power.

J. INTERNATIONAL TERRORISM:

Activities that:

1. involve violent acts or acts dangerous to human life that violate federal, state, local, or tribal criminal law or would violate such law if committed within the United States or a state, local, or tribal jurisdiction;

2. appear to be intended:

   i. to intimidate or coerce a civilian population;

   ii. to influence the policy of a government by intimidation or coercion; or

   iii. to affect the conduct of a government by assassination or kidnapping; and

3. occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear to be intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

K. PROPRIETARY: a sole proprietorship, partnership, corporation, or other business entity operated on a commercial basis, which is owned, controlled, or operated wholly or in part on behalf of the FBI, and whose relationship with the FBI is concealed from third parties.

L. PUBLICLY AVAILABLE: information that has been published or broadcast for public consumption, is available on request to the public, is accessible on-line or otherwise to the public, is available to the public by subscription or purchase, could be seen or heard by any casual observer, is made available at a meeting open to the public, or is obtained by visiting any place or attending any event that is open to the public.

M. RECORDS: any records, databases, files, indices, information systems, or other retained information.

N. SENSITIVE INVESTIGATIVE MATTER: an investigative matter involving the activities of a domestic public official or political candidate (involving corruption or a threat to the national security), religious or political organization or individual prominent in such an organization, or news media, or any other matter which, in the judgment of the official authorizing an investigation, should be brought to the attention of FBI Headquarters and other Department of Justice officials.

O. SENSITIVE MONITORING CIRCUMSTANCE:

1. investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above, or a person who has served in such capacity within the previous two years;

2. investigation of the Governor, Lieutenant Governor, or Attorney General of any state or territory, or a judge or justice of the highest court of any state or territory, concerning an offense involving bribery, conflict of interest, or extortion related to the performance of official duties;

3. a party to the communication is in the custody of the Bureau of Prisons or the United States Marshals Service or is being or has been afforded protection in the Witness Security Program; or

4. the Attorney General, the Deputy Attorney General, or an Assistant Attorney General has requested that the FBI obtain prior approval for the use of consensual monitoring in a specific investigation.

P. SPECIAL AGENT IN CHARGE: the Special Agent in Charge of an FBI field office (including an Acting Special Agent in Charge), except that the functions authorized for Special Agents in Charge by these Guidelines may also be exercised by the Assistant Director in Charge or by any Special Agent in Charge designated by the Assistant Director in Charge in an FBI field office headed by an Assistant Director, and by FBI Headquarters officials designated by the Director of the FBI.

Q. SPECIAL EVENTS MANAGEMENT: planning and conduct of public events or activities whose character may make them attractive targets for terrorist attack.

R. STATE, LOCAL, OR TRIBAL: any state or territory of the United States or political subdivision thereof, the District of Columbia, or Indian tribe.

S. THREAT TO THE NATIONAL SECURITY:

1. international terrorism;

2. espionage and other intelligence activities, sabotage, and assassination, conducted by, for, or on behalf of foreign powers, organizations, or persons;

3. foreign computer intrusion; and

4. other matters determined by the Attorney General, consistent with Executive Order 12333 or a successor order.

T. UNITED STATES: when used in a geographic sense, means all areas under the territorial sovereignty of the United States.

U. UNITED STATES PERSON:

Any of the following, but not including any association or corporation that is a foreign power as defined in Subpart G.1.-.3.:

1. an individual who is a United States citizen or an alien lawfully admitted for permanent residence;

2. an unincorporated association substantially composed of individuals who are United States persons; or

3. a corporation incorporated in the United States.

In applying paragraph 2., if a group or organization in the United States that is affiliated with a foreign-based international organization operates directly under the control of the international organization and has no independent program or activities in the United States, the membership of the entire international organization shall be considered in determining whether it is substantially composed of United States persons. If, however, the U.S.-based group or organization has programs or activities separate from, or in addition to, those directed by the international organization, only its membership in the United States shall be considered in determining whether it is substantially composed of United States persons. A classified directive provides further guidance concerning the determination of United States person status.

V. USE: when used with respect to human sources, means obtaining information from, tasking, or otherwise operating such sources.

Date: 9/29/08

Michael B. Mukasey
Attorney General

Exh. G - 22 pages

Exhibit G

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washingtonpost.com

U.S. May Ease Police Spy Rules

More Federal Intelligence Changes Planned

By Spencer S. Hsu and Carrie Johnson
Washington Post Staff Writers
Saturday, August 16, 2008; A01

The Justice Department has proposed a new domestic spying measure that would make it easier for state and local police to collect intelligence about Americans, share the sensitive data with federal agencies and retain it for at least 10 years.

The proposed changes would revise the federal government's rules for police intelligence-gathering for the first time since 1993 and would apply to any of the nation's 18,000 state and local police agencies that receive roughly $1.6 billion each year in federal grants.

Quietly unveiled late last month, the proposal is part of a flurry of domestic intelligence changes issued and planned by the Bush administration in its waning months. They include a recent executive order that guides the reorganization of federal spy agencies and a pending Justice Department overhaul of FBI procedures for gathering intelligence and investigating terrorism cases within U.S. borders.

Taken together, critics in Congress and elsewhere say, the moves are intended to lock in policies for Bush's successor and to enshrine controversial post-Sept. 11 approaches that some say have fed the greatest expansion of executive authority since the Watergate era.

Supporters say the measures simply codify existing counterterrorism practices and policies that are endorsed by lawmakers and independent experts such as the 9/11 Commission. They say the measures preserve civil liberties and are subject to internal oversight.

White House spokesman Tony Fratto said the administration agrees that it needs to do everything possible to prevent unwarranted encroachments on civil liberties, adding that it succeeds the overwhelming majority of the time.

Bush homeland security adviser Kenneth L. Wainstein said, "This is a continuum that started back on 9/11 to reform law enforcement and the intelligence community to focus on the terrorism threat."

Under the Justice Department proposal for state and local police, published for public comment July 31, law enforcement agencies would be allowed to target groups as well as individuals, and to launch a criminal intelligence investigation based on the suspicion that a target is engaged in terrorism or providing material support to terrorists. They also could share results with a constellation of federal law enforcement and intelligence agencies, and others in many cases.

Criminal intelligence data starts with sources as basic as public records and the Internet, but also includes law enforcement databases, confidential and undercover sources, and active surveillance.

Jim McMahon, deputy executive director of the International Association of Chiefs of Police, said the proposed changes "catch up with reality" in that those who investigate crimes such as money laundering, drug trafficking and document fraud are best positioned to detect terrorists. He said the rule maintains the key

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requirement that police demonstrate a "reasonable suspicion" that a target is involved in a crime before collecting intelligence.

"It moves what the rules were from 1993 to the new world we live in, but it maintains civil liberties," McMahon said.

However, Michael German, policy counsel for the American Civil Liberties Union, said the proposed rule may be misunderstood as permitting police to collect intelligence even when no underlying crime is suspected, such as when a person gives money to a charity that independently gives money to a group later designated a terrorist organization.

The rule also would allow criminal intelligence assessments to be shared outside designated channels whenever doing so may avoid danger to life or property -- not only when such danger is "imminent," as is now required, German said.

On the day the police proposal was put forward, the White House announced it had updated Reagan-era operating guidelines for the U.S. intelligence community. The revised Executive Order 12333 established guidelines for overseas spying and called for better sharing of information with local law enforcement. It directed the CIA and other spy agencies to "provide specialized equipment, technical knowledge or assistance of expert personnel" to support state and local authorities.

And last week, Attorney General Michael B. Mukasey said that the Justice Department will release new guidelines within weeks to streamline and unify FBI investigations of criminal law enforcement matters and national security threats. The changes will clarify what tools agents can employ and whose approval they must obtain.

The recent moves continue a steady expansion of the intelligence role of U.S. law enforcement, breaking down a wall erected after congressional hearings in 1976 to rein in such activity.

The push to transform FBI and local police intelligence operations has triggered wider debate over who will be targeted, what will be done with the information collected and who will oversee such activities.

Many security analysts faulted U.S. authorities after the 2001 terrorist attacks, saying the FBI was not combating terrorist plots before they were carried out and needed to proactively use intelligence. In the years since, civil liberties groups and some members of Congress have criticized the administration for unilaterally expanding surveillance and moving too fast to share sensitive information without safeguards.

Critics say preemptive law enforcement in the absence of a crime can violate the Constitution and due process. They cite the administration's long-running warrantless-surveillance program, which was set up outside the courts, and the FBI's acknowledgment that it abused its intelligence-gathering privileges in hundreds of cases by using inadequately documented administrative orders to obtain telephone, e-mail, financial and other personal records of U.S. citizens without warrants.

Former Justice Department official Jamie S. Gorelick said the new FBI guidelines on their own do not raise alarms. But she cited the recent disclosure that undercover Maryland State Police agents spied on death penalty opponents and antiwar groups in 2005 and 2006 to emphasize that the policies would require close oversight.

"If properly implemented, this should assure the public that people are not being investigated by agencies who are not trained in how to protect constitutional rights," said the former deputy attorney general. "The FBI will need to be vigilant -- both in its policies and its practices -- to live up to that promise."

German, an FBI agent for 16 years, said easing established limits on intelligence-gathering would lead to

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abuses against peaceful political dissenters. In addition to the Maryland case, he pointed to reports in the past six years that undercover New York police officers infiltrated protest groups before the 2004 Republican National Convention; that California state agents eavesdropped on peace, animal rights and labor activists; and that Denver police spied on Amnesty International and others before being discovered.

"If police officers no longer see themselves as engaged in protecting their communities from criminals and instead as domestic intelligence agents working on behalf of the CIA, they will be encouraged to collect more information," German said. "It turns police officers into spies on behalf of the federal government."

Civil liberties groups also have warned that forthcoming Justice Department rules for the FBI may permit the use of terrorist profiles that could single out religious or ethnic groups such as Muslims or Arabs for investigation.

Mukasey said the changes will give the next president "some of the tools necessary to keep us safe" and will not alter Justice rules that prohibit investigations based on a person's race, religion or speech. He said the new guidelines will make it easier for the FBI to use informants, conduct physical and photographic surveillance, and share data in intelligence cases, on the grounds that doing so should be no harder than in investigations of ordinary crimes.

Rep. Bennie Thompson (D-Miss.), chairman of the House Homeland Security Committee, said that updating police intelligence rules is a move "in the right direction. However, the vagueness of the provisions giving broad access to criminal intelligence to undefined agencies . . . is very troubling."

Staff writers Joby Warrick and Ellen Nakashima contributed to this report.

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THE Nation.

FBI Seeks Sweeping New Powers

by AZIZ HUQ

August 22, 2008

Lame-duck administrations with **abysmal poll ratings**and no legislative agenda attract little attention. But to ignore the Bush Administration at this point is perilous: in its waning days, the Administration is turning the Federal Bureau of Investigation into a domestic intelligence agency with sweeping powers to profile and spy on law-abiding Americans.

In July, the Associated Press **reported** that Attorney General Michael Mukasey was overhauling rules that govern when the FBI can begin an investigation. In a speech last week in Portland, Mukasey acknowledged this and explained that the new guidelines would yield a "more flexible, more proactive, and more efficient" bureau.
FBI guidelines matter because Congress has never enacted a comprehensive statute governing the bureau, even though the FBI last month **marked** its hundredth anniversary.

The FBI's birth in 1908 was an accident unanticipated by Congress: it was born because Attorney General Charles Bonaparte, frustrated by a Congressional appropriations rider precluding him from borrowing agents from Treasury to conduct investigations, hired ten former US Secret Service agents as investigators.

For the next hundred years, the bureau staved off efforts by Congress to create a constraining legislative framework. After the Church Committee investigations of the 1970s revealed massive FBI surveillance of civil rights leaders and activists, Congress seriously debated such a statute.

But then-Attorney General Edward Levi pre-empted that effort by issuing guidelines defining what facts could trigger an investigations, when confidential informants could be sent in and other hot-button questions. Political will on the Hill for confrontation evaporated.

While the Levi guidelines have been watered down by Reagan, Bush I and Bush II attorneys general, they nevertheless still provide a critical brake on the bureau: by giving rules to trigger an investigation, deciding when incognito FBI agents can attend public meetings, and for informants' usage--all matters the Constitution does not regulate. The rules provide the sole barrier between the people and open-ended surveillance.

While the new guidelines have yet to be released, Mukasey's Portland speech raises serious concerns.

The new rules, for example, would allow the FBI to open an investigation based on a person's race plus his or her travel history. In his Portland speech, Mukasey made much of the fact that no investigation can begin "simply based on somebody's race, religion, or exercise of First Amendment rights." But this is cold comfort if the bureau focuses on Muslim, Arab and South Asian communities, whose members frequently travel overseas (as anecdotal evidence and common sense suggest); for these groups, the new rules discards any restraint on surveillance.

Moreover, the new rules would allow the FBI to open investigations based on its own "**threat assessment** and profiles constructed from public databases and informants' tips. This invites the targeting of dissident groups--a **trend already visible** at the state and local level.

Simultaneously with the guidelines changes, the Administration is stealthily unfurling a gamut of other regulatory changes to shift federal and local law enforcement dramatically from an investigative to an intelligence-gathering role.

In past year, the Administration has injected upward of $2 million to develop a **network of 15,000-plus informants** in the United States. It has ramped up its **internal data-mining efforts**, and taken a forward-leaning position on its authority to conduct **secret searches**, or black-bag operations, in the United States.

Compounding these concerns, the bureau is aggressively recruiting local and state law enforcement into its open-ended data collection efforts.

In June, the bureau issued **guidance** to local law enforcement agencies about "suspicious activity" to be recorded and shared with federal authorities. The list includes First Amendment-protected activities, such as expressing "extremist views" and "affiliation" with "extremist organizations." Proposed **new regulations** would loosen limits on federal-state information sharing by eliminating the requirement that agencies state a reason to know information.

Further, as a pair of superlative reports by the ACLU (**here** and **here**) demonstrate, the federal government has recently initiated the creation of a nationwide network of "fusion centers," where federal and state law enforcement authorities sit together and share information.

Any one of these changes can get lost in the hype of convention season. Standing alone, any one change might seem innocuous, even sensible. Marshaled together, however, these stealth changes portend a dramatic redirection of America's law enforcement agencies--the inking of a new national surveillance state with tendrils trailing down into every precinct and station house of the land.

About Aziz Huq

Aziz Huq directs the liberty and national security project at New York University's Brennan Center for Justice. He is co-author of ***Unchecked and Unbalanced: Presidential Power in a Time of***

Terror (New Press, 2007)

He is a 2006 recipient of the Carnegie Scholars Fellowship and has published scholarship in the *Columbia Law Review*, the *Yearbook of Islamic and Middle Eastern Law*, and the New School's *Constellations Journal*. He has also written for *Himal Southasian*, *Legal Times* and the *American Prospect*, and appeared as a commentator on *Democracy Now!* and NPR's *Talk of the Nation*. **more...**

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The New York Times
nytimes.com

December 10, 2002

AMERICA UNDER SURVEILLANCE: Privacy and Security; New Tools for Domestic Spying, and Qualms

By MICHAEL MOSS AND FORD FESSENDEN

When the Federal Bureau of Investigation grew concerned this spring that terrorists might attack using scuba gear, it set out to identify every person who had taken diving lessons in the previous three years.

Hundreds of dive shops and organizations gladly turned over their records, giving agents contact information for several million people.

"It certainly made sense to help them out," said Alison Matherly, marketing manager for the National Association of Underwater Instructors Worldwide. "We're all in this together."

But just as the effort was wrapping up in July, the F.B.I. ran into a two-man revolt. The owners of the Reef Seekers Dive Company in Beverly Hills, Calif., balked at turning over the records of their clients, who include Tom Cruise and Tommy Lee Jones -- even when officials came back with a subpoena asking for "any and all documents and other records relating to all noncertified divers and referrals from July 1, 1999, through July 16, 2002."

Faced with defending the request before a judge, the prosecutor handling the matter notified Reef Seekers' lawyer that he was withdrawing the subpoena. The company's records stayed put.

"We're just a small business trying to make a living, and I do not relish the idea of standing up against the F.B.I.," said Ken Kurtis, one of the owners of Reef Seekers. "But I think somebody's got to do it."

In this case, the government took a tiny step back. But across the country, sometimes to the dismay of civil libertarians, law enforcement officials are maneuvering to seize the information-gathering weapons they say they desperately need to thwart terrorist attacks.

From New York City to Seattle, police officials are looking to do away with rules that block them from spying on people and groups without evidence that a crime has been committed. They say these rules, forced on them in the 1970's and 80's to halt abuses, now prevent them from infiltrating mosques and other settings where terrorists might plot.

At the same time, federal and local police agencies are looking for systematic, high-tech ways to root out terrorists before they strike. In a sense, the scuba dragnet was cumbersome, old-fashioned police work, albeit on a vast scale. Now officials are hatching elaborate plans for dumping gigabytes of delicate information into big computers, where it would be blended with public records and stirred with sophisticated software.

In recent days, federal law enforcement officials have spoken ambitiously and often about their plans to remake the F.B.I. as a domestic counterterrorism agency. But the spy story has been unfolding, quietly and sometimes haltingly, for more than a year now, since the attacks on the World Trade Center and the Pentagon.

Some people in law enforcement remain unconvinced that all these new tools are needed, and some experts are skeptical that high-tech data mining will bring much of value to light.

Still, civil libertarians increasingly worry about how law enforcement might wield its new powers. They say the nation is putting at risk the very thing it is fighting for: the personal freedoms and rights embodied in the Constitution. Moreover, they say, authorities with powerful technology will inevitably blunder, as became evident in October when an audit revealed that the Navy had lost nearly two dozen computers authorized to process classified information.

What perhaps angers the privacy advocates most is that so much of this revolution in police work is taking place in secret, said Cindy Cohn, legal director of the Electronic Frontier Foundation, which represented Reef Seekers.

"If we are going to decide as a country that because of our worry about terrorism that we are willing to give up our basic privacy, we need an open and full debate on whether we want to make such a fundamental change," Ms. Cohn said.

But some intelligence experts say that in a changed world, the game is already up for those who would value civil liberties over the war on terrorism. "It's the end of a nice, comfortable set of assumptions that allowed us to keep ourselves protected from some kinds of

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intrusions," said Stewart A. Baker, the National Security Agency's general counsel under President Bill Clinton.

Tearing Down a Wall

The most aggressive effort to give local police departments unfettered spying powers is taking place in New York City.

It was there 22 years ago that the police, stung by revelations of widespread abuse, agreed to stop spying on people not suspected of a crime. The agreement was part of a containment wall of laws, regulations, court decisions and ordinances erected federally and in many parts of the country in the 70's and 80's.

The F.B.I.'s spying authority was restricted, and the United States' foreign intelligence agencies got out of the business of domestic spying altogether. States passed their own laws. On the local level, ordinances and consent decrees were enacted not just in New York but also in Los Angeles, Chicago, San Francisco and Seattle. In the years since, these strictures have "become part of the culture," Mr. Baker said.

But the wall is under attack. Last month, a special appeals court ruled that the sweeping antiterrorism legislation known as the U.S.A. Patriot Act, enacted shortly after the September 2001 attacks to give the government expanded terror-fighting capacity, freed federal prosecutors to seek wiretap and surveillance authority in the absence of criminal activity. In Chicago last year, a federal appeals court threw out the agreement that restricted police surveillance. Some officials in Seattle would like to follow suit, saying they are effectively sidelined in the terrorism war.

In New York, the Police Department has sued in federal court in Manhattan to end the consent decree the department signed in 1980 to end a civil rights lawsuit over the infiltration of political groups.

Attorney General John Ashcroft and New York's police commissioner, Raymond W. Kelly, say the wall is a relic -- unnecessary and, worse, dangerous. David Cohen, the former deputy director of central intelligence who is now the Police Department's deputy commissioner for intelligence, argues that the consent decree's requirement of a suspicion of criminal activity prevents officers from infiltrating mosques.

"In the last decade, we have seen how the mosque and Islamic institutes have been used to shield the work of terrorists from law enforcement scrutiny by taking advantage of restrictions on the investigation of First Amendment activity," Mr. Cohen said in an affidavit.

The police in other cities cite the same need. "We're prohibited from collecting things that will make us a safer city," said Lt. Ron Leavell, commander of the criminal intelligence division of the Seattle police.

Mr. Cohen did not argue in his affidavit that the authorities, if unshackled, could have prevented the Sept. 11 attacks. But he did suggest that the F.B.I.'s failure to dig more deeply into the information it had before the attacks turned on agents' fears that they could not climb the wall.

"The recent disclosure that F.B.I. field agents were blocked from pursuing an investigation of Zacarias Moussaoui because officials in Washington did not believe there was sufficient evidence of criminal activity to support a warrant points out how one person's judgment in applying an imprecise test may result in the costly loss of critical intelligence," Mr. Cohen said.

Mr. Cohen has also asked that his testimony before the federal court be given in secret, unheard even by opposing lawyers. Last week, a judge told New York City that it needed to present better arguments to justify such extraordinary secrecy.

Civil libertarians, frustrated that they cannot draw the other side into a debate, argue that questions about the need for such expanded powers are critical, and far from answered. "Who said you have to destroy a village in order to save it?" asked Jethro Eisenstein, one of the lawyers who negotiated the original consent decree. "We're protecting freedom and democracy, but unfortunately freedom and democracy have to be sacrificed."

Even the police are far from unanimous about how intrusive they must be. The Chicago police, who have been free from their consent decree for nearly two years, say they have yet to use the new power. The Los Angeles police have made no effort to change their guidelines.

"I have not heard complaints that the antiterrorist division has been inhibited in its work," said Joe Gunn, executive director of the Los Angeles Police Commission.

A joint Congressional inquiry into intelligence failures before Sept. 11 concluded that the failures had less to do with the inability of authorities to gather information than with their inability to analyze, understand, share and act on it.

"The lesson of Moussaoui was that F.B.I. headquarters was telling the field office the wrong advice," said Eleanor Hill, staff director of the inquiry. "Fixing what happened in this case is not inconsistent with preserving civil liberties."

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'It Smacks of Big Brother'

The Congressional inquiry's lingering criticism has added impetus to a movement within government to equip terror fighters with better computer technology. If humans missed the clues, the reasoning goes, perhaps a computer will not.

Clearly, the F.B.I. is operating in the dark ages of technology. For instance, when agents in San Diego want to check out new leads, they walk across the street to the Joint Terrorism Task Force offices, where suspect names must be run through two dozen federal and local databases.

Using filters from the Navy's space warfare project, Spawar, the agents are now dumping all that data into one big computer so that with one mouse click they can find everything from traffic fines to immigration law violations. A test run is expected early next year. Similar efforts to consolidate and share information are under way in Baltimore; Seattle; St. Louis; Portland, Ore.; and Norfolk, Va.

"It smacks of Big Brother, and I understand people's concern," said William D. Gore, a special agent in charge at the San Diego office. "But somehow I'd rather have the F.B.I. have access to this data than some telemarketer who is intent on ripping you off."

Civil libertarians worry that centralized data will be more susceptible to theft. But they are scared even more by the next step officials want to take: mining that data to divine the next terrorist strike.

The Defense Department has embarked on a five-year effort to create a superprogram called Total Information Awareness, led by Adm. John M. Poindexter, who was national security adviser in the Reagan administration. But as soon as next year, the new Transportation Security Administration hopes to begin using a more sophisticated system of profiling airline passengers to identify high-risk fliers. The system in place on Sept. 11, 2001, flagged only a handful of unusual behaviors, like buying one-way tickets with cash.

