RE-EXAMINING THE ATTORNEY GENERAL'S GUIDELINES FOR FBI INVESTIGATIONS OF DOMESTIC GROUPS

David M. Park

I. INTRODUCTION

When a massive fertilizer bomb destroyed the Alfred P. Murrah building in Oklahoma City on April 19, 1995,[1] Americans found themselves confronted with a new threat to their security: domestic terrorist groups. While terrorist acts were certainly not unheard of within the borders of the United States, given that the World Trade Center was a target of a terrorist attack just two years earlier, the identity of the suspects arrested in the Oklahoma City attack surprised many.[2] Unlike those involved in the Trade Center bombing, the suspected Oklahoma City terrorists were American citizens.

In the aftermath of the bombing, lawmakers began searching for pro-active solutions to prevent further acts of terrorism by domestic groups.[3] The Federal Bureau of Investigations, the nation's primary criminal investigative agency, was an important focal point in this initial search for solutions.[4] Several politicians suggested the possibility of increasing the FBI's investigative powers.[5] They proposed that a broadening of the FBI Guidelines, a set of rules the Bureau adopted to govern its methods of investigation, could help prevent future attacks.[6]

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1. *See* Mark Johnson, *Terror from Within*, PROVIDENCE J.-BULL., Apr. 23, 1995, at D1.

2. *See id.*

3. *See* Jan Crawford Greenburg & Linnet Myers, *More Power for the FBI Raises Fears*, PHOENIX GAZETTE, Apr. 26, 1995, at A1; Rad Sallee, *Oklahoma City Tragedy: Anti-Terrorism Proposal Spurs Fears of Attack on Civil Liberties*, HOUS. CHRON., Apr. 26, 1995, at A11; James Q. Wilson, *The Case for Greater Vigilance*, TIME, May 1, 1995, at 73.

4. *See* Greenburg & Myers, *supra* note 3, at A1; Sallee, *supra* note 3, at A11; Wilson, *supra* note 3, at 73.

5. *See* Greenburg & Myers, *supra* note 3, at A1; Sallee, *supra* note 3, at A11; Wilson, *supra* note 3, at 73.

6. Greenburg & Myers, *supra* note 3, at A1.

The idea of expanding the Guidelines, however, died a quick death.[7] Virtually all the FBI's top officials, including Director Louis Freeh, Attorney General Janet Reno, and Deputy Attorney General Jamie Gorelick, agreed that the current Guidelines already provided the FBI with enough power to investigate terrorist groups.[8] They concluded an alteration of the Guidelines was unnecessary.[9] Instead, Freeh, Reno and Gorelick announced the FBI would now begin to interpret the current version more expansively.[10]

This announcement was not well received by civil libertarians.[11] Many civil rights activists felt FBI activity within the current "narrow" interpretation of the Guidelines was already too invasive[12] and certainly did not want to see these practices expanded. Activists questioned the value gained by increased FBI investigations when weighed against the loss of freedom that would surely accompany any increase in the Bureau's activities.[13] The FBI's history of harassing non-violent political groups was another point of contention among civil rights watchdogs.[14] Any alteration that would give the FBI greater ability to investigate domestic groups would be met with great suspicion.[15] Additionally, civil libertarians suggested that any changes in the Guidelines or investigative procedures that granted the FBI greater authority could be constitutionally challenged.[16]

This Note will examine the potential constitutional claims that civil libertarians may bring in response to the FBI's new interpretation of their current Guidelines. It will analyze the obstacles these claims must overcome, and the likelihood of their success. Finally, this Note will suggest an alteration of the current version of the Guidelines that attempts to reach a compromise between the

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7. *See Threat of Terrorism: The Constitutionality of Counter-terrorism Legislation, Before the Senate Comm. of the Judiciary, Subcomm. on Terrorism, Tech., and Gov't*, 104th Cong., 1st Sess. (1995), *available in* 1995 WL 261360 (F.D.C.H.) at *7 (testimony of Professor David Cole).

8. *Terrorism Hearings, House Int'l Relations Comm., Crime Subcomm.*, 104th Cong., 1st Sess. (1995), *available in* LEXIS, Current News File, at *5, *9 [hereinafter *Terrorism Hearings*]; David S. Broder, *Does the FBI Have the Tools to Fight Domestic Terrorism?*, WASH. POST, May 3, 1995, at A21.

9. *See Terrorism Hearings*, *supra* note 8, at *9 (testimony of Jamie Gorelick).

10. *Id.* at *7 (testimony of Louis Freeh).

11. Monica Davey, *ACLU Chief Says Fear May Imperil Rights*, ST. PETERSBURG TIMES, May 12, 1995, at 3B; Johnson, *supra* note 1, at D1; Sallee, *supra* note 3, at A11.

12. Davey, *supra* note 11, at 3B. Robyn E. Blummer, Executive Director of the Florida ACLU, objected to allowing the FBI to infiltrate organizations without an initial showing of criminal wrongdoing. *Id.*

13. According to Georgetown law professor David Cole, "The likelihood of good coming from it (granting broader powers) is minimal. The likelihood of detriment to legitimate political organizations is very high." Greenburg & Myers, *supra* note 3, at A1.

14. *See* Jeff Cohen & Norman Solomon, *FBI Often Abused Its Power*, CAPITAL TIMES, May 15, 1995, at C3.

15. *See* sources cited *supra* note 11.

16. *See* Tim Poor, *Panel Weighs Bolstering Laws to Fight Terrorism*, ST. LOUIS POST DISPATCH, Apr. 28, 1995, at A1.

concerns of civil rights activists and the needs of the FBI to prevent future domestic terrorist attacks.

II. BACKGROUND

A. Historical Development of the FBI Guidelines

Under Director J. Edgar Hoover, the FBI had nearly unlimited power to investigate, infiltrate, and generally harass political groups.[17] The Bureau's abuses of this power first came to light in 1976, after an investigation by a Senate Select Committee headed by Idaho Senator Frank Church.[18] The Church Committee issued a report, after more than a year of investigation,[19] detailing the extent of FBI surveillance and infiltration.[20] The report revealed a number of