Like Admiral Poindexter, the transportation agency is drawing from companies that help private industry better market their products. Among them is the Acxiom Corporation of Little Rock, Ark., whose tool, Personicx, sorts consumers into 70 categories -- like Group 16M, or "Aging Upscale" -- based on an array of financial data and behavioral factors.

Experts on consumer profiling say law enforcement officials face two big problems. Some commercial databases have high error rates, and so little is known about terrorists that it could be very difficult to distinguish them from other people.

"The idea that data mining of some vast collection of databases of consumer activity is going to deliver usable alerts of terrorist activities is sheer credulity on a massive scale," said Jason Catlett of the Junkbusters Corporation, a privacy advocacy business. The data mining companies, Mr. Catlett added, are "mostly selling good old-fashioned snake oil."

Libraries and Scuba Schools

As it waits for the future, the F.B.I. is being pressed to gather and share much more intelligence, and that has left some potential informants uneasy and confused about their legal rights and obligations.

Just how far the F.B.I. has gone is not clear. The Justice Department told a House panel in June that it had used its new antiterrorism powers in 40 instances to share terror information from grand jury investigations with other government authorities. It said it had twice handed over terror leads from wiretaps.

But that was as far as Justice officials were willing to go, declining to answer publicly most of the committee's questions about terror-related inquiries. Civil libertarians have sued under the Freedom of Information Act to get the withheld information, including how often prosecutors have used Section 215 of the 2001 antiterror law to require bookstores or librarians to turn over patron records.

The secrecy enshrouding the counterterrorism campaign runs so deep that Section 215 makes it a crime for people merely to divulge whether the F.B.I. has demanded their records, deepening the mystery -- and the uneasiness among groups that could be required to turn over information they had considered private.

"I've been on panel discussions since the Patriot Act, and I don't think I've been to one without someone willing to stand up and say, 'Isn't the F.B.I. checking up on everything we do?' " said John A. Danaher III, deputy United States attorney in Connecticut.

Several weeks ago, the F.B.I. in Connecticut took the unusual step of revealing information about an investigation to dispute a newspaper report that it had "bugged" the Hartford Public Library's computers.

Michael J. Wolf, the special agent in charge, said the agency had taken only information from the hard drive of a computer at the library that had been used to hack into a California business. "The computer was never removed from the library, nor was any software installed on this or any other computer in the Hartford Public Library by the F.B.I. to monitor computer use," Mr. Wolf said in a letter to The Hartford Courant, which retracted its report.

Nevertheless, Connecticut librarians have been in an uproar over the possibility that their computers with Internet access would be

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monitored without their being able to say anything. They have considered posting signs warning patrons that the F.B.I. could be snooping on their keystrokes.

"I want people to know under what legal provisions they are living," said Louise Blalock, the chief librarian in Hartford.

In Fairfield, the town librarian, Tom Geoffino, turned over computer log-in sheets to the F.B.I. last January after information emerged that some of the Sept. 11 hijackers had visited the area, but he said he would demand a court order before turning over anything else. Agents have not been back asking for more, Mr. Geoffino said.

"We're not just librarians, we're Americans, and we want to see the people who did this caught," he said. "But we also have a role in protecting the institution and the attitudes people have about it."

The F.B.I.'s interest in scuba divers began shortly before Memorial Day, when United States officials received information from Afghan war detainees that suggested an interest in underwater attacks.

An F.B.I. spokesman said the agency would not confirm even that it had sought any diver names, and would not say how it might use any such information.

The owners of Reef Seekers say they had lots of reasons to turn down the F.B.I. The name-gathering made little sense to begin with, they say, because terrorists would need training far beyond recreational scuba lessons. They also worried that the new law would allow the F.B.I. to pass its client records to other agencies.

When word of their revolt got around, said Bill Wright, one of the owners, one man called Reef Seekers to applaud it, saying, "My 15-year-old daughter has taken diving lessons, and I don't want her records going to the F.B.I."

He was in a distinct minority, Mr. Wright said. Several other callers said they hoped the shop would be the next target of a terrorist bombing.

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ACLU
AMERICAN CIVIL LIBERTIES UNION

FUSION CENTER UPDATE

JULY 2008 By Mike German and Jay Stanley

If the federal government announced it was creating a new domestic intelligence agency made up of over 800,000 operatives dispersed throughout every American city and town, filing reports on even the most common everyday behaviors, Americans would revolt. Yet this is exactly what the Bush administration is trying to do with its little-noticed National Strategy for Information Sharing, which establishes state, local and regional "fusion centers" as a primary mechanism for the collection and dissemination of domestic intelligence.[1]

In November 2007, the American Civil Liberties Union issued a report entitled "What's Wrong with Fusion Centers."[2] Extrapolating from a few troublesome incidents and comments made by state and federal officials, and mindful of the nation's long history of abuse with regard to domestic "intelligence" gathering at all levels of government, we warned about the potential dangers of these rising new institutions. We pointed out that, while diverse and often still in the early stages of formation, they often seem to be characterized by ambiguous lines of authority, excessive secrecy, troubling private-sector and military participation, and an apparent bent toward suspicionless information collection and data mining. We urged policymakers to examine this incipient network of institutions closely and, at a minimum, to put rigorous safeguards in place to ensure that fusion centers would not become the means for another wave of such abuses.

In the six months since our report, new press accounts have borne out many of our warnings. In just that short time, news accounts have reported overzealous intelligence gathering, the expansion of uncontrolled access to data on innocent people, hostility to open government laws, abusive entanglements between security agencies and the private sector, and lax protections for personally identifiable information.

Overall, it is becoming increasingly clear that fusion centers are part of a new domestic intelligence apparatus. The elements of this nascent domestic surveillance system include:

- Watching and recording the everyday activities of an ever-growing list of individuals
- Channeling the flow of the resulting reports into a centralized security agency
- Sifting through ("data mining") these reports and databases with computers to identify individuals for closer scrutiny

Such a system, if allowed to permeate our society, would be nothing less than the creation of a total surveillance society.

Recent reports have confirmed each of these elements.

MONITORING EVERYDAY BEHAVIOR

In April 2008, the *Wall Street Journal* and the *Los Angeles Times* both reported on a new Los Angeles Police Department order that compels LAPD officers to begin reporting "suspicious behaviors" in addition to their other duties—creating a stream of "intelligence" about a host of everyday activities that, according to documents, will be fed to the local fusion center.[3]

LAPD Special Order #11, dated March 5, 2008, states that it is the policy of the LAPD to "gather, record, and analyze information of a criminal or *non-criminal nature*, that could indicate activity or intentions related to either foreign or domestic terrorism," and includes a list of 65 behaviors LAPD officers "shall" report.[4] The list includes such innocuous, clearly subjective, and First Amendment protected activities as:

- taking measurements
- using binoculars
- taking pictures or video footage "with no apparent esthetic value"
- abandoning vehicle
- drawing diagrams
- taking notes
- espousing extremist views

Most people engage in one or more of these activities on a routine, if not daily, basis. Terrorists eat, but it would be absurd to investigate everyone who eats. The behaviors identified by the LAPD are so commonplace and ordinary that the monitoring or reporting of them is scarcely any less absurd. This overbroad reporting authority gives law enforcement officers justification to harass practically anyone they choose, to collect personal information, and to pass such information along to the intelligence community.

Suspicious activity report (SAR) policing opens the door to racial profiling and other improper police behavior, and exposes law-abiding people to government prying into their private affairs without just cause. This concern is not just hypothetical; the Associated Press has reported that new, forthcoming Attorney General Guidelines for the FBI will authorize opening investigations without evidence of wrongdoing, based solely on terrorist profiles that use race and ethnicity as risk factors.[5] No less an authority than former Attorney General John Ashcroft has called racial profiling "an unconstitutional deprivation of equal protection."[6]

Moreover, the LAPD's collection of "non-criminal" information runs afoul of Title 28, Part 23 of the Code of Federal Regulations, which states that law enforcement agencies:

> shall collect and maintain criminal intelligence information concerning an individual *only if there is reasonable suspicion that the individual is involved in criminal conduct or activity* and the information is relevant to that criminal conduct or activity.[7]

And it isn't just that SAR policing is illegal, it's also ineffective and counterproductive. These orders, if taken seriously by LAPD officers on the beat, can yield only one outcome: an ocean of data about innocent individuals that will dominate the investigative resources of the authorities. The police should instead focus their efforts and resources where there is a reasonable indication of misconduct. The LAPD cannot maintain the support of the community it serves if the department is viewed as a collection of spies instead of peace officers.

TURNING LOCAL POLICE OFFICERS INTO NATIONAL DOMESTIC INTELLIGENCE AGENTS

Rather than criticize the LAPD efforts, the Office of the Director of National Intelligence said the LAPD program "should be a national model."[8] Not surprisingly, in June 2008 the Departments of Justice and Homeland Security teamed with the Major City Chiefs Association to issue a report recommending expanding the LAPD SAR program to other U.S. cities.[9]

In fact, just a few weeks before the LAPD order was issued, the Director of National Intelligence published new "functional standards" for suspicious activity reports that a program like the LAPD's would generate.[10] The sequential timing of the DNI's functional standards, the LAPD SAR order and the Major City Chiefs' recommendations creates more than a little suspicion that these efforts are closely coordinated.

The DNI standards actually encourage state and local law enforcement to report non-criminal suspicious activities to the intelligence community by defining the scope of suspicious activity as "observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal, or other illicit intention."[11] What might constitute "other illicit intention" is not defined in the document but it is clearly something other than "criminal." The Major City Chiefs' report contains a diagram that illustrates the organizational processing of a SAR, which shows that information deemed "terrorist related" would be forwarded to fusion centers *before* "reasonable suspicion" is established.[12] This process clearly reflects the intent to retain information where no reasonable suspicion of criminal activity exists.

Defenders of these suspicious activity reports (SARs) claim they aren't a privacy concern because they would not include "personally identifiable information." But the DNI standards also re-work the term "personally identifiable information" to allow the collection and retention of specific data that could be used to distinguish or trace an individual's identity.[13] For instance, imagine a police officer stopping you for taking pictures and asking for identification to compile an SAR [see box]. Under the DNI functional standards your name and driver's license number would be removed from the SAR before it was distributed—but your date of birth, height, weight, race, hair and eye color, driver's license state, date of issue and date of expiration would all be reported. It is logical to conclude that this detailed information could be traced back to a particular individual. How this information could later be used, analyzed and mined by the intelligence community or private sector entities participating in fusion centers is completely unknown.

THE INCREASING COLLECTION OF DATA FOR DOMESTIC INTELLIGENCE

Rather than recognizing the dangers of fusion centers and taking measures to rein in domestic intelligence activities, fusion center proponents in federal, state and local government have expanded the nature and scope of information they collect.

The *Washington Post* reported in April of 2008 that fusion centers have increasing access to Americans' private information through an array of databases.[14] In addition to access to FBI and even CIA records, fusion centers often have subscriptions with private data brokers such as Accurint, ChoicePoint, LexisNexus, and LocatePlus, a database containing cellphone numbers and unpublished telephone records. According to the article, fusion centers have access to millions of "suspicious activity reports" sent to the Treasury Department's Financial Crimes Enforcement Network, as well as hundreds of thousands of identity theft reports kept by the Federal Trade Commission.

Some fusion centers appear to have unique access to particular databases or particular types of information, based perhaps on each individual state's laws or guidelines:

> Pennsylvania buys credit reports and uses face-recognition software to examine driver's license photos, while analysts in Rhode Island have access to car-rental databases. In Maryland, authorities rely on a little-known data broker called Entersect, which claims it maintains 12 billion records about 98 percent of Americans... Massachusetts... taps a private system called ClaimSearch that includes a "nationwide database that provides information on insurance claims, including vehicles, casualty claims and property claims."[15]

The fusion centers' access to these kinds of databases raises urgent questions about the lack of controls over law enforcement's use of large pools of data on innocent Americans. Because of the unfortunate history of abuse in which law enforcement and national security agencies kept files on the political activities of innocent Americans, the federal government adopted Title 28, Part 23 of the Code of Federal Regulations which bars those agencies from compiling dossiers on people not involved in wrongdoing. But commercial databases such as these, which collect as much information about as many Americans as they can, offer law enforcement an end-run around laws designed to protect privacy. The police don't "maintain" such dossiers anymore, but if they are just a few keystrokes away, the effect is the same—especially when all that innocent information is combined with Suspicious Activity Reports and other data that only government can access.

Even more troubling is the fact that these centers are networked together and seamlessly exchange information with the intelligence community through the Director of National Intelligence's Information Sharing Environment (ISE). The *Washington Post* report was based on a document produced from a survey of fusion centers, which shows their intent to maximize the access each of the fusion centers has to the various databases. This would allow a state fusion center that under state law or local policy is prohibited from buying credit reports, as an example, to circumvent its own restrictions by simply calling a fusion center in Pennsylvania to and asking Pennsylvania authorities to access the records it wants to analyze. This "policy shopping" process guts state and local privacy protections and gives the participating agencies, including the federal intelligence community, access to information they may not legally have on their own.

This outcome is not an accident, but rather the intended result of a national strategy. Fusion center proponents consciously regard the "800,000 plus law enforcement officers across the country... as "the 'eyes and ears' of an extended national security community,"[16] and the Office of the Director of National Intelligence encourages the intelligence community to consider all state and local government officials as "the first line of defense in a very deep line of information assets."[17]

The federal government's increasing efforts to formalize, standardize, and network these state, local, and regional intelligence centers—and plug them directly into the intelligence community's Information Sharing Environment—are the functional equivalent of creating a new national domestic intelligence agency that deputizes a broad range of personnel from all levels of government, the private sector, and the military to spy on their fellow Americans.

THE PERFECT STORM: THE LOS ANGELES COUNTY TERRORISM EARLY WARNING CENTER

The *San Diego Union-Tribune* recently exposed a scandal linking a police task force called the Los Angeles County Terrorism Early Warning Center (LACTEW) to an intelligence fiasco that can only be described as a "perfect storm" of the problems identified in the ACLU's November 2007 fusion center report.[18] This one has it all:

- Spying on religious groups in violation of the First Amendment
- Military involvement in domestic spying in violation of the Posse Comitatus Act
- Police officers and military personnel engaged in illegal activity to further their perceived intelligence mission
- A lack of security over classified material and a lack of oversight over the activities of "trusted" insiders
- The reported involvement of private defense contractors
- Excessive secrecy that shields all the other problems from public view

LACTEW, established in 1996, has often been described as the first fusion center. It has also been recommended as a model for others to emulate.[19] FBI Supervisory Special Agent William A. Forsyth described the methods employed by the LACTEW in a Naval Postgraduate School thesis published before the scandal came to light: "[t]he TEW utilizes data-mining tools, as well as standardized "Intelligence Preparation for Operations (IPO)" products to build all-source situational awareness and a common operating picture for the interagency response community."[20] According to 2006 congressional testimony, the LACTEW has now "evolved" into the Joint Regional Intelligence Center (JRIC) in Los Angeles.[21]

According to the *Union-Tribune* reports, a group of military reservists and law enforcement officers led by the co-founder of the LACTEW engaged in a years-long conspiracy to steal highly classified intelligence files from the Strategic Technical Operations Center (STOC) located at the U.S. Marine Corps Base at Camp Pendleton, California and secret surveillance reports from the U.S. Northern Command headquarters in Colorado Springs, Colorado. Some of the stolen files reportedly "pertained to surveillance of Muslim communities in Southern California," including mosques in L.A. and San Diego, and revealed "a federal surveillance program targeting Muslim groups" in the United States. The scheme apparently began in 2001 when the LACTEW co-founder called a civilian analyst at U.S. Northern Command to ask that she surreptitiously supply the LACTEW with military surveillance reports. The National Security Agency's involvement in the investigation hints that these records may relate to warrantless domestic surveillance operations conducted by the military.

Though some involved in the theft ring have claimed "patriotic" motives—the desire to share secret military intelligence with local law enforcement—the *Union-Tribune* reports indicate the possibility of financial motives for the crimes. Investigators are looking into allegations that the records were passed to defense contractors "in exchange for future employment" opportunities. Employees of one of the companies mentioned in the article, Kroll and Associates, a "risk assessment" firm, reportedly had ties to the LACTEW.[22]

The thefts of intelligence files were not uncovered through internal oversight mechanisms at the LACTEW, the STOC or the JRIC, but rather by accident, through a military investigation into stolen Iraq war trophies. Search warrants executed at a Carlsbad, California apartment and storage lockers in Carlsbad and Manassas, Virginia located the war booty, along with boxes of highly classified FBI and Department of Defense intelligence files.

The easy circumvention of the security of these centers by corrupt insiders reveals what little protections are given to the data government is collecting about Americans. We may never know the nature of the surveillance these authorities conducted, with whom they shared the resulting information, or the risks associated with its unauthorized disclosure because the "[l]egal proceedings in the case will probably be conducted in private."[23] LACTEW is a prime example of the combination of overzealous intelligence collection and inadequate oversight leading to "an intelligence nightmare."[24] As we warned in our report, giving profit-driven entities access to valuable intelligence information poses a grave risk to security and to the privacy rights of those caught in the web of surveillance.

If LACTEW is to be a "model" for anything, it should be seen as a shining example of the need for policy makers to construct mechanisms for tight oversight over fusion centers, lest they continue to become centers for out-of-control public-private surveillance and data-collection abuses.

The threat that suspicious activity reporting poses to law-abiding people is not hypothetical. There have been numerous reports of police stopping, questioning, even arresting individuals based on nothing more than certain perfectly lawful activities listed in the LAPD order. Whether these specific reports have actually been shared with fusion centers or not, they are exactly the kind of "intelligence" that the centers are ostensibly being created to collect. These reports include:

Taking video footage

- Sheriff's deputies in Texas stopped an Al-Jazeera television crew that was filming on a public road more than a mile away from a nuclear power plant and conducted "extensive background checks" on them. The police said they "found no criminal history or other problems."[25]

Taking pictures

- Mariam Jukaku, a 24-year old Muslim-American journalism student at Syracuse University, was stopped by Veterans Affairs police in New York for taking photographs of flags in front of a VA building as part of a class assignment. After taking her into an office for interrogation and taking her driver's license the police deleted the photographs from her digital camera before releasing her.[26]

- Shirley Scheier, a 54-year-old artist and Associate Professor of Fine Art at the University of Washington was stopped by police in Washington State for taking pictures of power lines as part of an art project. Police frisked and handcuffed Scheier, and placed her in the back of a police car for almost half an hour. She was eventually released, after officers photographed maps that Scheier used to find the power station. The officers also told her she would be contacted by the FBI about the incident.[27]

- Neftaly Cruz, a 21-year-old senior at Penn State, was arrested in his own backyard in Philadelphia for snapping a picture of police activity in his neighborhood with a cell phone camera. He was taken down to the police station where police threatened to charge him with conspiracy, impeding police, and obstruction of justice, but he was later released without charge.[28]

Expressing political and religious beliefs

- After making public comments criticizing the FBI's treatment of Muslims in Pittsburgh, Dr. Moniem El-Ganayni, a nuclear physicist and naturalized American citizen had his security clearance improperly revoked by the U.S. Department of Energy (DOE) despite 18 years of dedicated service. Though they never told him the reason his clearance was revoked, during seven hours of interviews, representatives from the DOE and the FBI never alleged a breach of security but instead questioned El-Ganayni about his religious beliefs, his work as an imam in the Pennsylvania prison system, his political views about the U.S. war in Iraq, and the speeches he'd made in local mosques criticizing the FBI.[29]

Taking measurements

- A Middle Eastern man in traditional clothing sparked a three-day police manhunt in Chicago when a passenger on the bus he was riding notified the police that he was clicking a hand counter during the trip. A Joint Terrorism Task Force investigation into the episode revealed he was using the counter to keep track of his daily prayers, a common Muslim practice.[30]

A ONE-WAY MIRROR?

Even as fusion centers are positioned to learn more and more about the American public, authorities are moving to ensure that the public knows less and less about fusion centers. In particular, there appears to be an effort by the federal government to coerce states into exempting their fusion centers from state open government laws.[31] For those living in Virginia, it's already too late; the Virginia General Assembly passed a law in April 2008 exempting the state's fusion center from the Freedom of Information Act.[32] According to comments by the commander of the Virginia State Police Criminal Intelligence Division and the administrative head of the center, the federal government pressured Virginia into passing the law, with the threat of withholding classified information if it didn't.[33] Such efforts suggest there is a real danger fusion centers will become a "one-way mirror" in which citizens are subject to ever-greater scrutiny by the authorities, even while the authorities are increasingly protected from scrutiny by the public.

Another example of the "one way mirror" emerged recently in Massachusetts, where the ACLU of Massachusetts recently obtained a copy of the Commonwealth Fusion Center's (CFC's) "Standard Operating Procedures."[34] The procedures allow undercover police officers to attend public meetings to gather intelligence even when there is no reasonable suspicion of illegal activity. These guidelines also authorize "inquiries and investigations" when "oral or written statements advocate unlawful or violent activity, to determine whether there exists a real threat," which is clearly First Amendment-protected activity. The hazards of such a policy were revealed in a recent incident at Harvard University, where a plain-clothes Harvard University detective was caught photographing people at a peaceful protest for "intelligence gathering" purposes.[35] HUPD officers are sworn special State Police officers with deputy sheriff powers, and they often work "in conjunction with other agencies, including the Massachusetts State Police, Boston Police, Cambridge Police, Somerville Police, and many federal agencies."[36] A university spokesman refused to say what the HUPD does with the photographs it takes for "intelligence gathering" purposes, so it is unknown whether this information was shared with the CFC. What is clear is that this type of unwarranted police surveillance of First Amendment-protected activity is exactly what the CFC Standard Operating Procedures explicitly authorize.

It is ironic that even as police increasingly challenge the right of regular citizens to take photographs in public places [see box], police themselves are busy photographing citizens peacefully exercising their First Amendment rights.

MISSION CREEP: MOVING FROM TERRORISTS TO PEACE ACTIVISTS

Police in Maryland appear to have followed practices similar to those authorized in the Massachusetts standard operating procedures. According to documents released in response to an ACLU lawsuit, the Maryland State Police (MSP) used undercover officers to spy on non-violent peace activists and anti-

death penalty groups. The undercover agents consistently reported that the activists acted legally at all times, yet the investigations continued for over 14 months. Information about the groups' political activities gathered during the investigations "was shared with seven different agencies, including the National Security Agency and an un-named military intelligence official."[37] A longtime peace activist who was an apparent target of the surveillance, Max Obuszewski, had his identifying information entered into a federal database under the "primary crime" heading of "Terrorism—anti-government;" even though absolutely no violent activity was even alleged in the reports.[38] The information was uploaded into a federal drug task force database that is accessible by the Maryland fusion center, the Maryland Coordination and Analysis Center (MCAC).[39]

We do not know whether the MCAC was aware of these MSP investigations or whether the "intelligence" the MSP gathered was shared through the fusion process, but fusion centers are clearly *intended* to be the central focal point for sharing terrorism-related information. If the MCAC was not aware of the information the state police collected over the 14 months of this supposed terrorism investigation, this fact would call into question whether the MCAC is accomplishing its mission. If the MCAC takes in information from its participating members, however, the fusion center itself should be responsible for determining whether the "intelligence" it receives is being appropriately collected. It can do that by, for example, enforcing strict guidelines and conditions of participation on its sources and participants.

For Mr. Obuszewski, in any case, the impact of being listed as a terrorist in a federal database is simply unknowable in the current climate of secrecy surrounding these intelligence programs.

Mr. Obuszewski's experience is all too typical of what we have seen in the United States for many decades—new police and surveillance powers, granted to the authorities out of fear of terrorism, end up being deployed against peace activists and other political dissenters. It has happened before—police departments employed "red squads" and the FBI ran a dirty-tricks program called COINTELPRO—and now it is happening yet again. It is a disturbing sign that our policy makers have not learned from that long history.

We can't afford to be in the dark about fusion centers. And just because the government isn't announcing this domestic surveillance program in grand style the way it has with other surveillance programs, doesn't mean we can ignore it. Given the broad scope of information fusion centers collect, process and disseminate, it would be irresponsible not to enforce vigorous public oversight. We have to make sure our Congress and our state legislatures know it's up to them to guard our privacy and to impose appropriate oversight controls and accountability standards on these out-of-control data-gathering monsters.

NOTES

[1] THE WHITE HOUSE, NATIONAL STRATEGY FOR INFORMATION SHARING: SUCCESSES AND CHALLENGES IN IMPROVING TERRORISM-RELATED INFORMATION SHARING, (Oct. 2007), *available at* http://www.whitehouse.gov/nsc/infosharing/NSIS_book.pdf.

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Exh. H - 5 pages

Exhibit H

H-1

The New York Times

October 19, 2008

EDITORIAL

Another Invitation to Abuse

We still don't know all of the ways that the Bush administration has violated Americans' civil liberties and undercut the balance of powers in the name of fighting terrorism. Even now, in President Bush's waning months in the White House, that overreach continues.

Attorney General Michael Mukasey recently issued new guidelines for the F.B.I. that permit agents to use a range of intrusive techniques to gather information on Americans — even when there is no clear basis for suspecting wrongdoing.

Under the new rules, agents may engage in lengthy physical surveillance, covertly infiltrate lawful groups, or conduct pretext interviews in which agents lie about their identities while questioning a subject's neighbors, friends or work colleagues based merely on a generalized "threat." The new rules also allow the bureau to use these techniques on people identified in part by their race or religion and without requiring even minimal evidence of criminal activity.

These changes are a chilling invitation for the government to spy on law-abiding Americans based on their ethnic background or political activity.

Mr. Mukasey has promised that investigations conducted under the new rules will be consistent with the Constitution. Clearly, the Bush administration cannot be trusted to find the right balance between law enforcement and civil liberties. Even before this administration the F.B.I. had its own long history of abusing its powers to spy on civil rights groups and antiwar activists.

Critics also warn that the new rules could impede legitimate law enforcement efforts by alienating communities whose cooperation the F.B.I. needs and by distracting agents from focusing on genuine criminal activity and national security threats.

Mr. Mukasey and Robert Mueller, the F.B.I. director, refused requests from several senators, including Patrick Leahy, the Judiciary Committee chairman, to delay the new rules until Congress and the public could thoroughly review them. Instead they rushed to put the changes in place before President Bush leaves office.

The next president will have to order a full and transparent review of this latest change, and all of the Bush administration's policies that threaten Americans' most fundamental rights.

washingtonpost.com

Guidelines Expand FBI's Surveillance Powers

Techniques May Be Used in U.S. Without Any Fact Linking Subject to Terrorism

By Carrie Johnson
Washington Post Staff Writer
Saturday, October 4, 2008; A03

Justice Department officials released new guidelines yesterday that empower FBI agents to use intrusive techniques to gather intelligence within the United States, alarming civil liberties groups and Democratic lawmakers who worry that they invite privacy violations and other abuses.

The new road map allows investigators to recruit informants, employ physical surveillance and conduct interviews in which agents disguise their identities in an effort to assess national security threats. FBI agents could pursue each of those steps without any single fact indicating a person has ties to a terrorist organization.

Attorney General Michael B. Mukasey said the guidelines are necessary to fulfill the FBI's core mission to predict threats and respond even before an attack takes place. The ground rules will help the bureau become "a more flexible and adept collector of intelligence," as independent commissions urged after the strikes of Sept. 11, 2001, Mukasey said in a statement yesterday.

The guidelines, which harmonize five different road maps dating back more than a generation, take effect Dec. 1. That is two months later than initially planned, and authorities said the delay was a concession to privacy advocates and Arab American groups who expressed concern that their members could be subject to racial or ethnic profiling.

Justice Department leaders rewrote a key section of the guidelines concerning agents' infiltration of groups and attendance at demonstrations. Under the new language, agents would be able to investigate the likelihood of violence stemming from a planned demonstration for as many as 30 days, with renewals subject to supervisory approval.

Congressional staff members said the revisions were superficial, and the American Civil Liberties Union immediately condemned the road map. Critics had asked Justice Department leaders to wait until a new president takes office, an approach that administration officials rejected.

Caroline Fredrickson, director of the ACLU's Washington legislative office, said: "Since, under these guidelines, a generalized 'threat' is enough to begin an investigation, the FBI will be given carte blanche to begin surveillance without factual evidence. . . . These guidelines will lead to political witch hunts and more unwarranted investigations of political enemies

and peace groups."

Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) said the grant of new authority to FBI agents flies in the face of recent history, including overreaching and sloppy record-keeping by agents who demanded too much secret information from telephone companies and Internet service providers as part of national security investigations.

Bush administration officials assert that the overhaul is merely a common-sense change that would give FBI agents who pursue national security leads the same power as agents who investigate criminal offenses.

Civil liberties activists yesterday raised anew questions about the expanded role of the FBI in collecting an array of foreign intelligence within U.S. borders, absent evidence of a crime. For instance, the guidelines allow FBI agents to conduct interviews and monitor the movement of people who may possess useful information on subjects of general interest to American policymakers, such as a foreign government's oil exports.

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Los Angeles Times

http://www.latimes.com/news/opinion/la-ed-fbi20-2008sep20,0,6702945.story
From the Los Angeles Times

Editorial

The FBI's reach

A plan to boost the agency's intelligence-gathering power at home raises concerns about rights.

September 20, 2008

Citing a post-9/11 change in its mission, the FBI is planning to relax guidelines for the surveillance of groups and individuals who might -- and the key word is "might" -- harbor terrorists or spies. Because the actual wording hasn't been released, it's difficult to make a definitive judgment about whether the new guidelines for initial investigative "assessments" would revive the bad old days when the FBI engaged in massive and unjustified spying on Americans. But explanations from Bush administration officials are unsettling.

This debate doesn't involve the most intrusive techniques open to the FBI, such as wiretapping (for which a court order is required) or even the warrantless subpoenas for records known as national security letters. Rather, the FBI wants more leeway to send agents or informants to public places and conduct "pretext interviews" -- FBI jargon for conversations in which an investigator asks questions without identifying himself as an agent. This first-stage surveillance doesn't require reasonable suspicion that those under surveillance are terrorists; it could take place on the basis of speculation or rumor.

In media briefings and congressional testimony by FBI Director Robert S. Mueller III, the agency paradoxically has portrayed the proposed guidelines both as urgently required for national security reasons and as a routine harmonization of investigative procedures.

Present guidelines make it harder for agents to investigate possible terrorism plots than to probe potential criminal conspiracies, Mueller has claimed. He offered the example of an agent who suspects that drug dealing is happening at a bar and mingles with patrons in an attempt to acquire information. By contrast, he complained, an agent couldn't conduct the same sort of reconnaissance in a tavern where fundraising for Hezbollah might be occurring.

The comparison is doubly flawed. First, unless the FBI were to conduct a covert dragnet of hundreds of bars, it probably wouldn't focus on a particular tavern unless it had a tip. The same probably would be true of surveillance of a tavern where terrorist activities were

suspected. Such surveillance is perfectly all right under existing rules. If retaining them means that the FBI couldn't go on a fishing expedition to every bar with Arab American customers, so be it.

More important, under the rules proposed by the FBI, agents and informants could insinuate themselves into mosques and political organizations whose only "suspicious" behavior is to criticize U.S. policy toward Iraq or support the Palestinian cause. That treads dangerously close to violating free speech and religion rights guaranteed under the 1st Amendment.

Given the FBI's sordid history of spying on and harassing innocent political activists, the burden is on the agency to demonstrate that it wouldn't abuse its authority, as some agents did in circumventing legal requirements for national security letters. If it can't convincingly make the case, the proposal should be abandoned.

Exh. I - 3 pages

Exhibit I

DECLARATION

I, Norton Sandler, make this declaration in support of the application to the Federal Election Commission for an advisory opinion that the Socialist Workers Party, the SWP's National Campaign Committee, and the committees supporting the candidates of the SWP are entitled to an exemption from certain disclosure provisions of the Federal Election Campaign Act.

I make this statement on the basis of my personal knowledge.

1. I am the chair of the Socialist Workers National Campaign Committee. I have served in this capacity for more than four years.

2. In the time I have held this responsibility, I have been told many times by supporters of the various national, state and local Socialist Workers campaigns across the country that they have received hostile and threatening phone, mail and electronic mail and they have expressed concern about them.

3. In our application to the Federal Election Commission for an extension of the committee's exemption from certain disclosure provisions of the Federal Election Campaign Act this year, there are a selection of these kinds of calls, letters, and emails. They are just a sample of the harassing communication campaign supporters receive on a regular basis.

4. These communications fall into roughly two types. The first is calls or mail that are clearly threats that cause supporters to be concerned for the safety of campaign offices and their person. Among examples of this type are the following:

- In June 2004, a threatening message was left on the phone at the San Francisco Socialist Workers Party headquarters saying "you all are going to pay for it."
- In May 2004, a threatening message was left on the phone at the San Francisco Socialist Workers headquarters stating "we'll be keeping an eye on you."
- In October 2008, two threatening and harassing phone calls were received in the Socialist Workers campaign headquarters in Minneapolis, Minnesota. Both times campaign volunteers were told "Fuck you" and then the caller hung up.

- In July 2005, the Socialist Workers Party in Los Angeles, California, was informed by the Department of Justice that it was one of 56 groups and individuals sent threatening letters denouncing "Jews, Blacks, Latinos, Asians and homosexuals" by an individual previously arrested for threatening to attack schools with anthrax. According to the Department of Justice, 52 of the 56 letters contained syringes.

5. The second type are hate mail and red-baiting calls that deride the campaign or the political positions of the campaign or individuals that have supported the campaign. These communications can be seen as belligerent efforts to express political differences, but, in light of the record of physical attacks on campaign offices and campaign supporters over the past four years, must be taken as a serious concern

6. Examples of these types of calls that are being submitted to the FEC with our application include:

- In January 2003, an anonymous phone call was made to a Shoreline Community College instructor in Seattle, Washington, redbaiting Scott Breen, a student who had posted a research paper on a related internet board. The call was accompanied by a posting on the internet reading "Who is Scott Breen? A leading NIH researcher? No, he is a guy who once ran for Mayor of Seattle on behalf of the Socialist Workers Party."
- In November 2002, a threatening e-mail message was sent to the campaign of Rachele Fruit, Socialist Workers candidate for Governor of Florida, saying "What's that smell? Ahhh, a communist lurking... running for office. Ain't gonna happen, sister."
- In September 2008, a phone message was left on the Socialist Workers campaign phone answering machine in St. Paul, Minnesota, calling campaign supporters "moron assholes."
- In January 2007, threatening e-mail sent to the Young Socialists national office and Albany chapter [the Young Socialists are a youth organization that supports the Socialist Workers candidates] calling them "assholes" and deriding their support for the Cuban revolution.

I-3

- In May 2005, a hostile e-mail message was sent to a campaign supporter in Boston, Massachusetts, saying "Cuba? What are you, an idiot? Get out of MY country and spend your days in Socialist heaven."

I declare under penalty of perjury that the foregoing is true and correct. Executed October 13, 2008.

Norton Sandler
October 13, 2008

Exh. J - 4 pages

Exhibit J

DECLARATION

I, John Studer, make this declaration in support of the application to the Federal Election Commission for an advisory opinion that the Socialist Workers Party, the SWP's National Campaign Committee, and the committees supporting the candidates of the SWP are entitled to an exemption from certain disclosure provisions of the Federal Election Campaign Act.

I make this statement on the basis of my personal knowledge.

1. I put together the lists of the Declarations submitted to the Federal Election Committee on behalf of the application of the Socialist Workers Party, the SWP's National Campaign Committee, and the committees supporting the candidates of the SWP are entitled to an exemption from certain disclosure provisions of the Federal Election Campaign Act.

2. In the course of preparing the list, I grouped 12 Declarations that describe incidents in which local police harassed Socialist Workers candidates and campaign supporters who had set up information tables on public locations to distribute campaign material and, in some instances, forced them to take down the information table.

3. In almost all of these incidents, it is clear that the police were motivated by hostility to the political positions of the Socialist Workers campaign that were displayed by signs on the information tables or in literature they were distributing. Examples of such instances are:

- In September 2008, Socialist Workers campaign supporters were distributing literature near Georgia State University in Atlanta, for both the party's presidential ticket and local Georgia candidates, including a flyer protesting the scheduled execution of Troy Davis and opposing the death penalty. The campaign is active in promoting actions and education in defense of Mr. Davis. Officers from two police cars surrounded the table and intimidated the campaign volunteers, forcing them to take down their table, scaring away people who had come to the table for information, and tore up leaflets urging support for the actions against the execution of Troy Davis. [Declaration of William Arth]
- In September 2007, supporters of the 2007 SWP Mayoral campaign in Philadelphia set up a campaign table in the University District, displaying campaign literature, books and pamphlets, as

well as a poster campaigning for "Justice for the Jena 6," a nationwide movement the Socialist Workers campaign participated in seeking the dropping of racist charges against six Black high school students in Jena, Louisiana. Police officers left their cruisers and hovered around the table, intimidating the campaigners and others attracted to the table. [Declaration of Ellen Berman]

- In April 2007, police harassed a group of campaign supporters at a table with a sign protesting police brutality in Newark, NJ [Declaration of Sara Lobman]
- In January 2006, distributors of the *Militant* newspaper forced by police to leave Phillipi, West Virginia or face arrest while distributing an issue of the paper campaigning for union action to defend mine safety. The campaigners were escorted to the city limits by police. [Declarations of Dan Fein and Brian Williams, article from Clarksburg, WV, *Exponent Telegram* newspaper]
- In October 2007, campaign supporters set up a table in East Boston, Massachusetts, and were approached by four police officers, who told them they had to take the table down. They explained they were campaigning for candidates. The officers picked up a number of books related to themes the socialist candidates campaign around, including support for the Cuban revolution, opposition to racial discrimination and police brutality, support for a woman's right to choose abortion, etc., that were displayed on the table and asked "what do these have to do with your campaign?" Another officer tried to convince the campaigners to take down their table by telling them they were in violation of an ordinance that prohibited soliciting within ten feet of an ATM machine. The campaigners did not take the table down, but were forced to move the table. [Declaration of William Leonard]
- In September 2006, campaigners for the Socialist Workers were forced by police to take down a campaign table in Chicago after cops saw campaign sign on the table protesting police brutality. [Declarations of Rollande Girard, Christian Castro]
- In October 2008, SWP campaign supporters were distributing literature in East Boston, Massachusetts, when two police cars pulled up nearby and the officers went to the table and harassed the campaigners, telling them that they better not block traffic. The

campaigner overheard one police officer tell another that they were messing with "a free-speech thing." [Declaration of William Leonard]

- In October 2005, supporters of the Socialist Workers campaign canvassed door to door in a neighborhood on the north side of Toledo, Ohio, a few days after the National Socialist Movement, a neo-Nazi organization, had attempted to conduct a racist march in the city. The campaign supporters explained that they were opponents of the neo-Nazi march and were campaigning in support of Black rights. Police came and told the campaigners they were prohibited from going door to door in Toledo and threatened them with arrest. The officers demanded they leave the city, and, fearing further harassment or arrest, the campaigners left. [Declaration of Rollande Girard]
- In May 2008, the Socialist Workers candidate for U.S. Congress in New Jersey's 10th C.D. and supporters were ordered by police to stop petitioning to put party candidates on the ballot in Newark's Penn Station. [Declaration of Mike Taber]

4. Other declarations describe similar instances in New York City, New York; Albertville, Alabama; and Montclair, New Jersey.

5. In some of these instances, police attempted to justify their effort to harass or force the socialist campaigners to take down their table by referring to vague "ordinances" or "permit requirements" that would bar them from distributing campaign material, regulations that would restrict their basic free speech rights.

6. I contacted a number of organizations that deal with civil and political rights in cities where these incidents occurred and was told that, in general, there are not legal restrictions on the exercise of the political right to distribute campaign information on public locations. For instance, Debbie Seagraves, the executive director of the American Civil Liberties Union in Georgia, said that there are no special rules or regulations against campaigning on city streets in Atlanta or that would permit police behavior such as that described in the Declaration describing the incident in which Atlanta police tore up literature protesting the planned execution of Troy Davis and forced socialist campaigners to take down an information booth on the public sidewalk. Mary Catherine Roper of the Pennsylvania ACLU told me that there are absolutely no permit requirements covering campaign literature tables in Philadelphia.

I declare under penalty of perjury that the foregoing is true and correct.
Executed October 21, 2008 in Philadelphia, Pennsylvania.

John Studer
October 21, 2008

Exhibit K

Exh. K - 21 pages

K-1

EXCERPTS FROM THE MUNICIPAL CODE OF TOLEDO, OHIO

TOLEDO MUNICIPAL CODE

Complete to October 1, 2008

....

963.18. Handbills.

(a) **Public Places.**

No person shall deposit or unlawfully sell any handbill in or upon any public place. Provided, however, that it shall not be unlawful on any public place for any person to hand out or distribute without charge to the receiver, any handbill to any person willing to accept it.

(b) **Private Premises.**

No person shall deposit or unlawfully distribute any handbill in or upon private premises, except by handing or transmitting any such handbill directly to the occupant of such private premises. Provided, however, that in case of private premises which are not posted against the receiving of handbills or similar material, such person, unless requested by anyone upon such premises not to do so may securely place any such handbill in such a manner as to prevent such handbill from being deposited by the elements upon any public place or private premises, except mailboxes may not be so used when prohibited by federal postal law or regulations.

(1) **Exemption for newspapers and political literature.**

The provisions of this section shall not apply to distribution upon private premises only of newspapers or political literature; except that newspapers and political literature shall be placed in such a manner as to prevent their being carried or deposited by the elements upon any public place or private premises.

(c) **Placing Handbills on Vehicles.**

No person shall deposit any handbill in or upon any vehicle unless the occupant of a vehicle is willing to accept it.

(d) **Clean-up.**

It shall be the responsibility of any person distributing handbills to maintain the area which they are utilizing free of any litter caused by or related to such handbill distribution.

(1952 Code § 16-2-10)

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EXCERPTS FROM THE CODE OF ORDINANCES OF THE CITY OF ATLANTA, GEORGIA AND THE STUDENT CODE OF CONDUCT AND ADMINISTRATIVE POLICIES OF GEORGIA STATE UNIVERSITY

K-4

CODE OF ORDINANCES
City of
ATLANTA, GEORGIA

Codified through
Ordinance No. 2008-85(08-O-2256),
enacted Nov. 26, 2008.
(Supplement No. 43)

Sec. 74-607. Distribution of handbills and unsolicited newspapers.

(a) It shall be unlawful for any person or persons to throw, deposit, leave, place, or to cause the throwing, depositing, leaving, or placing of any commercial or noncommercial handbill or unsolicited newspaper on any property open to the public within the City of Atlanta, however, it shall not be a violation of this article to hand out or to distribute handbills or unsolicited newspapers to any person or persons.
(b) Handbills or unsolicited newspapers placed on private property shall be placed or deposited in a manner reasonably designed to prevent the handbill from being blown or drifted about such private property or property open to the public, including streets, storm water catchment and conveyance systems and other public places.
(c) Nothing in this article shall be deemed an authorization to place handbills in mailboxes when such use is prohibited by federal law or by postal regulations.
(d) It shall be unlawful for any person or persons to deposit or leave, or to cause the depositing or placing of any commercial or noncommercial handbill or unsolicited newspaper on any parked vehicle within the City of Atlanta.

(Ord. No. 2007-07, § 1, 2-13-07; Ord. No. 2008-61(08-O-1247), § 1, 7-16-08)

GEORGIA STATE UNIVERSITY STUDENT CODE OF CONDUCT AND ADMINISTRATIVE POLICIES

K. CAMPUS SPEECH, DISTRIBUTION, AND POSTING POLICY

1. **Speeches and Demonstrations**
   a. The University strongly supports the First Amendment guarantees of freedom of speech, expression, and the right to assemble peaceably ("speech activities"). Accordingly, the University remains firmly committed to affording every member of the University community the opportunity to engage in peaceful and orderly speech that does not disrupt the operation of the University. Such opportunities are provided on an equal, content-neutral basis.

   b. In order to balance the rights, health and safety of all members of the University community, the University regulates the time, place, and manner of such expression. Accordingly, the following regulations shall apply to all students, student organizations, faculty, staff, and visitors:

      i. Persons or organizations may engage in speech activities in the following locations: the city streets adjacent to campus buildings, Library Plaza, Unity Plaza, the Urban Life Center Plaza and the area beneath the Courtland Street viaduct. University sites (non-city streets) are available for speaking or other forms of expression between 8:00 a.m. and 9:00 p.m., Monday through Friday except when the areas have been reserved by a University-Affiliated department or student organization. Maps indicating these areas are available in the Student/University Center Office, Suite 360, (404) 413-1860

      ii. Plans for speaking activities in other campus areas and times must be approved by the Student/University Center Reservations Office at least 72 hours in advance of the event. Such plans will be considered in a content-neutral manner.

2. **Distribution of Written Materials**
   a. <u>University Affiliated Distribution</u>
      i. Chartered student organizations and University departments and agencies may distribute literature and non-commercial pamphlets, handbills, circulars, newspapers, magazines, surveys, petitions, and questionnaires (or other items that require the interruption of pedestrian traffic) in the public areas on campus except in the following locations: classrooms and laboratories, dining areas, elevators, escalators, libraries, entrances and exits to buildings and other campus locations exempted by the Dean of Students.

      ii. Chartered student organizations, University departments and agencies may distribute material from tables reserved through the Student/University Center Reservations Office, Suite 345, (404) 413-1870. Chartered student organizations co-sponsoring an event or distributing written materials with a Non-University Affiliated organization must maintain a presence throughout the entire duration of the event or distribution.

      iii. All printed material must bear the name of the organization or department.

      iv. Scatter marketing (throwing multiple copies of documents on the ground for them to be seen and/or picked up) and other forms of marketing that violate City of Atlanta anti-litter ordinances are strictly prohibited. Violation of this prohibition may result in disciplinary action, fines, or both.

      v. The University makes all decisions about written material distributed on campus in a content-neutral manner.

   b. <u>Non-University Affiliated Distribution</u>
      i. Organizations not affiliated with the University may only distribute literature and non-commercial pamphlets, handbills, circulars, newspapers, magazines, surveys,

petitions, or questionnaires (or other non-commercial items that require the interruption of pedestrian traffic) in the following locations: a) properly reserved meeting spaces or b) the city streets adjacent to campus buildings, Library Plaza, Unity Plaza, the Urban Life Center Plaza and the area beneath the Courtland Street viaduct. Maps indicating valid areas to distribute materials shall be made available in the Student/University Center Office, Suite 360, (404) 413-1860.

ii. All printed material must bear the name of the individual or organization and may not solicit for donations, membership fees or sales.

iii. Requests to distribute written material must be made in advance to the Executive Director of the Student/University Center and such activity may be limited by the Dean of Students to specific areas. Authorized representatives of a Non-University Affiliated organization engaging in activities under this section must maintain a presence throughout the entire duration of the event or distribution.

iv. Scatter marketing (throwing multiple copies of documents on the ground for them to be seen and/or picked up) and other forms of marketing that violate City of Atlanta anti-litter ordinances are strictly prohibited. Violation of this prohibition may result in disciplinary action, fines, or both.

v. The University makes all distribution decisions on a content-neutral basis.

3. **Commercial and Nonprofit Solicitation/Sales**
All commercial solicitations or sales by University Affiliated and Non-University Affiliated persons or organizations on the University campus must be cleared in advance through the Office of Student/University Center Administration. All sales of materials, memberships, applications or other commercial enterprises – whether temporary or extended in nature - must be conducted in compliance with the University Commercial Solicitation Agreement. However, certain fundraising activities (e.g. candy sales, bake sales, etc.) held by members of the University community or token giveaways by significant sponsors of University events are exempt from the Agreement. The Commercial Solicitation Agreement is available through the Student/University Center Office, Suite 345, (404) 413-1870.

4. **Other Provisions**
Reasonable limitations may be placed on the time, manner, and place of the above activities in order to serve the interests of health and safety, prevent disruption of the educational process, and protect against threats to the rights of others. Accordingly, all University Affiliated and Non-University Affiliated persons or organizations must comply with the following provisions, or be asked by the Student/University Center Reservations Office to cease activities and leave campus.
   a. Activities may not obstruct, or aggressively confront, vehicular, pedestrian or other traffic.

   b. Use of sound amplification or unreasonable noise on the University campus is prohibited if it disrupts University activities. Use of sound amplification may be limited to certain specified hours at various campus locations, such as the Stage at Library Plaza, Unity Plaza, and the Urban Life Plaza (hours during which sound amplification is allowed may be obtained from the Student/University Center Reservations Office). The Reservations Office staff reserves the right to monitor sound levels and to require sound level modification. Failure to promptly comply with University directives to reduce sound levels may result in the immediate cancellation of the reservation and/or event.

   c. There must be no obstruction of entrances or exits to buildings.

   d. There must be no interference with educational activities inside or outside of buildings.

   e. There must be no interference with scheduled University ceremonies, events or activities.

f. Malicious or unwarranted damage or destruction of property owned or operated by the University or property belonging to students, student organizations, faculty, staff or visitors of the University is prohibited. Persons or organizations causing such damage may be held financially responsible.

g. Persons or organizations operating under these provisions on or adjacent to the University campus must remove all resulting structures, signs, and litter from the area at the end of their activities. If this is not accomplished, persons or organizations responsible for the activities may be held financially responsible.

h. Persons or organizations must be in compliance with all applicable federal, state and local laws and ordinances as well as all University policies, rules, and regulations.

i. Chartered student organizations co-sponsoring an event or distributing written materials with a Non-University Affiliated organization must maintain a presence throughout the entire duration of the event or distribution.

5. Campus Posting Policy

a. Introduction

In order to create and maintain an aesthetic environment and neat campus, Georgia State University established the following guidelines regarding posting of informational material on campus facilities. Address any questions about the campus posting policy, contact the Student/University Center Office, Suite 360, Student Center, or call (404) 413-1860.

b. Posting Prohibitions

Posters, flyers or notices may not be attached to doors, walls, windows, trees, car windshields, trash cans, recycling bins, light poles or exterior surfaces of buildings. Items posted improperly will be removed daily and destroyed. Persons and organizations that post items improperly may be subject to disciplinary sanctions and/or charged for the cost of removal and any damage to University property. Georgia State University is not responsible for maintaining or returning items that are improperly posted and removed.

c. Public Notices Posted by Affiliated Individuals or Organizations

i. Chartered student organizations, Georgia State departments, students, faculty and staff may post information related to official University activities in other locations on campus according to the guidelines set forth below. Grip strips are located throughout the University Center and student lounges for the posting of official University activity announcements by chartered organizations and University departments. Posted items should clearly identify the affiliation with the University. Only one posting is permitted per grip strip location. Notices may not be posted over previously posted items. Sponsors are responsible for promptly removing dated material. The guidelines for posting by University affiliated groups are as follows:

(1) Employment opportunity notices may be posted through Career and Job Search Services located in the University Center.

(2) Listings for off-campus housing and roommates may be posted through the off-campus housing services located in the Dean of Student's Office in the Student University Center. Information may be posted on 3-by-5-inch cards on the bulletin boards located on the third floor of the University Center and in Kell Hall.

(3) Student University Center, Sparks Hall Student lounge-2nd floor, and General Classroom Lounge-6th floor.

ii. The Office of Student Life and Leadership provides locked bulletin-board cabinets located in several different locations on campus. Only chartered student organizations and University departments may post notices of events in these bulletin boards by contacting the Office of Student Life and Leadership.

iii. Physical Education and Aquatics buildings have bulletin boards that are designated General Posting on which authorized Georgia State handbills may be posted. Authorization will only be given to handbills that relate to:

(1) programs scheduled in the buildings

(2) departmental postings (kinesiology and health, athletics, recreation)

(3) Dean of Students Office

(4) registered student organizations

Bulletin boards dedicated to specific recreational programs and departmental boards are not available for posting general handbills.

iv. Departmental- or agency-assigned bulletin boards - Posting of materials on any campus bulletin board that is assigned to a University department requires the approval of that department or agency. Any materials not authorized by the department will be removed and discarded.

d. Public Notices Posted by Non-Affiliated Individuals or Organizations
Individuals and organizations not affiliated with the University may post public notices on designated bulletin boards located in University buildings. Notices are removed each Friday. The University assumes no responsibility for the content of the material posted nor does this posting constitute any endorsement by the University. A list of the designated bulletin board locations may be obtained at the University Center Information Desk of the University Center and Student Center Office. In addition, organizations not affiliated with the University may purchase advertisements through the Signal, the campus newspaper, located in the University Center. Non-University Affiliated organizations may not post items on the University Center grip strips.

e. Student Center Posting Guidelines
The Student Center posting guidelines are outlined in the 1998 Policies and Procedures handbook.

f. Georgia State University Housing
The University Housing Office determines, in its sole discretion, the appropriateness of all information to be posted in Georgia State University Housing. Any persons or organizations wishing to post activity announcements at Georgia State University Housing may do so by delivering the flyer, poster or notice to the University Housing Office, Suite 250 Student Center. Items to be posted must clearly identify their affiliation with the University and/or person or organization. Only one posting of an event per lobby area is allowed.

Approved March 20, 2008, Student Life and Development Committee
Approved April 17, 2008, University Senate

K-9

EXCERPTS FROM THE MANUAL OF GENERAL POLICY AND MINUTES OF THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK

The City University of New York
Manual of General Policy

The Manual of General Policy (MGP) was created to provide the University community and others interested in the policies that govern the University with an easy to use reference manual. The MGP consolidates the non-bylaw policy action items passed from the Board of Trustees Minutes that are currently in force. In a small number of cases, materials from other sources have been incorporated into the MGP due to their importance in establishing University policy. The MGP is not a legal authority; in all cases requiring a legal authority, the text of the Board of Trustees Minutes or other original document(s) should be consulted.

...

Policy 6.6 MAINTENANCE OF PUBLIC ORDER

The Board of Trustees in compliance with Chapter 191 of the Laws of 1969 (Henderson Act) adopts the following rules and regulations for the maintenance of public order on college campuses and other college property used for educational purposes

1 Rules Governing Members of the Academic Community and Visitors

A member of the academic community shall not intentionally obstruct and/or forcibly prevent others from the exercise of their rights. Nor shall he or she interfere with the institution's educational processes or facilities, or the rights of those who wish to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services.

Individuals are liable for failure to comply with lawful directions issued by representatives of the University/college when they are acting in their official capacities. Members of the academic community are required to show their identification cards when requested to do so by an official of the college.

Unauthorized occupancy of University/college facilities or blocking access to or from such areas is prohibited. Permission from appropriate college authorities must be obtained for removal, relocation and use of University/college equipment and/or supplies.

Theft from or damage to University/college premises or property, or theft of or damage to property of any person on University/college premises is prohibited.

Each member of the academic community or an invited guest has the right to advocate his or her position without having to fear abuse—physical, verbal, or otherwise—from others supporting conflicting points of view. Members of the academic community and other persons on the college grounds shall not use language or take actions reasonably likely to provoke or encourage physical violence by demonstrators, those demonstrated against, or spectators.

Action may be taken against any and all persons who have no legitimate reason for their presence on any campus within the University/college, or whose presence on any such campus obstructs and/or forcibly prevents others from the exercise of their rights, or whose presence interferes with the institution's educational processes or facilities, or the rights of those who wish to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services.

Disorderly or indecent conduct on University/college-owned or -controlled property is prohibited.

No individual shall have in his or her possession a rifle, shotgun or firearm or knowingly have in his or her possession any other dangerous instrument or material that can be used and is intended to inflict bodily harm on an individual or damage upon a building or the grounds of the University/college without the written authorization of such educational institution. Nor shall any individual have in his or her possession any other instrument or material that can be used and is intended to inflict bodily harm on any individual or damage upon a building or the grounds of the University/college.

Any action or situation that recklessly or intentionally endangers mental or physical health or involves the forced consumption of liquor or drugs for the purpose of initiation into or affiliation with any organization is prohibited.

The unlawful manufacture, distribution, dispensation, possession, or use of illegal drugs or other controlled substances by University students or employees on University/college premises, or as part of any University/college activities is prohibited. Employees of the University must also notify the college personnel director of any criminal drug statute conviction for a violation occurring in the workplace not later than five days after such conviction.

The unlawful possession, use, or distribution of alcohol by students or employees on University/college premises or as part of any University/college activities is prohibited.

K-12

MINUTES OF THE MEETING OF THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK

HELD

JUNE 25, 1990

AT THE BOARD HEADQUARTERS BUILDING 535 EAST 80TH STREET – BOROUGH OF MANHATTAN

The Chairperson called the meeting to order at 5:23 P.M.

There were present:

James P. Murphy, Chairperson
Edith B. Everett, Vice Chairperson

Blanche Bernstein
Sylvia Bloom
Gladys Carrion
Louis C. Cenci
Michael J. Del Giudice
William R. Howard
Harold M. Jacobs
Calvin O. Pressley
Thomas Tam
Brenda Farrow White

Robert A. Picken, ex officio
Gregorio Mayers, ex officio

Etta G. Grass, Acting Secretary of the Board

Chancellor Joseph S. Murphy
Deputy Chancellor Laurence F. Mucciolo
President Milton G. Bassin
President Raymond C. Bowen
President Roscoe C. Brown, Jr.
President Leon M. Goldstein
President Matthew Goldstein
President Bernard W. Harleston
President Robert L. Hess
President Edison O. Jackson
President Augusta Souza Kappner
President Shirley Strum Kenny
President Paul LeClerc
President Charles W. Meridieth
President Gerald W. Lynch
President Isaura S. Santiago
President Kurt R. Schmeller
President Edmond L. Volpe
Sr. Vice Chancellor Donal E. Farley
Vice Chancellor Ira Bloom
Vice Chancellor Joyce Brown
Vice Chancellor Lee A. Corbie
Vice Chancellor Jay Hershenson
Acting Vice Chancellor Richard F. Rothbard
Dean Haywood Burns
Dean Stanford A. Roman
Michael Solomon, Esq.

The absence of Mr. Fink was excused.

K-13

C. QUEENS COLLEGE – B.A. IN WOMEN'S STUDIES:

RESOLVED, That the program in Women's Studies leading to the Bachelor of Arts to be offered at Queens College be approved effective September, 1990, subject to financial ability.

EXPLANATION: The purpose of the proposed program is to offer students the opportunity to study in an in-depth, structured and rational manner the roles and images of women in past and present societies, women's contributions to society and culture, and the structures and opportunities women have experienced historically and crossculturally.

Women's Studies has become an established discipline at colleges and universities across the country with its own sets of questions, methodologies, scholarly journals, and professional meetings, and conferences. Establishing a program in Women's Studies at Queens College will satisfy a significant need in the existing curriculum and also provide students and faculty with access to an area of study that is now part of traditional college and university curricula. All of the courses in the program are currently being offered on a regular basis at the College. The program is therefore cost effective and an appropriate addition to the liberal arts and career programs offered by the College.

NO. 5X. TIANANMEN ANNIVERSARY: Dr. Tam stated that the month of June marks the anniversary of the Tiananmen Tragedy in China and the memorial activities initiated by the Board of Trustees last year. To show continued grief at the loss of innocent human life at this tragic event and support for democracy and human rights in China, he requested that the Board observe a minute of silence at the Board meeting.

In response to a question from Mrs. Everett, Dr. Tam stated that students in China are still attending universities; university activities are still going on, but they can use some support in terms of greater freedom and more student participation. They have a lot to learn from The City University of New York.

NO. 6. COMMITTEE ON FACULTY, STAFF, AND ADMINISTRATION: RESOLVED, That the following items be approved or action taken as noted:

Dr. Jacobs stated that on behalf of the Committee, he is sending a letter to Pres. Lief, thanking him for his invaluable help to the Committee.

A. DISTINGUISHED PROFESSORS: RESOLVED, That the following be designated Distinguished Professors in the Ph.D. Program in History, at The Graduate School and University Center for the period September 1, 1990 – August 31, 1991, with compensation of $20,000 per annum in addition to their regular academic salaries, subject to financial ability:

Name

Diggins, John
Semmel, Bernard

B. VISITING DISTINGUISHED PROFESSOR: – Item Withdrawn.

At this point Mr. Del Giudice left the meeting.

C. REVISION TO THE RULES AND REGULATIONS FOR THE MAINTENANCE OF PUBLIC ORDER PURSUANT TO ARTICLE 129-A OF THE EDUCATION LAW:

RESOLVED, That the Rules and Regulations for the Maintenance of Public Order adopted by the Board of Trustees of The City University of New York on June 23, 1969, and amended on October 27, 1980, and May 22, 1989, be amended to read as follows:

RULES AND REGULATIONS FOR THE MAINTENANCE OF PUBLIC ORDER PURSUANT TO ARTICLE 129-A OF THE EDUCATION LAW

The tradition of the University as a sanctuary of academic freedom and center of informed discussion is an honored one, to be guarded vigilantly. The basic significance of that sanctuary lies in the protection of intellectual freedom: the rights of professors to teach, of scholars to engage in the advancement of knowledge, of students to learn and to express their views, free from external pressures or interference. These freedoms can flourish only in an atmosphere of mutual respect, civility, and trust among teachers and students, only when members of the University community are willing to accept self-restraint and reciprocity as the condition upon which they share in its intellectual autonomy.

Academic freedom and the sanctuary of the University campus extend to all who share these aims and responsibilities. They cannot be invoked by those who would subordinate intellectual freedom to political ends, or who violate the norms of conduct established to protect that freedom. Against such offenders the University has the right, and indeed the obligation, to defend itself. We accordingly announce the following rules and regulations to be in effect at each of our colleges which are to be administered in accordance with the requirements of due process as provided in the Bylaws of the Board of Higher Education.

With respect to enforcement of these rules and regulations we note that the Bylaws of the Board of Higher Education provide that:

> "THE PRESIDENT. The president, with respect to his education unit, shall:
>
> "a. Have the affirmative responsibility of conserving and enhancing the educational standards of the college and schools under his jurisdiction;
>
> b. Be the advisor and executive agent of the Board of his respective College Committee and as such shall have the immediate supervision with full discretionary power in carrying into effect the Bylaws, resolutions, and policies of the Board, the lawful resolutions of the several faculties;
>
> c. Exercise general superintendence over the concerns, officers, employees, and students of his educational unit."

1. RULES

1. A member of the academic community shall not intentionally obstruct and/or forcibly prevent others from the exercise of their rights. Nor shall he interfere with the institution's educational processes or facilities, or the rights of those who wish to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services.

2. Individuals are liable for failure to comply with lawful directions issued by representatives of the University/college when they are acting in their official capacities. Members of the academic community are required to show their identifications cards when requested to do so by an official of the college.

3. Unauthorized occupancy of University/college facilities or blocking access to or from such areas is prohibited. Permission from appropriate college authorities must be obtained for removal, relocation, and use of University/college equipment and/or supplies.

4. Theft from, or damage to University/college premises or property, or theft of or damage to property of any person on University/college premises is prohibited.

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5. Each member of the academic community or an invited guest has the right to advocate his position without having to fear abuse, physical, verbal, or otherwise, from others supporting conflicting points of view. Members of the academic community and other persons on the college grounds shall not use language or take actions reasonably likely to provoke or encourage physical violence by demonstrators, those demonstrated against, or spectators.

6. Action may be taken against any and all persons who have no legitimate reason for their presence on any campus within the University/college, or whose presence on any such campus obstructs and/or forcibly prevents others from the exercise of the rights or interferes with the institution's educational processes or facilities, or the rights of those who wish to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services.

7. Disorderly or indecent conduct on University/college-owned or controlled property is prohibited.

8. No individual shall have in his possession a rifle, shotgun, or firearm or knowingly have in his possession any other dangerous instruments or material that can be used to inflict bodily harm on an individual or damage upon a building or the grounds of the University/college without the written authorization of such educational institution. Nor shall any individual have in his possession any other instrument or material which can be used and is intended to inflict bodily harm on any individual or damage upon a building or the grounds of the University/college.

9. Any action or situation which recklessly or intentionally endangers mental or physical health or involves the forced consumption of liquor or drugs for the purpose of initiation into or affiliation with any organization is prohibited.

10. The unlawful manufacture, distribution, dispensation, possession, or use of illegal drugs or other controlled substances by University students or employees [in the workplace,] on University/college premises; or as part of any University/college activities is prohibited. Employees of the University must also notify the College Personnel Director of any criminal drug statute conviction for a violation occurring in the workplace not later than five (5) days after such conviction.

11. The unlawful possession, use, or distribution of alcohol by students or employees on University/college premises or as part of any University/college activities is prohibited.

2. PENALTIES

1. Any student engaging in any manner in conduct prohibited under substantive Rules 1-[9] 11 shall be subject to the following range of sanctions as hereafter defined in the attached Appendix: admonition, warning, censure, disciplinary probation, restitution, suspension, expulsions, ejection, and/or arrest by the civil authorities.

2. Any tenured or non-tenured faculty member, or [tenured] other member of the instructional staff, or member of the classified [administrative or custodial] staff engaging in any manner in conduct prohibited under substantive Rules 1-[10]11 shall be subject to the following range of penalties: warning, censure, restitution, fine not exceeding those permitted by law or by the Bylaws of The [Board of Higher Education] City University of New York or suspension with/without pay pending a hearing before an appropriate college authority, dismissal after a hearing, ejection, and/or arrest by the civil authorities, and, for engaging in any manner in conduct prohibited under substantive rule 10, may, in the alternative, be required to participate satisfactorily in an appropriately licensed drug treatment or rehabilitation program. [In addition, in the case of a] A tenured or non-tenured faculty member, or [tenured] other member of the instructional staff, or member of the classified [administrative or custodial] staff charged with engaging in any manner in conduct prohibited under substantive Rules 1-[9]11 shall be entitled to be treated in accordance with applicable provisions of the Education Law, or the Civil Service Law, or the applicable collective bargaining agreement, or the Bylaws or written policies of The City University of New York.

3. Any visitor, licensee, or invitee, engaging in any manner in conduct prohibited under substantive Rules 1-[10]11 shall be subject to ejection, and/or arrest by the civil authorities.

4. Any organization which authorized the conduct prohibited under substantive rules 1-[10] 11 shall have its permission to operate on campus rescinded.

Penalties 1–4 shall be in addition to any other penalty provided by law or The City University Trustees.

APPENDIX

SANCTIONS DEFINED:

A. Admonition.

An oral statement to the offender that he has violated university rules.

B. Warning

Notice to the offender, orally or in writing, that continuation or repetition of the wrongful conduct, within a period of time stated in the warning, may cause far more severe disciplinary action.

C. Censure.

Written reprimand for violation of specified regulation, including the possibility of more severe disciplinary sanction in the event of conviction for the violation of any University regulation within a period stated in the letter of reprimand.

D. Disciplinary Probation.

Exclusion from participation in privileges or extracurricular University activities as set forth in the notice of disciplinary probation for a specified period of time.

E. Restitution.

Reimbursement for damage to or misappropriation of property. Reimbursement may take the form of appropriate service to repair or otherwise compensate for damages.

F. Suspension.

Exclusion from classes and other privileges or activities as set forth in the notice of suspension for a definite period of time.

G. Expulsion.

Termination of student status for an indefinite period. The conditions of readmission, if any is permitted, shall be stated in the order of expulsion.

H. Complaint to Civil Authorities.

I. Ejection.

NOTE: Matter underlined is new; matter in brackets to be deleted

K-17

EXCERPTS FROM THE CODE OF THE TOWNSHIP OF MONTCLAIR, NEW JERSEY

K-18

Code of the Township of Montclair

ARTICLE I Adoption of Code (§ 1-1 - § 1-15)

[Adopted 5-23-2000 by Ord. No. 00-19]

§ 1-1 Adoption of Code.

Pursuant to N.J.S.A. 40:49-4, the ordinances of the Township of Montclair of a general and permanent nature adopted by the Township Council of the Township of Montclair, as revised, codified and consolidated into chapters and sections by General Code Publishers Corp., and consisting of Chapters 1 through 347, together with an Appendix, are hereby approved, adopted, ordained and enacted as the "Code of the Township of Montclair," hereinafter known and referred to as the "Code."

§ 178-3 Distribution of handbills.

No person shall place, throw, cast or distribute any paper of any kind, any handbill, circular, card or other advertising matter, including all samples of every description whatsoever, in or upon any street or public place, or in or upon any motor vehicle on a public street or place, or in or upon any front yard or courtyard of private premises, or in or upon any stoop of such private premises, or in or upon any vestibule or hall of any building, or in any letter box thereon or therein maintained; provided, however, that nothing contained in this section shall be deemed to prohibit the delivery of any such matter by the United States postal authorities and the delivery of newspapers, magazines and periodicals from regularly established news dealers. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

K-19

EXCERPTS FROM THE MUNICIPAL CODE FOR THE CITY OF BOSTON, MASSACHUSETTS

CITY OF BOSTON MUNICIPAL CODE

This code is current through Ord. 2007 C. 12, passed 12/12/07

...

●16-12.3● Advertising.

Except in accordance with a permit from the Commissioner of Public Works no person shall, for the purpose of advertising goods, wares or merchandise for sale, while on foot in any street, carry and display any show card, placard or sign, nor shall any person distribute to persons in any street for the purpose of advertising goods, wares or merchandise for sale, handbills, cards, circulars or papers other than newspapers, nor shall any person having the control of any vehicle used principally for advertising permit such vehicle to operate in any street north and east of Massachusetts Avenue. The Commissioner of Public Works shall establish, with respect to such advertising matter, such uniform rules governing the size of show cards, placards, and signs as shall be reasonably necessary to prevent interference with public travel and for the other convenience and safety of the public and such rules governing the size of handbills, cards, circulars and papers other than newspapers which may be distributed in the street as shall be reasonably necessary to prevent littering or other hazard to public safety. Each permit issued hereunder shall contain a copy of the rules relating thereto and shall be limited by its terms to the authorization of conduct permitted thereby and otherwise legal.

No permit shall be required nor shall this ordinance operate to affect, interfere with or in any way abridge the right of persons on the street to carry or display noncommercial show cards, placards or signs or to distribute non-commercial handbills, cards, circulars or papers other than newspapers.

(CBC 1975 Ord. T14 § 287)

16-41 PROHIBITING AGGRESSIVE SOLICITATION.

●16-41.1● Definitions.

For purposes of this section:

a. *Solicit* shall mean to request an immediate donation of money or other thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other value. The solicitation may be, without limitation, by the spoken, written, or printed word, bodily gestures, signs, or by other means of communication.

b. *Aggressive manner* shall mean:

1. Any conduct that is (i) intended to or is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in that person's immediate possession; or (ii) intended to or is likely to cause a reasonable person to be intimidated into responding affirmatively to the solicitation; or

2. Persisting in closely following or approaching a person, after the person solicited has been solicited and informed the solicitor by words or conduct that such person does not want to be solicited or does not want to give money or any other thing of value to the solicitor; or

3. Intentionally or recklessly blocking or interfering with the safe or free passage of the person being solicited, whether the person is a pedestrian or the operator of a vehicle, including the situation where the person takes evasive action to avoid physical contact with the person making the solicitation; or

4. Intentionally touching or making any physical contact with the person being solicited in the course of the solicitation without the person's consent.

c. *Automated teller machine* shall mean a device, linked to a financial institution's account records, which is able to carry out transactions, including, but not limited to: account transfers, deposits, cash withdrawals, balance inquiries, and mortgage and loan payments.

d. *Automated teller machine facility* shall mean the area comprised of one or more automatic teller machines, and any adjacent space which is made available to banking customers during and after regular banking hours.

e. *Bank* shall mean the same as the defined G.L. c. 167, s. I.

f. *Check cashing business* shall mean the same as that defined by G.L. 167, c. 169A, s. I.

g. *Public area* shall mean an area to which the public has access and includes, but is not limited to, alleys, bridges, buildings, driveways, parking lots, parks, playgrounds, plazas, sidewalks, and streets open to the general public, and the doorways and entrances to buildings, and dwellings.

(Ord. 1997 c. 10)

16-41.2 Prohibited Acts.

It shall be unlawful for any individual to solicit money or other things of value, even if validly licensed by the City of Boston for such act, if such solicitation is conducted:

a. In an aggressive manner in a public area, including the situation where the individual being solicited in an aggressive manner is the operator or occupant of a motor vehicle located on a public way and the solicitation consists of performing or offering to perform a service in connection with such vehicle; or

b. Within ten (10') feet of any entrance or exit of any bank or check cashing business during the hours of operation of such bank or check cashing business or within ten (10') feet of any automated teller machine during the hours of its operation.

(Ord. 1997 c. 10)

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Exhibit L

Exh. L - 2 pages

L - 1

The New York Times
nytimes.com

November 11, 2008

Plaintiffs Are Surprised by New Rules on Taping

By BENJAMIN WEISER

The New York Police Departmentnion imposed stricter rules on the videotaping of demonstrations, saying it will generally be done only when the department suspects that laws are being broken.

The revised rules on public surveillance, which went into effect 19 months ago, replaced a much broader set of guidelines that allowed the police to videotape just about any public gathering. The new rules say videotaping is permissible "when it reasonably appears that unlawful conduct is about to occur, is occurring or has occurred during the demonstration."

Civil liberties lawyers who had been pressing for such a change said that the Police Department altered the rules without informing them or the court, and that as a result, litigation over the practices continued to be pursued.

"It's disturbing that the department did so in secret, wasting precious tax dollars to engage in an unnecessary legal battle," said Arthur Eisenberg, legal director of the New York Civil Liberties Union, which is co-counsel for the plaintiffs who have been fighting to limit the police videotaping.

But lawyers for New York City disputed the contention that they had acted in secret, and said that they had kept the plaintiffs and the judge informed of their plans to change the rules.

The fight over the police videotaping is just the latest twist in a historic class-action lawsuit that was first filed in 1971 and has sought to balance the right to free expression with the state's interest in maintaining order.

The lawsuit, brought over harassment of political advocacy groups by the department's so-called Red Squad, led to a 1985 consent decree, which was named for Barbara Handschu, the first listed plaintiff.

In 2003, a federal judge, Charles S. Haight Jr., agreed to modify the decree, which had restricted the Police Department's ability to conduct surveillance of political groups. The police had argued that they needed more flexibility in investigating terrorism.

In 2005, the plaintiffs asked Judge Haight to stop the Police Department from engaging in the routine videotaping of demonstrators.

At the time, Police Department rules allowed the videotaping of demonstrators during "public assemblages or any other critical incident in which such accurate documentation is deemed potentially beneficial or useful."

City officials said the department's videotaping practices were legal. In June 2007, Judge Haight declined to stop the practice, although he said he would entertain further challenges.

In a statement issued on Monday, city officials continued to defend the department's videotaping practices.

"The Police Department does not engage in unlawful political surveillance," said Celeste Koeleveld, a senior lawyer in the Corporation Counsel's office.

The plaintiffs said in a filing on Monday in Federal District Court in Manhattan that it was not until Sept. 18 that they learned that the department had tightened the rules in April 2007. They said that the newer and more restrictive rules — which allow videotaping only where there is illegal activity or for limited purposes like crowd control or training — were acceptable to them.

Had they known of the change, they said, they could have done away with many months of litigation. They asked that the judge order the city to reimburse them for legal fees, and to inform them of any future changes in policy.

"It reminds me of that cartoon," Jethro M. Eisenstein, another lawyer for the plaintiffs, said in a telephone interview, "where somebody is running at a wall over and over, and suddenly the door opens, and you realize nobody told you there was a door there."

City officials disputed the contention that the new guidelines had been issued in secret. Ms. Koeleveld, the lawyer for the city, said that both the court and Mr. Eisenstein had been notified in writing.

The city officials, citing the pending litigation, declined further comment. But they said they would show in court that the city "has complied with the Handschu guidelines in the past, and continues to do so."

Exhibit M

Exh. M - 31 pages

M-1

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US DISTRICT COURT SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOCIALIST WORKERS PARTY, et al.,

Plaintiffs,

-against-

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants.

73 Civ. 3160 (TPG)

U.S. DISTRICT COURT
MAR 10 1987
S.D. OF N.Y.

DEFENDANTS' MEMORANDUM ON PROPOSED ORDER OF INJUNCTIVE RELIEF

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- Of Counsel -

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OF JUDGE THOMAS P. GRIESA
MAR 11 1987

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PCS:mfm
5/1715/2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SOCIALIST WORKERS PARTY, et al., :

Plaintiffs, :

- against - : 73 Civ. 3160 (TPG)

ATTORNEY GENERAL OF THE UNITED STATES, et al., :

Defendants. :

- -x

DEFENDANTS' MEMORANDUM ON PROPOSED ORDER OF INJUNCTIVE RELIEF

Introduction

On January 27, 1987, the Court held a conference on the record for the purpose of considering the parties' respective proposed orders for injunctive relief. In that proceeding the Court rejected the plaintiffs' proposed order as too broad and the defendants' proposed order as too narrow when measured against the Court's August 25, 1986 Opinion. At the conference the Court orally confirmed that it deemed information acquired by the Federal Bureau of Investigation ("FBI") through the use of informants and by means of surreptitious entries to be "illegally obtained" within the meaning of its Opinion. (Tr. at 6, 9.) It thus defined the scope of injunctive relief as embracing information obtained through those methods.*

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* The Court found the FBI's covert disruption activities to be unlawful, 642 F.Supp. at 1417-20, but it made no finding that the FBI obtained information through such activities. Id. at 1384-89. Rather, the findings reflect that the FBI utilized information previously obtained by some unspecified method of acquisition to formulate and

[Footnote continues]

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During the conference the Court requested that the Government provide information on the nature and handling by the defendant agencies of files and information concerning the plaintiffs. (Tr. at 19.) With this memorandum and the exhibits submitted herewith we offer such information as we have been able to obtain from agencies whose interests will be affected by the Court's order together with a discussion of those governmental interests. We submit that any order of an injunction entered by the Court should contain a provision whereby the affected government agency can in an emergency situation or exigent circumstances make ex parte application to a district court to use or disseminate the information otherwise subject to the constraints of the injunction. The order should further provide that, in emergencies where a court order cannot be obtained in time, the agency be permitted to disseminate the information and inform the court subsequently. An appropriate form of order accompanies this memorandum.*

[Footnote continued]

implement disruption activities. See, e.g., id. at 1385, item (1) (FBI learned that Franklin had criminal record of earlier offenses), and id., at 1386, item (6) (FBI learned from an informant that CAMD was receiving support from NAACP). Thus there is no record evidence that the FBI utilized its covert disruption activities to obtain information, and such activities should be excluded from any determination of unlawful methods of acquiring information about the plaintiffs.

* In submitting this memorandum and the accompanying form of order defendants do not acknowledge that injunctive relief in any form is warranted. Although the Court found particular FBI activities to afford a basis for liability in damages, it did not make the requisite finding of a sufficient likelihood that any one of them would recur and that a remedy in damages for injuries flowing from such recurrence

[Footnote continues]

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DISCUSSION

I. The Government Has Legitimate and Important Interests Which Require an Order that Would Permit It to Apply Ex Parte to a Federal Court to Make Ad Hoc Use of Information Otherwise Barred by This Court's Order

Concerning the nature of its powers to afford relief, the Court noted in its general formulation of the proposed relief that it has the power to grant an injunction concerning documents that the Government obtained unlawfully "and the maintenance of which serves no legitimate purpose for the agency which possesses them." 642 F.Supp. at 1431-32. As shown below and as demonstrated in the attached exhibits, the defendant agencies have important legitimate needs for

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[Footnote continued]

would be inadequate. See City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983), and Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

As to the form of relief contemplated by the Court, a prohibition on the use or dissemination of information deemed to have been unlawfully obtained by the FBI, such relief is inappropriate because, apart from the FBI's use of certain information in its SWP Disruption Program, there was no finding by the Court that any defendant agency used or disseminated such information in a manner that was unconstitutional. The proposed injunctive relief thus transgresses well established precepts that govern a court's discretion to grant injunctive relief.

Judicial power to enter an injunction may be exercised only on the basis of a constitutional violation, and the nature of the violation determines the scope of the remedy. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). The sole function of an injunction is to forestall future violations, United States v. Oregon Medical Society, 343 U.S. 326, 333 (1952), but on the record in this action there was no violation of plaintiffs' constitutional rights caused by defendants' use or dissemination of FBI-obtained information of a kind that will realistically occur in the future.

ad hoc use and/or dissemination of information deemed by the Court to have been unlawfully obtained. The constraints on the Government's use or dissemination of information coming within the scope of the injunction can be reconciled with the Government's legitimate needs for that information under certain circumstances by including a provision in the order for injunctive relief that permits the affected defendant government agency to make ex parte application to a federal court for an order permitting use or dissemination of information otherwise barred by the order, and in extreme emergencies to act in advance of obtaining such an order.*

Such a provision in the order for injunctive relief would effectuate the "legitimate purpose" portion of the Court's formulation, quoted above, consistently with Supreme Court guidance in the area. In Rizzo v. Goode, 423 U.S. 362 (1976), the Supreme Court counseled against an injunctive order that

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* Although this Court's opinion contemplated segregation of files, neither party has proposed such relief. The FBI requests that, rather than physically segregate files, it be permitted to place an appropriate legend on all files subject to this Court's order. While the Court believed that physical segregation presented no problem because the Court had viewed certain informant files that had been the subject of controversy in this lawsuit (Jan. 27, 1987 tr. at 11), those files are only a small portion of the documents that are likely to be covered by this Court's order (depending, of course, on the exact scope of that order). Actual physical segregation would constitute a tremendous burden over and above that of locating and identifying documents covered by the injunction, and we request that such an obligation not be imposed. In view of plaintiff's failure to include such an obligation in their proposed order, we believe that they will not object to this request.

imposes sharp limitations on a government agency's dispatch of its internal affairs, noting the "well-established" rule that the Government has traditionally been granted the widest latitude in conducting such affairs. 423 U.S. at 378-79. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. at 312. The equitable relief contemplated in this case has serious public consequences. The provision sought by the defendants is necessary to accommodate important public interests and the relief for the plaintiffs which the Court has described in general terms.*

This Court cited Paton v. LaPrade, 524 F.2d 862 (3rd Cir. 1975), and Chastain v. Kelley, 510 F.2d 1232 (D.C. Cir. 1975), as authority for the form of relief contemplated here. However, both of those decisions teach that there are several factors to be weighed, including the governmental interests at stake, before a court orders file expungement or its equivalent, as in this case, a bar to the Government's use of information contained in its files. In Paton the court of appeals held that the plaintiff had standing to challenge the FBI's retention of

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* The Supreme Court has prescribed an approach of flexibility and accommodation in formulating injunctive relief: "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. at 329. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Swann, supra, 402 U.S. at 16.

its file on her, but went on to vacate the district court's order of expungement because it had not considered five factors: (1) the accuracy and adverse nature of the information; (2) the availability and scope of dissemination of the records; (3) the legality of the methods by which the information was compiled; (4) the existence of statutes authorizing its compilation and maintenance and/or prohibiting destruction of records; and (5) the value of the records to the Government. 524 F.2d at 869.

Similarly in Chastain v. Kelley, supra, the court prescribed a balancing of interests, saying that any order of expungement "must be rationally and selectively responsive to those interests." Id. at 1236. There the court found that the plaintiff FBI agent might have a right not to be adversely affected in the future by the information in his file, if the information (1) was inaccurate; (2) was obtained by "fatally flawed" procedures; and (3) was prejudicial without serving any proper FBI purpose. Ibid. As in Paton, the Court reversed an expungement order entered without consideration of these factors.

The D.C. Circuit cited the two aforementioned decisions in Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied sub nom. Brennan v. Hobson, 470 U.S. 1084 (1985), a case more analogous to this one. There the court stressed that an order directing expungement of records (and, by extension, a ban on their use or dissemination) involves a balancing of interests: the harm to "an individual" as against the utility of the records to the government. 737 F.2d at 65. The court also pointed out that criminal records generally were inherently prejudicial and

that decisions involving expungement of such records were of limited relevance as guidance in cases that did not involve criminal records: that is, the prejudice or detriment factor is accorded far less weight in favor of the subject of the file where, as here, a criminal record is not involved. Ibid.

The aforecited decisions are clear in teaching that the methods by which the Government has acquired information are not the sole determinant of whether an expungement order or an order barring the use and dissemination of information should be entered. The applicable factors apply to this case as follows:

The Nature of the Information:

The Court has found that "It is safe to characterize the FBI investigation of the SWP from the early 1950's onwards as a national security investigation." 642 F. Supp. at 1377. It follows that the file contents are not criminal records or records of criminal conduct. See id. at 1380: "thousands of reports recording peaceful, lawful activity by the SWP and YSA." Hence they are not inherently prejudicial or adverse in the sense contemplated by Paton, Chastain, and Hobson, supra. That factor should accordingly be weighed in favor of the Government.

The Accuracy of the Information:

The information obtained by the FBI was obtained by methods having a high degree of reliabilty. The Court found that a significant portion of SWP and YSA membership consisted of FBI informants. 642 F. Supp. at 1380. A number of those informants achieved positions of responsibility within the plaintiff

organizations, with approximately 51 informants serving on executive committees or executive boards. Id. at 1381-82. The Court also found that informants supplied the FBI with approximately 12,600 SWP and YSA documents of which 7,000 were intended to be available only within the organizations. Id. at 1382. The information obtained through surreptitious entries was contained in documents photographed or removed from SWP or YSA premises. Id. at 1394. Such information necessarily has verbatim accuracy. Information obtained through electronic surveillance, both microphone and telephone, id. at 1389, has a similar degree of accuracy. In any event, the Court made no finding that the information obtained by the FBI is inaccurate. The factor of accuracy should accordingly be weighed in favor of the Government.

The Governmental Interests Involved:

The governmental interests affected by denial of use or dissemination of information concerning the plaintiffs held or provided by the FBI are legitimate and substantial. The information, regardless of how it was obtained, serves, in this Court's formulation, "a legitimate purpose for the agency which possesses them." 642 F. Supp. at 1432. Those legitimate governmental interests, which are reflected in the declarations submitted as exhibits to this memorandum, present a basis for the Court to include a provision in its order for injunctive relief permitting the FBI or other affected governmental agencies to apply ex parte to any federal court for an order permitting use or disclosure of particular information otherwise barred by this Court's order, and permitting disclosures in advance of such an order in extreme emergencies.

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The governmental interests in question principally concern federal statutes establishing loyalty requirements for federal employees, related executive orders and directives requiring security clearances for federal employees and employees of government contractors involved in providing classified equipment and services, and the needs of certain agencies having responsibilities to provide physical protection to persons and, where possible, to prevent acts of terrorism. We will relate those interests to the findings of this Court and to recognition accorded them by the Supreme Court and other courts with reference to applicable federal statutes and executive orders.

This Court found that the SWP subscribes to the political and economic doctrines of Marx and Lenin as further articulated by Trotsky. 642 F. Supp. at 1369. It also found that although the SWP appeared too small to implement its goals, id. at 1370, it nevertheless viewed itself as a revolutionary or "combat" party, id. at 1371, which "has not deserted the theory and example of Lenin and Trotsky favoring ultimate violent revolution." Id. at 1373. The Court also found the SWP's stated opposition to terrorism to be unconvincing: through the Fourth International the SWP remained affiliated with other Trotskyist groups that both advocated and practiced terrorism. Id. at 1373-75. For those and other reasons it was -- and is -- reasonable for the FBI and other agencies of the Government to believe that the SWP and its members have a revolutionary ideology whose goal is the violent overthrow of our democratic processes and form of government. See id. at 1370.

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Inasmuch as revolutionary ideology is an ingredient in the body of information about the plaintiffs obtained by the FBI during its investigation, it implicates the vital interest of self-preservation of this Nation's form of government under the Constitution. The Supreme Court has noted that self-preservation is "the ultimate value of any society." Dennis v. United States, 341 U.S. 494, 509 (1951). Revolution -- replacement of the present form of our government by means not provided for in the Constitution -- necessarily poses a threat to the fundamental interest of self-preservation. "This governmental interest outweighs individual rights in . . . associational privacy . . . ." Uphaus v. Wyman, 360 U.S. 72, 80 (1959). "[W]hile the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests." United States v. Robel, 389 U.S. 258, 267 (1967), citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). In light of the teachings of these authorities, this Court should avoid entering an order for injunctive relief that puts the Nation's vital interest of self-preservation at risk.

The principal area where the Court's proposed order may adversely affect the Government's recognized vital interests concerns the responsibilities of the defendant agencies in providing, receiving, or acting upon information concerning the loyalty and security of government employees and government contractors. In 5 U.S.C. § 7311 Congress prohibited the employment of anyone who is a knowing member of an organization that advocates the violent or forceful

overthrow of the Government. Executive Order 10450 effectuates that statutory mandate. Section 3(a) of that order prescribes that the appointment of each civilian employee shall be made subject to investigation, with a national agency check being the minimum investigation. The scope of any investigation pursuant to that order is to be initially determined with reference to the degree of adverse effect the occupant of a position could have on the national security. Ibid.

The Executive Order further directs that where questions arise in an investigation indicating that "the employment of any such person may not be clearly consistent with the national security, there shall be conducted with respect to such person a full field investigation . . ." or such lesser investigation as will be sufficient for the agency head to determine whether the employee's retention is clearly consistent with the interests of the national security. Ibid. Applicants for critical sensitive positions must be subjected to full field investigations, and applicants for non-critical sensitive positions may be required to undergo full field investigations at the discretion of the relevant agency head. Federal Personnel Manual Ch. 736, Subchs. 1-4, 2-3(a). As this Court noted, "[T]he basic loyalty-security program of E.O. 10450 remains in place." 642 F. Supp. at 1399.

The effectiveness of the government's loyalty-security program rests in the first instance on investigations that are as thorough in their execution and accurate in their product

as each situation warrants. Where the issuance or denial of a security clearance for access to classified information or equipment is in question, the public interest is best served when all information pertinent to the subject of an investigation is available so that the decision-making process is an informed one.* The obvious starting point for any investi-gation is information that the responsible agency has on hand or information available to it through a file search of other agencies, such as the National Agency Check. See 642 F. Supp. at 1396. That information, even though it may appear to be stale because of its date of acquisition and may not directly bear upon the ultimate security clearance determination, is important for the leads that it affords the investigator and for identifying questions requiring resolution through inquiry to other -- and ultimately contemporary -- sources of information. It is also important for assessing an individual's credibility and truthfulness: for example, whether a candidate for a security clearance admits or denies past SWP membership where information obtained through a surreptitious entry shows him to have been an

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* The Supreme Court tacitly endorsed this position when it said, "[T]here is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." Cole v. Young, 351 U.S. 536, 546 (1956).

active member in 1976 or earlier.* As this Court observed, "On these matters, the record before the court indicates that each case turns on its own individual facts, involving the attitude and conduct of the person, the nature of the service to be performed for the Government, the sensitivity of the information which the person will handle, and other factors." 642 F. Supp. at 1428.

Unless the Court permits the defendant agencies in emergency or exigent circumstances to make ex parte application to a federal court to permit use of the information concerning the plaintiffs obtained by the FBI, the decision whether or not an individual's access to sensitive or classified information "is clearly consistent with the interests of the national security," E.O. 10450 § 3(a), will be made on the basis of an investigation that is inherently not thorough. Where, as here under the proposed injunction, a body of information that is relevant to the investigative process and which may be relevant to the decision-maker in the ultimate determination of whether to issue or deny a security clearance is arbitrarily excluded from the entire process, the national security interests at stake are

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* Even in a criminal case, the Government would be entitled to use illegally obtained information to impeach the false testimony of a defendant. E.g., Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954). The Government should be no worse off when assessing the credibility of an applicant for employment who will be entrusted with the most sensitive secrets of state.

necessarily compromised.* As the Supreme Court has taught, however, the power to safeguard its vital interests should not be denied the Government. See United States v. Robel, supra.

Similar considerations apply to the responsibility of the FBI to make name check information available to the Department of Defense in connection with the latter's responsibilities for maintaining the industrial security program pursuant to Executive Order 10865, as amended by Executive Order 10909. The Department of Defense has an obvious interest in having all available information in order to conduct thorough background checks before issuing security clearances in connection with its industrial security program. That program affects private sector employees for whom a security clearance is required by virtue of their involvement in research, development,

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* It appears that the Court may not intend this result. Toward the end of its opinion it said:

> Any indication that the SWP or YSA has a current program of carrying out violent revolution or acts of violence or terrorism would not reflect the presently known facts. This does not, of course, prevent legitimate inquiry about the actions and attitudes of an individual to the extent that they bear on relevant questions of loyalty and security.

642 F. Supp. at 1428. Nevertheless, the present and the past, particularly in individuals' lives, are inextricably linked in a continuum. The past illuminates the present. An order that excludes from consideration virtually all information obtained in a certain period perforce frustrates the accuracy of any determination regarding an individual's present circumstances.

or production contracts for classified matters.* See Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970), for a general outline of the operation of Executive Order 10865. See Smith v. Schlesinger, 513 F.2d 462, 465 n.1 (D.C. Cir. 1975), for citations to decisions concerning investigations and security clearance matters in the industrial security program. See also Gaver v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973), and Wolfson v. United States, 492 F.2d 1386 (Ct. Cl. 1974) (loss of security clearance and employment because of membership in Communist front organization and association with Communist Party sympathizers).

The Supreme Court has expressly recognized that the Government's interest in preventing espionage and sabotage in the Nation's defense plants is "not insubstantial." See United States v. Robel, 389 U.S. at 264. There the Supreme Court recognized the right of the government to deny access to its secrets to those who would use that information to harm the Nation.

> We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense facilities those who would use their positions to disrupt the Nation's production facilities.

389 U.S. at 266-67. By the same token, agencies of the

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* The court did not find any actionable conduct arising in the industrial security context. See 642 F. Supp. at 1427, last paragraph.

Executive Branch should not be denied through court order the authority to conduct specific focused investigations based upon realistic national security concerns. See Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1014-16 (7th Cir. 1984). The governmental interest in having valid and reliable lead information in this context to conduct an appropriate investigation is the same as that noted in connection with the federal employee loyalty and security program, supra.

In addition to the foregoing areas of responsibility, the Government has important interests in having timely access to FBI file information in a variety of special situations. Foremost among these in terms of sensitivity are verification of suitability for White House staff employment and the protection of the President and foreign dignitaries. See Declaration of Secret Service Special Agent Richard McCann and Declaration of FBI Special Agent Robert Scherrer. Similar interests of somewhat less sensitivity arise in connection with providing all available background information on law clerks and other employees of the United States courts who occupy positions of trust. Whether a particular SWP or YSA member is susceptible or responsive to the Fourth International and predisposed to carry the party's program into effect through unlawful means or to commit a violent act is a valid subject of inquiry. Again, party membership, although not determinative, is a starting point for inquiry to rule out the prospect of injury to recognized governmental interests in special

situations. It raises questions about reliability and stability requiring resolution by the agency that has the responsibility for carrying out the governmental interests discussed above and reflected in the exhibits submitted with this memorandum. The responsibilities imposed by those interests are ongoing and inescapable.*

The foregoing considerations, particularly the criteria for expungement set forth in Paton, Chastain, and Hobson, dictate that no injunctive relief should be entered at all. See also pp. 21-22 infra. At the very least, relief should be drawn as narrowly as possible, and should allow for ad hoc use even of illegally obtained information where exigent circumstances warrant.

II. The Court's Proposed Order Presents Practical Problems in Implementation and Compliance

Insofar as it would bar the Government from using or disseminating information about the plaintiffs and their members that was obtained by the FBI by methods which the Court determines to be unlawful, the proposed order presents certain practical problems of compliance for the defendant agencies and their employees. These problems are indicated in the exhibits submitted with this memorandum. They exist apart from any provision for ex parte emergency relief that the Court might include pursuant to the considerations presented in Part I of this memorandum.

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* An ironic feature of the proposed relief is that information governed by the proposed order, no matter how accurate and pertinent to an agency's mission, would not be available to the Government even though the same information would be available to Soviet intelligence services through the Freedom of Information Act. See 642 S. Supp. at 1432.

The principal problem is posed by the structure of the defendant agencies' files, the form in which information obtained by the FBI is placed in them, and the manner in which information is located and retrieved from them.* By far the greatest volume of file holdings consists of files on individuals -- over four million in the case of the Office of Personnel Management alone. See Affidavit of Gary B. McDaniel, sworn to March 4, 1987, at p. 5. Information in those files is accessible only through the use of a personal name coupled with additional identifying information such as date and place of birth or Social Security number. There is no method of access that can be based upon SWP or other membership, and the plaintiff organizations do not appear prepared to provide the defendants with the names and other identifying data of their members. In addition to the files on individuals, certain of the defendant agencies maintain separate files on the Socialist Workers Party as a subject of interest. Information in them is accessible through an index, usually based upon personal names, or through physical page-by-page examination of the file.

The FBI disseminated information about the plaintiff organizations and their members in a form that concealed or protected from identification the source or method by which the

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* The affidavits and declarations submitted herewith set out in detail the difficulties posed by an injunction against use of information. The National Security Agency has submitted a declaration, although it was dismissed from this action in 1981, because it may be adversely affected by any ban on dissemination of FBI information.

information was acquired. The FBI observed similar precautions in channeling or distributing information obtained in the SWP investigation to files on specific individuals maintained by the FBI. Outside the FBI a recipient agency would often extract information from an FBI report and insert it in an individual's file or insert only pertinent portions of an FBI report in a particular file.

A consequence of these practices is that information in the defendant agencies' files that was obtained or furnished by the FBI does not always show that it originated with the FBI. Even if it did, the other agencies would be unable to determine how the FBI obtained the information. Within the FBI the manner by which particular information was obtained can only be determined after a lengthy and costly reconstruction and interpretation of underlying records generated in the course of producing the substantive information. Outside the FBI that determination cannot be made at all. In many instances it will not be possible to determine whether the information concerns the plaintiffs and their members, even though it may have originally been acquired by the FBI by methods deemed by the Court to be unlawful.*

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* In addition to the affidavits and declarations submitted herewith, the United States Postal Services advises counsel that a computerized check of files of the Postal Inspection Service revealed no files indexed under the name of the SWP or YSA. As is the case with other agencies, however, this is no guarantee that information derived from illegal FBI activity directed at the SWP does not reside somewhere in Postal Service files, and the only way to retrieve it would be a hand search of all the files.

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A practical consequence of these factors is that there will be many instances when an investigator, analyst, or file clerk in the defendant agencies will be in a position of inadvertently or unwittingly violating the Court's order because there will be nothing in the papers or information before that person serving to alert him to the fact (1) that it originated with the FBI, (2) that it pertained to the plaintiffs as such, (3) or that it was acquired by means that violated the plaintiffs' constitutional rights. These problems will obtain even if it is possible for the defendant agencies to formulate internal directives that will serve to inform their operating personnel of the provisions of the Court's order in terms adaptable to daily working level application.

Although the defendants will make a good faith effort at compliance, the realities of their filing systems and operating procedures are such that there may be instances of an apparent but unavoidable violation of the Court's order. Any order entered by the Court should make allowance for such instances so that an unwitting government employee or his superior is not unjustifiably faced with proceedings for contempt.

Furthermore, the defendants respectfully submit that no injunction should bind any defendant other than the FBI because this court found no violation of law, or misuse of

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information, by any agency other than the FBI, after a plenary trial that offered plaintiffs a full opportunity to prove that they were entitled to relief against these agencies. Having failed in such proof, plaintiffs should not now obtain an order that would impose a substantial burden on innocent agencies. There is no "exclusionary rule" in many, if not all, non-criminal proceedings, see, e.g., Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 1040-60 (1984); In re Daley, 549 F.2d 469, 474-77 (7th Cir.), cert. denied. 434 U.S. 829 (1977); Childs v. McCord, 420 F. Supp. 428, 432-36 (D. Md. 1976), aff'd per curiam sub nom. Childs v. Schlitz, 556 F.2d 1178 (4th Cir. 1977); Ekelund v. Secretary of Commerce, 418 F. Supp. 102, 106 (E.D.N.Y. 1976), and even if there were, a rule that would require agencies found to be innocent of wrongdoing nevertheless to purge their files, otherwise segregate information received from the FBI, or ignore such information despite its pertinence to the agency's mission, would not further the policies of the exclusionary rule, which is to deter government wrongdoing. E.g., United States v. Leon, 468 U.S. 897 (1984)(exclusionary rule does not apply to search conducted in good faith reliance on subsequently invalidated warrant); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974).

The Supreme Court's recent decision in INS v. Lopez-Mendoza, 468 U.S. 1032, suggests, as we have previously argued, that no injunction should issue at all. In that case, the Court held that the exclusionary rule did not apply to civil deportation proceedings, finding, inter alia, that the limited deterrent effect of applying the rule was far outweighed by the

societal cost of sanctioning an illegal alien's continued illegal presence in the country. Id. at 1046-47. When one weighs the deterrent effect of an injunction here barring use of illegally obtained information (in effect, an exclusionary rule) against its societal costs, the result should be obvious. A deterrent is utterly unnecessary because, as this Court correctly found, the FBI's violations of law occurred long ago and are unlikely to recur. On the other side of the scale is the societal cost of permitting individuals to have access to highly sensitive secrets of state while requiring the Government to turn a blind eye to information that might, at the very least, justify further inquiry. Such a cost should not be imposed by this Court.

III. The Order Proposed By Plaintiffs Is Consistent With Neither This Court's Opinion Nor the Law

In several particulars, the proposed injunction annexed as Exhibit A to plaintiffs' memorandum dated February 11, 1987 goes beyond the decision of this Court or is not authorized by law.

First, this Court's opinion directs that any documents or information covered by its order may be disclosed "in response to legal process or Freedom of Information Act requests." 642 F. Supp. at 1432. Plaintiffs' proposed order, at paragraph 2, would add a prohibition against disclosure, even in the circumstances contemplated by the Court, of the identities of individuals or non-governmental entities without their written consent. There is no provision in law entitling plaintiffs, let alone individuals or entities that are not even parties to this law suit, to such relief. It will be recalled that the Court

dismissed all claims arising under the Privacy Act, 5 U.S.C. § 552a, which is the only relevant statute regulating governmental disclosure of information about individuals. Accordingly, paragraph 2 of plaintiff's proposed order should be stricken.

Second, paragraph 3(d) would include mail covers within the definition of illegal methods of obtaining information. This Court made no finding that the use of this technique against the SWP, even at the request of the FBI, was illegal. This provision should therefore not be included in this Court's order.

Third, paragraph 4 of plaintiffs' proposed injunction would in effect require a presumption that information was obtained illegally, unless the FBI can determine that it was obtained legally. In view of the practical difficulties described above in identifying the source of information, and the public interest in permitting the Government at least to be able to use information obtained legally, the presumption should be the other way around. At the least, paragraph 4 should be stricken from plaintiffs' proposed order.

Fourth, plaintiffs' proposed order (¶ 3(b)), would define as illegally obtained documents "obtained after July 1, 1955 as a result of the use of FBI informers . . . ." At the January 27, 1987 conference before this Court there was some discussion of the appropriate cutoff date for documents and information subject to the court's order. The Court suggested that an appropriate cutoff would be congruent to the discovery cutoff of 1960. (Tr. 11). Plaintiffs, in their memorandum in support of their proposed order, appear to be arguing that the

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earlier date of 1955 is appropriate because of this Court's finding that from the early 1950's onward the FBI's investigation was a national security investigation. However, that fact did not of itself make the investigation or the techniques used in it illegal -- the FBI was and is authorized to conduct such investigations. The Government respectfully submits that the cutoff date suggested by the court is more reasonable than that proposed by plaintiffs.*

CONCLUSION

The governmental interests and responsibilities discussed above and reflected in the exhibits submitted with this memorandum are legitimate, substantial and important. They merit this Court's protection. While the Government urges that no injunctive relief whatever should be granted, in the context of the Court's proposed injunctive relief some protection is effectuated by including in any order a provision such as that set forth in Paragraph 3 of the defendants' proposed order which will permit any affected agency of the Government in exigent or emergency circumstances to apply ex parte to any federal court for an order permitting use, disclosure, or dissemination of

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* We reiterate that nothing in this memorandum should be construed as consent by the Government to the entry of any injunction, or to any particular terms of the injunction the Court intends to enter. The Government continues to maintain that no injunction at all is warranted by the record in this case or by law.

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information otherwise barred from use, dissemination, or disclosure by other provisions of the order for injunctive relief.

Dated: New York, New York

March 6, 1987

Respectfully submitted,

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GOVERNMENT'S
PROPOSED
INJUNCTION

1. No document (including all documentary material and information maintained in any form) in the custody, possession, or control of the Federal Bureau of Investigation ("FBI") which was obtained unlawfully or developed from unlawfully obtained information shall be used, released or disclosed in any manner within or outside the Government, and no information contained in or developed from any such document shall be used, released, or disclosed by the FBI within or outside the Government for any reason except in response to a court order or in response to a request under the Freedom of Information Act.

2. For the purposes of this order, the term "document obtained unlawfully or developed from unlawfully obtained information" means

(a) any document or information obtained as a result of surreptitious entries by the defendant Federal Bureau of Investigation, its agents or employees, of premises owned or controlled by the SWP or YSA;

(b) any document or information obtained after January 1, 1960 as a result of the use of FBI informants regarding the SWP and YSA; and

(c) any document developed from information or documents obtained as described in this paragraph.

3. The FBI may apply ex parte to any federal court for an order permitting disclosure of information otherwise barred from dissemination by Paragraph 1. If the FBI determines before an application can be made that an emergency requires the disclosure of information otherwise barred from dissemination by Paragraph 1, it may make such disclosure provided that it informs this Court of such disclosure as soon as practicable thereafter.

UNITED STATES DISTRICT JUDGE

Dated:

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SOCIALIST WORKERS PARTY, et al., Plaintiffs, v. THE ATTORNEY GENERAL OF THE UNITED STATES, et al., Defendants.	)	FILE NO. 73 Civ. 3160

DECLARATION

I, LEE E. CARLE, hereby declare and say:

1. I am the Information Review Officer for the Directorate of Operations (DO) of the Central Intelligence Agency (CIA). I am responsible for the review of determinations made with respect to DO documents at issue in litigations in which the CIA is involved or will be affected. The statements made herein are based upon my knowledge and belief, upon information made available to me in my official capacity, upon advice of the CIA Office of General Counsel, and upon conclusions reached in accordance therewith.

2. I am generally familiar with the terms of the Order entered by the Court herein on 25 August 1986 and with the transcript of the hearing held in this case on 27 January 1987 regarding the proposed terms of an injunction to be entered by the Court against use of material concerning the Socialist Workers Party (hereinafter "SWP") and members thereof which was obtained unlawfully by the FBI. I am submitting this Declaration to

address some of the problems which such an injunction could cause for CIA files.

3. If the Court enters an injunction herein which is worded broadly, it could create substantial administrative hardship for the DO because of the problem of identification and segregation of all records DO possesses derived from "unlawful" FBI activities, as described in the Court's opinion. Although some CIA records may be readily identifiable as concerning the SWP and derived from FBI reports, it is highly unlikely that a significant number of such records would indicate the specific FBI source (e.g., whether the information resulted from an illegal break-in, an informant, a wire-tap, or other source) and whether the source was lawfully or unlawfully used by the FBI. Also, information in CIA records which was derived from an unlawful activity of the FBI may not evidence any indication of a relationship between the information and the SWP. For example, if a name trace on an individual is requested of DO, DO may have information on the individual pertinent to the request but not indicating any SWP connection, even though the individual was first brought to DO's attention as a result of unlawful FBI activity. If the Court enjoins the use of <u>all</u> derivative information which is not readily identifiable as derived from unlawful FBI activity, such action would cause serious administrative hardship in complying therewith. The distinction between lawfully obtained and unlawfully obtained information provided by the FBI to CIA would be very difficult to

make in a comprehensive manner from the records systems as maintained by CIA.

4. A second problem area could result from a potentially over-broad prohibition on use or dissemination of any information resulting from FBI activities, without an ability of CIA to use the information in connection with matters of compelling national security interests. Because of the difficulty in identifying whether the FBI information was lawfully or unlawfully obtained, the use or dissemination of information in an emergency or national security situation would be seriously curtailed. Of course, it is impossible for me to state that such situations will occur or which form they may take. However, such situations could involve at a minimum terrorism, counterintelligence, threats to U.S. Government personnel and related categories. Because of the critical speed required to respond to national security emergencies which cannot be reasonably anticipated, judicial procedures allowing modification of a broad injunction only on an ad hoc basis would be too slow to allow any meaningful use of information which could be vital if timely used.

5. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Lee E. Carle

LEE E. CARLE

DATED: March 4, 1987

Exhibit N

Exh. N – 18 pages

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Department of Justice

JOINT STATEMENT OF

ELISEBETH COLLINS COOK
ASSISTANT ATTORNEY GENERAL

AND

VALERIE CAPRONI
GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE

ENTITLED

"NEW ATTORNEY GENERAL GUIDELINES FOR DOMESTIC INTELLIGENCE COLLECTION"

PRESENTED

SEPTEMBER 23, 2008

N-2

Joint Statement of
Elisebeth Collins Cook
Assistant Attorney General, Office of Legal Policy
Department of Justice
and
Valerie Caproni
General Counsel
Federal Bureau of Investigation

Select Committee on Intelligence
United States Senate

"New Attorney General Guidelines for Domestic Intelligence Collection"

September 23, 2008

Mr. Chairman, Vice Chairman Bond, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the Attorney General's Guidelines for Domestic FBI Operations. We believe that these guidelines will help the FBI continue its transformation from the pre-eminent law enforcement agency in the United States to a domestic intelligence agency that has a national security mission and law enforcement mission.

The new guidelines provide more uniform, clear, and straightforward rules for the FBI's operations. They are the culmination of prior efforts to revise the FBI's operating rules in the wake of the September 11 terrorist attacks. They are consistent with and help implement the recommendations of several distinguished panels for the FBI to coordinate national security and criminal investigation activities and to improve its intelligence collection and analytical capabilities.

These guidelines will protect privacy rights and civil liberties, will provide for meaningful oversight and compliance, and will be largely unclassified. Consequently,

the public will have ready access in a single document to the basic body of operating rules for FBI activities within the United States. The guidelines will take the place of five existing sets of guidelines that separately address, among other matters, criminal investigations, national security investigations, and foreign intelligence collection. They are set to take effect on October 1, 2008.

We have greatly appreciated the interest of this Committee and others in these guidelines. Over the past six weeks, we have made a draft of the guidelines available for review to the Members and staff of this Committee, the House Permanent Select Committee on Intelligence, the Senate Judiciary Committee, and the House Judiciary Committee. We have provided briefings (and made the draft guidelines available for review) to a wide range of interested individuals and groups, including Congressional staff, public interest groups ranging from the American Civil Liberties Union (ACLU) to the Arab-American Anti-Discrimination Council (ADC) to the Electronic Privacy Information Center (EPIC), and a broad set of press organizations. The dialogue between the Department and these individuals and groups has been, in our view, both unprecedented and very constructive. We have appreciated the opportunity to explain why we undertook this consolidation, and we are amending the draft guidelines to reflect feedback that we have received.

I. Purpose of the Consolidation Effort

Approximately 18 months ago, the FBI requested that the Attorney General consider combining three basic sets of guidelines—the General Crimes Guidelines, which

were promulgated in 2002, the National Security Investigative Guidelines (NSIG), which were promulgated in 2003, and a set of guidelines that are called the Supplemental Foreign Intelligence Guidelines, which were promulgated in 2006.

This request was made for three primary reasons. First, the FBI believed that certain restrictions in the national security guidelines were actively interfering with its ability to do what we believe Congress, the 9/11 Commission, WMD Commission, and the President and the American people want the FBI to do, which is to become an intelligence-driven agency capable of anticipating and preventing terrorist and other criminal acts as well as investigating them after they are committed. The clear message to the FBI has been that it should not simply wait for things to fall on its doorstep; rather, it should proactively look for threats within the country, whether they are criminal threats, counterintelligence threats, or terrorism threats.

Second, the FBI believed that some of the distinctions between what an agent could do if investigating a federal crime and what an agent could do if investigating a threat to national security were illogical and inconsistent with sound public policy. Specifically, the FBI argued that there was not a good public policy rationale for (a) the differences that existed, and (b) the guidelines that governed national security matters to be more restrictive than those that governed criminal matters.

Third, the FBI concluded that having inconsistent sets of guidelines was problematic from a compliance standpoint. The FBI made its request for consolidation after the Inspector General had issued his report on the use of National Security Letters. That report helped crystallize for the FBI that it needed stronger and better internal

controls, particularly to deal with activities on the national security side, as well as a robust compliance program. The FBI argued that, from a compliance standpoint, having agents subject to different rules and different standards depending on what label they gave a matter being investigated was very problematic. The FBI asserted that it would prefer one set of rules because compliance with a single set of rules could become, through training and experience, almost automatic.

The Department agreed with the merits of undertaking this consolidation project, and the result is the draft guidelines we are discussing today. These guidelines retain the same basic structure of predicated investigations on the one hand, and pre-investigative activity on the other—currently called threat assessments on the national security side and prompt and limited checking of leads on the criminal side. The standard for opening a preliminary investigation has not changed and will not change.

The most significant change reflected in the guidelines is the range of techniques that will now be available at the assessment level, regardless of whether the activity has as its purpose checking on potential criminal activity, examining a potential threat to national security, or collecting foreign intelligence in response to a requirement. Specifically, agents working under the general crimes guidelines have traditionally been permitted to recruit and task sources, engage in interviews of members of the public without a requirement to identify themselves as FBI agents and disclose the precise purpose of the interview, and engage in physical surveillance not requiring a court order. Agents working under the national security guidelines did not have those techniques at their disposal. We have eliminated this differential treatment in the consolidated

guidelines. As discussed in more detail below, the consolidated guidelines also reflect a more comprehensive approach to oversight.

II. Uniform Standards

The guidelines provide uniform standards, to the extent possible, for all FBI investigative and intelligence gathering activities. They are designed to provide a single, consistent structure that applies regardless of whether the FBI is seeking information concerning federal crimes, threats to national security, foreign intelligence matters, or some combination thereof. The guidelines are the latest step in moving beyond a reactive model (where agents must wait to receive leads before acting) to a model that emphasizes the early detection, intervention, and prevention of terrorist attacks, intelligence threats, and criminal activities. The consolidated guidelines also reflect the FBI's status as a full-fledged intelligence agency and member of the U.S. Intelligence Community. To that end, they address the FBI's intelligence collection and analysis functions more comprehensively. They also address the ways in which the FBI assists other agencies with responsibilities for national security and intelligence matters.

The issuance of these guidelines represents the culmination of the historical evolution of the FBI and the policies governing its domestic operations that has taken place since the September 11, 2001, terrorist attacks. In order to implement the decisions and directives of the President and the Attorney General, to respond to inquiries and enactments of Congress, and to incorporate the recommendations of national

commissions, the FBI's functions needed to be expanded and better integrated to meet contemporary realities. For example, as the WMD Commission stated:

> [C]ontinuing coordination . . . is necessary to optimize the FBI's performance in both national security and criminal investigations . . . . [The] new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old "wall" between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very different FBI from the one we had on September 10, 2001. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 466, 452 (2005).)

To satisfy these objectives, the FBI has reorganized and reoriented its programs and missions, and the guidelines for FBI operations have been extensively revised over the past several years. For example, the Attorney General issued revised versions of the principal guidelines governing the FBI's criminal investigation, national security investigation, and foreign intelligence collection activities successively in 2002, 2003, and 2006.

Despite these revisions, the principal directives of the Attorney General governing the FBI's conduct of criminal investigations, national security investigations, and foreign intelligence collection have persisted as separate documents that impose different standards and procedures for comparable activities. Significant differences exist among the rules these separate documents set for core FBI functions. For example, even though activities that violate federal criminal laws and activities that constitute threats to the national security oftentimes overlap considerably, FBI national security investigations have been governed by one set of rules and standards, while a different set of rules and

standards has applied to the FBI's criminal investigations generally. These differences have created unfortunate situations where the same kind of activity may be permissible for a criminal investigation but may be prohibited for a national security investigation.

As an example of how the prior guidelines treated comparable activities differently based on how those activities were categorized, consider the question of what the FBI can do in public places. Under the multiple guidelines regime, the rules were different if the FBI received a tip that a building was connected to organized crime as opposed to a tip that the building was connected to a national security matter, such as international terrorist activity. The rules for how long the FBI could sit outside the building, or whether the FBI could follow someone exiting the building down the street, were different; specifically, more restrictive on the national security side and difficult to apply. It makes no sense that the FBI should be more constrained in investigating the gravest threats to the nation than it is in criminal investigations generally.

Similarly, under the prior guidelines, human sources—that is, "informants" or "assets"—could be tasked proactively to ascertain information about possible criminal activities. Those same sources, however, could not be proactively tasked to secure information about threats to national security, such as international terrorism, unless the FBI already had enough information to predicate a preliminary or full investigation.

The consolidated guidelines we are discussing today carry forward and complete this process of revising and improving the rules that apply to the FBI's operations within the United States. The new guidelines integrate and harmonize these standards. As a result, they provide the FBI and other affected Justice Department components with

clearer, more consistent, and more accessible guidance for their activities by eliminating arbitrary differences in applicable standards and procedures dependent on the labeling of similar activities ("national security" versus "criminal law enforcement"). In addition, because these guidelines are almost entirely unclassified, they will make available to the public the basic body of rules for the FBI's domestic operations in a single public document.

III. Coordination and Information Sharing

In addition to the need to issue more consistent standards, the FBI's critical involvement in the national security area presents special needs for coordination and information sharing with other DOJ components and Federal agencies with national security responsibilities. Those components and agencies include the Department's National Security Division, other U.S. Intelligence Community agencies, the Department of Homeland Security, and relevant White House agencies and entities. In response to this need, the notification, consultation, and information-sharing provisions that were first adopted in the 2003 NSIG are perpetuated in the new guidelines.

IV. Intelligence Collection and Analysis

Additionally, the new guidelines carry out a significant area of reform by providing adequate standards, procedures, and authorities to reflect the FBI's character as a full-fledged domestic intelligence agency—with respect to both intelligence collection and intelligence analysis—and as a key participant in the U.S. Intelligence Community.

In relation to the collection of intelligence, legislative and administrative reforms expanded the FBI's foreign intelligence collection activities after the September 11, 2001, terrorist attacks. These expansions have reflected the FBI's role as the primary collector of intelligence within the United States—whether it is foreign intelligence or intelligence regarding criminal activities. Those reforms also reflect the recognized imperative that the United States' foreign intelligence collection activities inside the United States must be flexible, proactive, and efficient in order to protect the homeland and adequately inform the United States' crucial decisions in its dealings with the rest of the world. As the WMD Commission stated in its report:

> The collection of information is the foundation of everything that the Intelligence Community does. While successful collection cannot ensure a good analytical product, the failure to collect information . . . turns analysis into guesswork. And as our review demonstrates, the Intelligence Community's human and technical intelligence collection agencies have collected far too little information on many of the issues we care about most. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 351 (2005).)

The new guidelines accordingly provide standards and procedures for the FBI's foreign intelligence collection activities that are designed to meet current needs and

realities and to optimize the FBI's ability to discharge its foreign intelligence collection functions.

In addition, enhancing the FBI's intelligence analysis capabilities and functions has consistently been recognized as a key priority in the legislative and administrative reform efforts following the September 11, 2001, terrorist attacks. Both the Joint Inquiry into Intelligence Community Activities and the 9/11 Commission Report have encouraged the FBI to improve its analytical functions so that it may better "connect the dots."

> [Counterterrorism] strategy should . . . encompass specific efforts to . . . enhance the depth and quality of domestic intelligence collection and analysis . . . . [T]he FBI should strengthen and improve its domestic [intelligence] capability as fully and expeditiously as possible by immediately instituting measures to . . . significantly improve strategic analytical capabilities . . . . (Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 351 & H.R. Rep. No. 792, 107th Cong., 2d Sess. 4-7 (2002) (errata print).)

> A "smart" government would *integrate* all sources of information to see the enemy as a whole. Integrated all-source analysis should also inform and shape strategies to collect more intelligence . . . . The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to "connect the dots." (Final Report of the National Commission on Terrorist Attacks Upon the United States 401, 408 (2004).)

The new guidelines accordingly incorporate more comprehensive and clear authorizations for the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The guidelines will allow the FBI to do a better job of being an intelligence-driven agency.

To be an intelligence-driven agency, the FBI needs to be asking questions. What is the threat within our environment? To give an example, without the new quidelines, if the question were asked of a Special Agent in Charge (SAC) of an FBI field office, "Do you have a problem of theft of high technology or theft of classified information within your domain?" the answer would be phrased in terms of how many cases were open. But the number of cases open is a reflection only of what has already been brought to the FBI's attention; it is not an accurate measure of the true scope of a given risk.

The new guidelines will allow the FBI fundamentally to change who it approaches in answering the types of questions that we believe this Committee and the American people would like it to be answering. If a field office is seeking to assess whether it has a substantial threat within its area of responsibility of theft of classified or sensitive technology, it might begin the analytic work necessary to reach a conclusion by considering whether there are research universities in the area that are developing the next generation of sensitive technology or doing basic research that will contribute to such technology and considering whether there are significant defense contractors in the area. From there, the field office should compare those potential vulnerabilities with specific intelligence regarding the intentions of foreign entities to unlawfully obtain sensitive technology.

If an SAC determines that, within his or her area of responsibility, sensitive technology is being developed at a local university that is of interest to foreign powers, the SAC should then determine whether there are individuals within the field office's area of responsibility that pose a threat to acquire that technology unlawfully. In this

example, a logical place to start would be to look at the student population to determine whether any are from or have connections to the foreign power that is seeking to obtain the sensitive technology.

Under existing guidelines, agents are essentially limited to working overtly to narrow the range of potential risks from the undoubtedly over-inclusive list of students with access. They can talk to existing human sources, and they can ask them: "Do you know anything about what's going on at the school? Do you know any of these students?" If the agent does not have any sources that know any of the students, then the assessment is essentially stopped from a human source perspective, because recruiting and tasking sources under the national security guidelines is prohibited unless a preliminary investigation is open. Similarly, the agent also cannot do a pretext interview without a preliminary investigation open, but the agent does not have enough information at that point to justify opening a preliminary investigation. An overt interview in the alternative may be fine in a wide range of scenarios, but could result in the end of an investigation by tipping off a potential subject of that investigation.

At the end of the day, the inability to use techniques such as recruiting and tasking of sources, or engaging in any type of interview other than an overt one, was inhibiting the FBI's ability to answer these types of intelligence-driven questions.

The ability to use a wider range of investigative techniques at the assessment stage, prior to the opening of a predicated investigation, is a critical component of the FBI's transformation into an intelligence-driven organization. Since 2003, we have had the ability to conduct threat assessments to answer questions such as whether we have

vulnerabilities to or a problem with the theft of sensitive technology in a particular field office. With the new consolidated guidelines, the FBI will now have the tools it needs to ascertain the answer to those questions more efficiently and effectively.

V. Oversight and Privacy and Civil Liberties

The new guidelines take seriously the need to ensure compliance and provide for meaningful oversight to protect privacy rights and civil liberties. They reflect an approach to oversight and compliance that maintains existing oversight regimes that work and enhances those that need improvement.

As a result of the stand up of the National Security Division, and the reports by the Inspector General on the use of National Security Letters, the Department and the FBI have been engaged in extensive efforts to reexamine and improve our oversight and compliance efforts in the national security area. Our assessment has been that oversight in the criminal arena is provided through the close working relationship between FBI agents and Assistant U.S. Attorneys (AUSAs), as well as the oversight that comes naturally in an adversarial system for those investigations that ripen into prosecutions. Oversight on the national security side is different because of more limited AUSA involvement and because ultimate criminal prosecutions are less frequent in this area.

Traditionally, on the national security side, oversight was accomplished through two primary means: notice and reporting to then-Office of Intelligence Policy and Review, now a part of the National Security Division, and through filings with the FISA Court. We believe that conducting oversight in this manner was not as effective as the

system set forth in the new guidelines. The prior oversight system was based primarily on reporting and generated many reports from the FBI to the Department that did not provide meaningful insight into the FBI's national security investigations. Thus, the Department's oversight resources were not focused on those activities that should have been the highest priority—namely, those activities that affected U.S. persons. Moreover, to the extent that the process relied in part in filings with the FISA court for more in-depth oversight, it was under-inclusive. Many national security investigations proceed without ever seeking or obtaining an order from the FISA Court. The guidelines establish an approach to oversight that focuses the Department's oversight efforts on protecting the civil liberties and privacy rights of Americans in all national security investigations.

The new guidelines accomplish oversight on the national security side in a number of ways. The guidelines require notifications and reports by the FBI to the National Security Division concerning the initiation of national security investigations and foreign intelligence collection activities in various contexts. They also authorize the Assistant Attorney General for National Security to requisition additional reports and information concerning such activities. Additionally, many other Department components and officials are involved in ensuring that activities under the guidelines are carried out in a lawful, appropriate, and ethical manner, including the Justice Department's Office of Privacy and Civil Liberties and the FBI's Privacy and Civil Liberties Unit, Inspection Division, Office of General Counsel, and Office of Inspection and Compliance. A significant component of the oversight that will be provided by the

National Security Division will come in the form of "National Security Reviews," which are the in-depth reviews of national security investigations that the National Security Division and the FBI's Office of General Counsel commenced following the Inspector General's report on National Security Letters in 2007.

Moreover, the new guidelines carry over substantial privacy and civil liberties protections from current investigative guidelines. They continue to prohibit the FBI from investigating or maintaining information on United States persons in order to monitor activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. In connection with activities designed to collect foreign intelligence in response to Intelligence Community requirements, where the lawful activities of U.S. persons can be implicated, the guidelines require the FBI to operate openly and consensually with U.S. persons, if feasible. Additionally, as the Attorney General emphasized when he testified before the Senate Judiciary Committee, the guidelines prohibit practices (such as racial or ethnic "profiling") that are prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

The issue of how investigators may take race, ethnicity, or religion into account during an investigation is a difficult question, but it is not a new question. We have long recognized that it is not feasible to prohibit outright the consideration of race, ethnicity or religion—the description of a suspect may include the race of the perpetrator, and groups (such as Aryan Brotherhood, La Cosa Nostra, or the IRA) that are under investigation may have membership criteria that tie to race, ethnicity, or religion. But it is also the case that it cannot be, and should not be, permissible to open an investigation based only on an

individual's perceived race, ethnicity, or religion. We believe that the balance struck in 2003 in this regard—reflected in the Attorney General's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies—is the appropriate one, and we have not changed that balance.

These guidelines continue to require notice to appropriate Department officials when investigations involve domestic public officials, political candidates, religious or political organizations, or the news media. Moreover, as a matter of FBI policy, the FBI imposes higher levels of approval on many activities that have an academic nexus, reflecting the American tradition of academic freedom in our institutions of higher learning.

Finally, these guidelines operate in conjunction with numerous privacy and civil liberties officials and components within the FBI and Department of Justice. As mentioned earlier, the vast majority of the new guidelines will be made available to the public, thereby providing the public with more ready access to the rules governing FBI activities within the United States. Before the consolidated guidelines take effect, the FBI will carry out comprehensive training to ensure that their personnel understand these new rules and will be ready to apply them in their operations. Indeed, this training is already underway. The FBI is also developing appropriate internal policies to implement and carry out the new guidelines. These policies cannot afford agents or supervisors more flexibility than the guidelines themselves but can, and in several cases do, set forth additional restrictions.

VI. Conclusion

Over the last seven years, the FBI has altered its organizational structure, and the Attorney General has issued new policies to guide the FBI as it seeks to protect the United States and its people from terrorism, intelligence threats, and crime, while continuing to protect the civil liberties and privacy of it citizens. The changes reflected in the new guidelines are necessary in order for the FBI to continue its important transformation to being an intelligence-driven organization. We believe that using intelligence as the strategic driver for the FBI's activities will improve its ability to carry out its national security, criminal law enforcement, and foreign intelligence missions.

Thank you again for the opportunity to discuss these issues with you, and we will be happy to answer any of your questions.

Exh. O - 4 pages

Exhibit O

The New York Times
nytimes.com

November 20, 2008

New York Police Fight With U.S. on Surveillance

By DAVID JOHNSTON and WILLIAM K. RASHBAUM

WASHINGTON — An effort by the New York Police Department to get broader latitude to eavesdrop on terrorism suspects has run into sharp resistance from the Justice Department in a bitter struggle that has left the police commissioner and the attorney general accusing each other of putting the public at risk.

The Police Department, with the largest municipal counterterrorism operation in the country, wants the Justice Department and the Federal Bureau of Investigation to loosen their approach to the federal law that governs electronic surveillance. But federal officials have refused to relax the standards, and have said requests submitted by the department could actually jeopardize surveillance efforts by casting doubt on their legality.

Under the law, the government must in most cases obtain a warrant from the special Foreign Intelligence Surveillance Court before it can begin electronic monitoring of people suspected of spying or terrorism. The requests are subjected to sharp scrutiny, first by lawyers at the F.B.I., then by lawyers at the Justice Department, and finally by the court itself.

New York's department, as a local police force, cannot apply directly, but must seek warrants through the F.B.I. and the Justice Department. The police want those agencies to expedite their requests, and say that the federal agencies unfairly blocked the city's applications for surveillance warrants, first in June and then in September. The disagreement, in which the Bush Justice Department has taken a more cautious approach than police officials, is something of an unexpected twist for an administration that has more often seemed willing to stretch legal boundaries to fight terrorism.

The dispute has played out since midsummer in a highly unusual exchange of letters between Raymond W. Kelly, the police commissioner, and Michael B. Mukasey, the attorney general, in which each accuses the other of mishandling terrorism cases and embracing an approach that made the public more vulnerable. The letters have not been publicly released.

While the letters do not specifically identify the target of the eavesdropping requests, Mr. Mukasey said that the Police Department had sought authority in one of them to eavesdrop on "numerous communications facilities" without providing an adequate basis for their requests. Some officials who have been briefed on the cases said the requests, from the police Intelligence Division, were unusually broad, and included telephones in public places, like train or subway stations, rather than phones used by a specific individual.

Even in the best of times, the police and the F.B.I.'s New York office can be quarrelsome partners, and current and former officials say the dispute between the two — which share overlapping responsibilities for security in New York — has brought the relationship to a new low.

The inability of the Justice Department to resolve the conflict may mean that the matter ends up in the hands of Eric H. Holder Jr., who is expected to be nominated by President-elect Barack Obama to become the next attorney general. Based on Mr. Obama's statements during the campaign, it appears unlikely that his administration would adopt a more permissive attitude toward eavesdropping than the Bush administration.

In his five-page letter on Oct. 27, Mr. Kelly wrote to Mr. Mukasey charging that the F.B.I. and Justice Department had thwarted the Police Department's intelligence efforts in two specific cases. He wrote that federal authorities were "constraining" critical terrorism investigations in New York and said the federal government "is doing less than it is lawfully entitled to protect New York City," concluding that "the city is less safe as a result."

Mr. Mukasey, in a seven-page retort, dated Oct. 31, dismissed what he called Mr. Kelly's "alarming conclusions" as factually incorrect. Mr. Mukasey wrote that Mr. Kelly was in effect proposing that the Justice Department and the F.B.I. disregard the law, as spelled out in the Foreign Intelligence Surveillance Act of 1978.

"Not only would your approach violate the law, it would also in short order make New York City and the rest of the country less safe," wrote Mr. Mukasey, a federal judge in Manhattan before he became attorney general.

In a statement, the Police Department's deputy commissioner for legal matters, S. Andrew Schaffer, who has advised Mr. Kelly on the matter, said that Mr. Mukasey's contention that Mr. Kelly had proposed an illegal course of conduct was "preposterous and categorically untrue."

"We have asserted," the statement continued, "based on actual cases, that FISA warrants were not sought in a timely manner in part because of a self-imposed standard of probable cause which is higher than that required by Supreme Court precedent."

On Wednesday evening, the Justice Department issued a statement confirming the exchange of letters "regarding an issue of mutual concern." The statement said that the two agencies continued to work together effectively and that the Justice Department had taken several steps to improve coordination.

Indeed, a police official said that what he characterized as "this spirited exchange of letters" resulted in "an expediting of the FISA process — in other words, from the Police Department's view, the desired result."

The contents of the letters were made known to The New York Times by people who believed the matter should be made public. In addition, 10 people, including some on each side of the debate, agreed to interviews in which they provided details about the dispute but insisted that they not be identified.

The police Intelligence Division makes its requests for eavesdropping warrants through the New York Joint Terrorism Task Force, a unit in which F.B.I. agents, police detectives and investigators from other agencies work together. The Intelligence Division and the task force work independently of each other, a situation that has been at the heart of the worsening relationship.

Mr. Mukasey said in his letter that he had personally investigated two cases Mr. Kelly had said were behind his complaints and wrote that he had been "unable to have a meaningful conversation" with the commissioner when the two discussed the issue in a July 25 telephone call because "you were not versed on the facts."

An independent effort to investigate the dispute was undertaken in recent months by the president's Intelligence Advisory Board, a panel of high-level business executives, former intelligence and foreign policy experts appointed by President Bush.

The board's review concluded that both local and federal officials were sometimes confused about important aspects of the law and recommended more training and better coordination.

The clash comes at a potentially significant moment for Mr. Kelly. Some officials suggested the letter was a

way for Mr. Kelly to announce his availability for a high-level job in the Obama administration, possibly secretary of homeland security. His name has circulated as a possible candidate, but associates have denied that Mr. Kelly is seeking a job in Washington, although they have been unwilling to say he would decline to take one.

The forceful response from Mr. Mukasey, a well-regarded jurist brought to Washington last year to restore credibility and ballast to the Bush administration's beleaguered Justice Department, was more remarkable coming from an official known for his bland public pronouncements and keeping a low profile. In the 1990s, as a federal judge, Mr. Mukasey presided over the longest and most complex terrorism trial ever presented in a United States court in which Sheik Omar Abdel Rahman was convicted of conspiring to wage war against the United States.

In his letter, Mr. Kelly said that the Police Department's efforts to use the national security law had been tangled in bureaucratic confusion. "On September 15, for instance," he wrote, "the most senior F.B.I. officials in New York informed N.Y.P.D. that predication for a particular FISA warrant could not be established with available evidence only to learn a few hours later that the application had been approved on an emergency basis."

But in his letter, Mr. Mukasey blamed the Police Department for delays. "For example, in one of the cases you cite in your letter, the N.Y.P.D. failed to disclose relevant information about investigative steps it had taken in connection with a terrorism suspect. This failure delayed our ability to seek FISA coverage from the court."

Mr. Kelly complained that Justice Department lawyers imposed a needlessly high standard to be certain that every surveillance application submitted to the court would be approved. "Intelligence collection operations against potential terrorist threats to the homeland often involve considerable uncertainty," he wrote. "D.O.J. should not hesitate to present judges with close cases. Some requests for warrants will inevitably be denied."

But Mr. Mukasey said that submitting such cases to the court would be a mistake. "The less the FISA court comes to trust the validity of the applications, the more inclined the judges will be to impose on all applications the kind of scrutiny that doubtful applications merit, which of course takes more time and causes more delay because the court's resources are limited," he said. "The greater the delay, the fewer the applications can be processed and granted within a given time. The fewer successful FISA applications, the less intelligence can be gathered. The less intelligence gathered, the greater the danger to all Americans, including New Yorkers. That is not a complex formula."

Nearly 150 Police Department detectives work with a like number of F.B.I. agents and roughly 100 others from nearly four dozen other federal, state and local law enforcement agencies on the Joint Terrorism Task Force, several officials said. At the same time, the Police Department's Intelligence Division has several hundred other detectives working separately, running a sweeping network of informants and collecting a mass of intelligence aimed at forestalling another attack in New York.

The Intelligence Division is run by David Cohen, a former top Central Intelligence Agency official who holds the rank of deputy commissioner and is often a vocal and unapologetic critic of the F.B.I. Indeed, the Police Department and the C.I.A. are two agencies that often seem to have contempt for the F.B.I., even as investigators work together on many cases.

Tensions between the task force and the Intelligence Division detectives, according to a number of investigators and officials in both agencies, have become intense and in some instances, of significant concern. The detectives have sought to infiltrate some of the same groups singled out by the task force and

collect information in some of the same mosques, bookstores and other locations without notifying the task force, the investigators and officials said.

At the same time, morale on the task force, where few agents have more than five years' experience, and supervisors not much more, is extremely low, officials said. Many rookie and veteran agents are loath to work on its squads because of excessive red tape and what they view as few opportunities for advancement, investigators and officials said.

The Intelligence Division under Mr. Cohen has come under criticism in the past for its surveillance activity and has been mired in litigation over its extensive undercover investigation of political groups before the 2004 Republican National Convention. It long worked under a 1985 consent decree, stemming from a lawsuit over harassment of political advocacy groups, that restricted its ability to conduct such surveillance. The terms of the decree were changed in 2003 as a result of the 2001 terror attacks.

David Johnston reported from Washington, and William K. Rashbaum from New York.

Exhibit P

Exh. P - 10 pages

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The New York Times

January 5, 2009

Activist Unmasks Himself as Federal Informant in G.O.P. Convention Case

By COLIN MOYNIHAN

When the scheduled federal trial begins this month for two Texas men who were arrested during the Republican National Convention on charges of making and possessing Molotov cocktails, one of the major witnesses against them will be a community activist who acted as a government informant.

Brandon Darby, an organizer from Austin, Tex., made the news public himself, announcing in an open letter posted on Dec. 30 on Indymedia.org that he had worked as an informant, most recently at last year's Republican convention in St. Paul.

"The simple truth is that I have chosen to work with the Federal Bureau of Investigation," wrote Mr. Darby, who gained prominence as a member of Common Ground Relief, a group that helped victims of Hurricane Katrina in New Orleans.

He added, "I strongly stand behind my choices in this matter."

Mr. Darby's revelations caused shock and indignation in the activist community, with people in various groups and causes accusing him of betrayal.

"The emerging truth about Darby's malicious involvement in our communities is heart-breaking and utterly ground-shattering," said the Austin Informant Working Group, a collection of activists from the city who worked with Mr. Darby. "Through the history of our struggles for a better world, infiltrators and informants have acted as tools for the forces of misery in disrupting and derailing our movements."

Mr. Darby's letter answered lingering questions in the case of the two Texas men, David McKay and Bradley Crowder, both also from Austin. They are scheduled to go on trial in Minnesota on Jan. 26, and if convicted on all counts, each faces a prison sentence of up to 30 years.

Neither the United States attorney's office in Minnesota nor the F.B.I. would comment on Mr. Darby's announcement.

"As a matter of policy, we're not going to confirm or deny the identity of anybody who gives us information confidentially," said E. K. Wilson, an F.B.I. spokesman in Minnesota.

But in a telephone interview, Mr. Darby said that he had provided information leading to the arrest of Mr. Crowder and Mr. McKay, and that he planned to testify at their trial.

Mr. Darby would not provide details about his undercover activities, but said he had also worked as an informant in cases not involving the convention. He defended his decision to work with the F.B.I. as "a good moral way to use my time," saying he wanted to prevent violence during the convention at the Xcel Energy Center.

Documents that activists said were given to defense lawyers by the prosecution and printed on F.B.I. letterhead indicated that an informant — now identified as Mr. Darby — carried out a thorough surveillance

operation that dated back to at least 18 months before the Republican gathering. He first met Mr. Crowder and Mr. McKay in Austin six months before the convention.

Mr. Darby provided descriptions of meetings with the defendants and dozens of other people in Austin, Minneapolis and St. Paul. He wore recording devices at times, including a transmitter embedded in his belt during the convention. He also went to Minnesota with Mr. Crowder four months before the Republican gathering and gave detailed narratives to law enforcement authorities of several meetings they had with activists from New York, San Francisco, Montana and other places.

One of his last conversations with Mr. McKay ended in an alley in Minneapolis, according to court documents, with Mr. Darby recording Mr. McKay talking about plans to use Molotov cocktails.

The F.B.I. reports mentioned dozens of people, most of whom have not been accused of any crime. In addition to listing biographical and physical particulars, Mr. Darby frequently offered observations on the motives, attitudes and states of mind of activists with whom he dealt.

"Part of what intrigues me is not only how he operates but what is the role of the F.B.I. in how he operates," said Lisa Fithian, an organizer who is named in the reports. "We don't know what we're dealing with here."

Some former friends of Mr. Darby have denounced him as a provocateur and said he might have enabled or encouraged Mr. Crowder and Mr. McKay to break the law. Mr. Darby denied that.

An F.B.I. agent swore in an affidavit that at one point Mr. McKay acknowledged that he intended to use firebombs. Such devices were never used, and both defendants have pleaded not guilty.

"The claim that the case is solely based on the testimony of informants is simply a wanton and willful untruth," Mr. Darby said in the interview. "It omits the physical evidence, the confession and possibly the testimony of many others."

In 2005, Mr. Darby went to New Orleans after Hurricane Katrina struck, joining Common Ground Relief as it provided medical attention and helped repair homes. He became a visible member of the group, sometimes acting as a spokesman and appearing on "The Tavis Smiley Show" on PBS.

When The St. Paul Pioneer Press published an article in October that cited an unidentified source who named Mr. Darby as an informant in the case against Mr. Crowder and Mr. McKay, a co-founder of Common Ground, Scott Crow, defended Mr. Darby publicly and warned against "rumors, conjecture and innuendo."

"I put it all on the line to defend him when accusations first came out," Mr. Crow said. "Brandon Darby is somebody I had entrusted with my life in New Orleans, and now I feel endangered by him."

Mr. Darby acknowledged that many people he spied on might not accept his explanation that he was motivated by conscience.

"I am well aware," he said, "that I've stepped outside of accepted behaviors and that I've committed a sin in the eyes of many activists."

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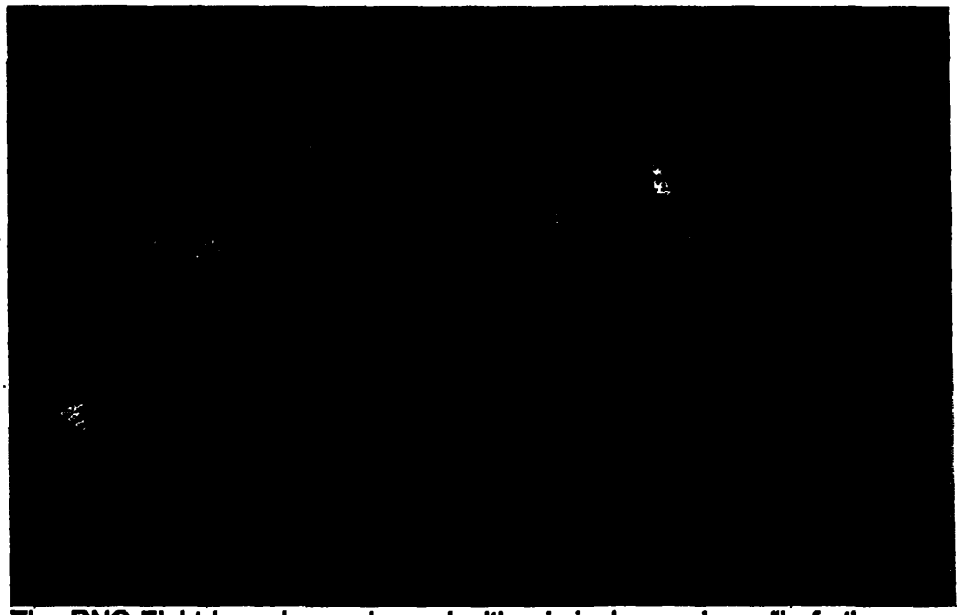
StarTribune.com | MINNEAPOLIS - ST. PAUL, MINNESOTA

'Anarchist' looked like someone's mom

By RANDY FURST, Star Tribune
December 1, 2008



The RNC Eight have been charged with criminal conspiracy "in furtherance of terrorism," accused of attempting to provoke a riot and prevent the Republican National Convention from taking place. They deny the accusations. They provided this photo showing, from left, Rob Czernik, 24; Erik Oseland, 21; Monica Bicking, 23; Eryn Trimmer, 23; Luce Guillen-Givins,24; Garrett Fitzgerald, 25; Nathanael Secor, 26, and Max Specktor, 19.

On Aug. 31, 2007, Marilyn Hedstrom, who appeared to be in her early 50s, walked into a run-down store-front where anarchists hung out on E. Lake Street in Minneapolis.

She introduced herself as Norma Jean.

Asked by a man at the Jack Pine Center why she was there, she said she had issues with President Bush and the Iraq war. "I told him I was interested in helping the cause and interested in participating in the protesting," she later wrote in reports reviewed by the Star Tribune.

What she did not tell him is that she was a deputy sheriff for the Ramsey County Sheriff's Office. Along with two other undercover sheriff's operatives and an FBI informer, she had

been assigned to infiltrate the RNC Welcoming Committee, which was planning street blockades at the 2008 Republican National Convention.

She went "dumpster diving" at the group's instructions to find food for the anarchists to eat. She cooked meals for some meetings, ran errands, coordinated committee discussions and represented the organization at some gatherings of the protest movement. She became friends of some of the activists. And she, ironically, even helped on security for the anarchists, who worried that the cops were infiltrating them.

For a year Deputy Hedstrom led a double life as Norma Jean Johnson, filing her recollections, often daily, with the Special Investigations Unit, as did the other operatives.

The covert operation was not without drama. When one informant was accused of being a cop, he broke into tears, convincing his accusers that they were mistaken, according to a report.

"Their function was critical to the success of the investigation," said Ramsey County Sheriff Robert Fletcher. "These are difficult roles. You need to be a good actor."

Recalling demonstrations that paralyzed Seattle in 1999 during World Trade Organization meetings, local and federal authorities have been more aggressive in the past decade in gearing up for major protests, especially those where anarchists may intervene. There were big investigations before the 2004 Republican National Convention in New York City.

Eight members of the RNC Welcoming Committee were arrested and are awaiting trial on charges of conspiracy to commit second-degree riot. They are accused of plotting to shut down the convention by blockading roads. They're also accused of planning criminal damage to property, including use of incendiary devices.

Fletcher said many allegations are based on reports from the undercover personnel.

Robert Kolstad, attorney for one of the eight, said much of the evidence is based on hyperbolic comments made by Welcoming Committee members that had little to do with their intentions. "Despite the rhetoric, there was never reasonable expectation by anyone to shut down the convention," he said.

Members of the RNC Eight have announced plans to hold a news conference Tuesday to criticize Ramsey County Attorney Susan Gaertner, whose office is prosecuting the case.

The Star Tribune reviewed 1,000 pages of reports by the three who spied for the sheriff.

The reports were obtained by a source with access to the documents. The newspaper has not seen most of the reports from an FBI informer who Fletcher says provided "the best information." Fletcher, who did not provide the newspaper with any reports by the undercover operatives, also declined to allow interviews with the three from his office.

Following department procedures, he said his office surveyed public documents and the Internet in August 2007, concluding that the Welcoming Committee might be planning criminal activity. He then authorized a "limited investigation" allowing his operatives to attend public meetings.

Watch, but don't suggest

Based on what they and the FBI informer found, a full investigation was launched, allowing undercover agents to attend private meetings and participate in the group so long as they did not suggest criminal activities, he said.

The sheriff's investigation cost about $300,000, Fletcher said. He's asking the city of St. Paul to reimburse his office from $50 million in federal funds for convention security.

Hedstrom, a narcotics officer, was partnered with Rachel Nieting, a guard in the county jail. Nieting, in her 20s, posed as Amanda, Hedstrom's niece. A third operative, Chris Dugger, was a confidential paid informant who has since become a jail guard and has taken tests to become a deputy.

Agent was like a mom

Nieting, now a deputy, halted her undercover work after a few months. Fletcher said she "didn't have the level of acceptance that Marilyn had." Hedstrom told an anarchist that Amanda dropped out after finding a new boyfriend.

Most of the anarchists were decades younger than Hedstrom, but Fletcher said that posed no problem. "We're not always looking for a person that seems to fit perfectly," he said. "Someone that is not an obvious fit ... is least likely to be suspected." Also, he said, pairing Hedstrom and Nieting increased their safety.

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Hedstrom settled into her covert role.

"Norma Jean looked like somebody's mom," recalls Meredith Aby, a member of the Anti-War Committee, a group that occasionally met with the anarchists. "She was treated by the Welcoming Committee as if she were one of their own."

Betsy Raasch-Gilman, 56, who helped raise money with Hedstrom on the Welcoming Committee, said they sometimes discussed family and grandchildren. "To this day, I don't know how much was put-on and how much was real," she said. Raasch-Gilman learned that Hedstrom was undercover after court documents were filed. "I wonder how she lives with her conscience," she said of Hedstrom. "She knows the truth of the matter. We were not conspiring to riot."

Nathanael Secor, one of the RNC Eight, said "a level of comradeship" developed between activists and the operatives and it was disappointing to learn they were spies.

Still, he says, "We had the feeling we were under surveillance from the beginning. It did not come as a complete shock."

Cop was almost outed

While Hedstrom blended in, Dugger gave off different vibes and was often under a cloud of suspicion. In his late 20s, he was "kind of muscular," had tattoos and looked like a biker, says Katrina Plotz, a member of the Anti-War Committee.

At one meeting of various groups, "somebody made a joke that based on looks, he's the one who looks like a cop," Plotz said. "He kind of smiled and didn't say anything."

At a meeting where Hedstrom was the facilitator, a kind of chairperson, an anarchist expressed concern that he was a cop, a report said. Dugger "became emotional and told them how bad he felt, he wiped his eyes and blew his nose." He denied he was an informer.

The memo said two anarchists told him they "don't think he is a cop. They said a cop would have just walked away and never returned and wouldn't cry."

Dugger even got into the act. By August he was urging an anarchist to suspect another anarchist of being an informer.

In the reports, the anarchists talk with bravado, with occasional references to breaking windows and damaging vehicles. They told each other it was not violence, since they had no plans to injure people.

Many meetings involved no talk of property damage, or even protests. They dealt with tasks like finding places to stay. The local anarchist core was small, and the reports offer a glimpse into strains --and even gripes -- among them.

Nieting wrote that she and Hedstrom were the only two women to join Karen Redleaf at a "women's Welcoming Committee" meeting. Redleaf, a committee member, talked about how disconnected she felt and was only coming to Sunday meetings because Norma Jean was there.

Redleaf, who has not been charged, declined to comment, but Peter Erlinder, her attorney, said she did not know Hedstrom and Nieting were undercover operatives.

The agents described how subgroups planned a decentralized disruption of St. Paul, choosing sectors for blockades and confrontation. There are references to a committee called the "action faction," where there were more discussions about blockades. Fletcher said his operatives did not get inside the faction but the FBI informer did. There were references to using "chains and locks for locking up downtown business doors."

Former Minneapolis Police Chief Tony Bouza praised the covert investigation. "It was a classic case of an effective police operation against a criminal conspiracy. ... They targeted the right groups," said Bouza, author of "Police Intelligence," a book on undercover police work.

But David Cunningham, a professor at Brandeis University in Massachusetts, says that while authorities may have had probable cause to infiltrate anarchist groups, he is concerned about a potential chill on civil liberties.

Cunningham, author of "There's Something Happening Here," a history of covert FBI activities in the 1960s and '70s, said there needs to be more oversight of undercover work from Congress. He also believes local law enforcement agencies should be required to obtain court approval for undercover operations.

Staff writer Pat Pheifer contributed to this report.

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Posted on Sat, Dec. 13, 2008

Lawyers: Activists set up by undercover cops at KKK rally

By JULIE SHAW
Philadelphia Daily News

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A Municipal Court judge yesterday granted a defense motion to compel the identities of two police officers working as confidential informants in a bizarre case involving the Ku Klux Klan, anti-racist protesters, police and FBI.

Defense attorneys Paul J. Hetznecker and Lawrence Krasner contend that their clients - three anti-racist protesters facing trial on misdemeanor vandalism, harassment and related charges - may have been set up by law enforcement, possibly acting as agents provocateur.

The case stems from July 23, 2007, when word spread that there was supposed to be a noon KKK rally in LOVE Park, 15th Street and John F. Kennedy Boulevard, in Center City.

It turned out to be the "Klan rally that never was," Krasner said in court yesterday before Judge Marsha Neifield.

While anti-racist protesters showed up, the only "neo-Nazis" who appeared were two white men with short haircuts who acted as if they were white supremacists, according to a witness. It was revealed yesterday that the two men were undercover police officers.

Defense attorneys also noted in court yesterday that as far as they could tell, there never was a permit applied for by the KKK or one issued by the city for a KKK rally that day. The attorneys also pointed out through questioning of law-enforcement members that none of them could produce evidence of a KKK flier said to have advertised the rally.

On the "rally" day, witness Sheila Maddali, a law-school student, testified for the defense yesterday that she saw the two men - later determined to be the undercover cops - and thought they were KKK members. She heard one of the anti-racist protesters say to them, "You just want to lynch black people?"

A man thought to be a Klan member then said, "We lynch whoever we want," she said.

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The two undercover cops then left the park and got into a black Ford Explorer parked on Arch Street near Broad, as some of the anti-racist protesters followed.

Sitting in the front of the Ford were Police Detective Sean Brennan and FBI Special Agent Stephen Powell.

Authorities have previously said that four anti-racist protesters then began kicking the SUV. One protester allegedly threw a set of pliers at the back window.

Three of those four protesters - Jared Schultz and Jason Robbins, both 29, and Thomas Keenan, 23 - still face trial on eight misdemeanor charges. They are members of the Anti-Racist Action group.

Brennan and Powell, both members of the Philadelphia Joint Terrorism Task Force, were yesterday called as prosecution witnesses by Assistant District Attorney Jack O'Neill.

Brennan testified that he had learned of the supposed KKK rally days before. He believed he saw it advertised on a flier. He then told Powell about it that day.

On the rally day, Brennan said he drove his Ford Explorer to the rally with Powell to observe it.

He said he stopped near LOVE Park and saw the two undercover officers, then called one of them to find out what they were doing. Shortly afterward, that officer called him, saying there was "some sort of confrontation" in the park. Brennan told the officer to meet him at Broad and Arch.

Under cross-examination by the defense attorneys, Brennan agreed that in police paperwork on the arrests of the anti-racist protesters he and another detective intentionally left out that the two confidential informants were in the park and in the Ford.

"It was left out for [their] safety," Brennan said.

Powell, who testified before Brennan, differed on some details. He said he only learned of the rally about half an hour before it was scheduled to occur, and said he, not Powell, was the one on the phone with one of the undercover officers.

He said he and Powell had told the two undercover officers to get in the Ford at Arch and Broad out of concern for their safety.

Lt. John McConnell, of the District Attorney's Narcotics Division, testified that he was the person who had directed the two undercover officers to go to the KKK rally that day. He wanted them to see if any member of the local Keystone State Skinheads group attended the rally.

The two officers, he said, were undercover narcotics officers.

Under cross-examination by Hetznecker, McConnell agreed that this wasn't the first time undercover narcotics officers have been used in this city for surveillance purposes at rallies.

In making her decision, Judge Neifield said she was "extremely mindful of the safety" of police officers, but also found it "troubling" that detectives in the matter had left out in police paperwork the fact that the two confidential informants were at the park and in the SUV.

She said she also understood defense attorneys' concerns in the case and granted their motion to compel authorities to divulge the identities of the undercover agents so they could further learn

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why they were at the park.

She gave the commonwealth until Jan. 26 to decide if it will appeal her decision.

Two members of Keystone United, formerly the Keystone State Skinheads, were in the courtroom yesterday as observers, including the group's eastern regional director, Keith Carney.

During a break, Carney, of Northeast Philadelphia, said he was there to "monitor the outcome" of the hearing and trial. *

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Exh. Q - 2 pages

Exhibit Q

DECLARATION

I, Norton Sandler, make this declaration in support of the application to the Federal Elections Commission for an advisory opinion that the Socialist Workers Party, the Socialist Workers Party's National Campaign Committee, and the committees supporting the candidates of the Socialist Workers Party are entitled to an exemption from certain disclosure provisions of the Federal Elections campaign Act.

I make this statement on the basis of personal knowledge.

1. I have served as the chair of the Socialist Workers National Campaign Committee during the last five years, which includes both the 2004 and 2008 presidential campaigns. Prior to 2004, I helped lead Socialist Workers campaign efforts in a number of cities.

2. Over this period, I have had reported to me by Róger Calero, Socialist Workers Party presidential candidate in 2004 and 2008, and Alyson Kennedy and Arrin Hawkins, the party's vice-presidential candidates in 2008 and 2004 respectively, that they have met an increasing number of people who are attracted to their campaign but are afraid that if they become publicly involved or identified with it, they will meet stepped up government harassment. As I have traveled and worked to organize political and financial support for these campaigns, I have had the same experience.

3. More workers and youth are being attracted to the Socialist Workers Party campaign as they see war, economic ruin, racism, anti-immigrant violence, and attacks on political rights increase. Though this increase is still modest, it is noticeable in the response to our campaign tours and meetings.

4. Many of these same individuals though see the step up in police spying, wiretapping and other surveillance both on a national and local level, and physical as well as other kinds of attacks on those who are often scapegoated for social problems, especially immigrants and working people who are Afro-America.. As noted earlier, a growing number of people attracted to our campaigns under today's conditions are fearful that if they join in campaign activity or contribute publicly to the campaign, they may be targeted for harassment or victimization by the authorities or right-wing vigilantes. This was more true in 2008 than it was in 2004.

I declare under penalty of perjury that the foregoing is true and correct. Executed December 14, 2008 in New York, New York.

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Norton Sandler
December 14, 2008

Exh. R - 2 pages

Exhibit R

R-1

DECLARATION

I, Frank Forrestal, make this declaration in support of the application to the Federal Elections Commission for an advisory opinion that the Socialist Workers Party, the Socialist Workers Party's National Campaign Committee, and the committees supporting the candidates of the Socialist Workers Party are entitled to an exemption from certain disclosure provisions of the Federal Elections campaign Act.

I make this statement on the basis of personal knowledge.

1. I ran as a Congressional candidate (3rd C.D.) for the Socialist Workers Party in Des Moines, Iowa, in 2008 and helped to organize support for Socialist Workers Party candidates in Des Moines in 2006 and 2007 and in Los Angeles, California, where I lived until 2006 before I moved to Des Moines.

2. The central tool we have used to spread the word about the activities of the Socialist Workers candidates and their election platform and stands, including my own campaigns, has been the *Militant* newspaper. The paper, which editorially supports the socialist campaigns, consistently covers the tours and speeches of the candidates. For instance, every single issue of the paper since the 2008 Socialist Workers presidential ticket of Róger Calero for president and Alyson Kennedy for vice-president was launched in January 2008 carried coverage of the campaign.

3. I traveled with Róger Calero, Socialist Workers Party presidential candidate in both 2004 and 2008, to numerous union and political activities during both campaigns. At all these events, we distributed the *Militant* as widely as possible to introduce people to the campaign and its positions. We always attempted to gather as many subscriptions as possible to the paper, so that people interested in the ideas and activities of the campaign could follow them over a number of months. We explained that this was the best way to keep track of the campaign and the ideas it was promoting. We also urged those interested in the campaign to get involved.

4. For those who have been won to look to the Socialist Workers campaign, the *Militant* is their main voice in helping formulate their response to political developments and to follow the efforts of others to resist economic and political attacks.

5. For these reasons, in my experience, those who are most likely to consider contributing to the Socialist Workers election campaigns and/or to

become involved in supporting them are people who follow the campaign in the pages of the *Militant* newspaper.

6. At the same time, the *Militant* is also the place where they are most likely to read about attacks on Socialist Workers Party campaign headquarters and harassment or threats against campaigners and distributors of the *Militant* by government officials and police as well as private individuals who are hostile to the program and activities of the Socialist Workers campaign. Over the past six year alone, I myself have written four articles for the paper concerning such attacks, including in both Los Angeles and Des Moines.

7. After making a quick review of back issues of the *Militant* over the same time period, I saw more than 40 articles concerning similar attacks, firings, harassment and threats that I recall reading that were written by other contributors to the paper.

I declare under penalty of perjury that the foregoing is true and correct. Executed December 14, 2008 in St. Paul, Minnesota.

Frank Forrestal
December 14, 2008

Exh. S - 5 pages

DECLARATION

I, John Studer, submit the following list of election results for Socialist Workers candidates for public office in 2008, in support of the application to the Federal Elections Commission for an advisory opinion that the Socialist Workers Party, the Socialist Workers Party's National Campaign Committee, and the committees supporting the candidates of the Socialist Workers Party are entitled to an exemption from certain disclosure provisions of the Federal Elections Campaign Act.

I prepared the accompanying list.

In 2008 no Socialist Workers candidate won an election.

I declare under penalty of perjury that the foregoing is true and correct. Executed December 5, 2008 in Philadelphia, Pennsylvania.

John Studer
December 5, 2008

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Socialist Workers Presidential Ticket

2008: Róger Calero for president
Alyson Kennedy for vice-president

- On the ballot in 10 states: Colorado, Delaware, Florida, Iowa, Louisiana, Minnesota, New Jersey, New York, Vermont, and Washington.
- Vote in the ten states the Socialist Workers presidential ticket was on the ballot: 9,827 (0.007%)
- (The Socialist Workers ticket also had official write-in status in California, Connecticut, and Georgia, but vote totals are not available yet.)

Socialist Workers Candidates for U.S. Senate

2008

Candidate	State	Vote total	Percentage
Sara Lobman	New Jersey	8,395	0.3%

In addition to the above state where a Socialist Workers candidate for U.S. Senate was on the ballot, there were also write-in campaigns in Georgia, Illinois, Massachusetts, Minnesota and Texas. No vote totals are available for these write-in candidates.

Socialist Workers Candidates for U.S. House of Representatives

2008

Candidate	State	Vote total	Percentage
Martin Koppel	New York	2,083	1.00%
Michael Taber	New Jersey	1,649	1.00%
Frank Forrestal	Iowa	4,562	1.00%

In addition to the above states where Socialist Workers candidates for U.S. Congress were on the ballot, there were also write-in campaigns in California, Florida, Georgia, Illinois, Minnesota, New York, Pennsylvania, Texas Washington and for Delegate to Congress from the District of Columbia. No vote totals are available for these write-in candidates.

In addition to federal candidates, in 2008 the Socialist Workers Party ran candidates for state and municipal offices:

The candidate that was on the ballot and his vote total:

Massachusetts: William Leonard, State Senate, 2nd Suffolk District: 3,047 votes, 5%.

Candidates who were not on the ballot and for whom vote totals are not available were:

Texas: Anthony Dutrow, State Representative District 138.

Washington: Chris Hoeppner, Governor.

Washington, D.C.: Sam Manuel, City Council At-Large.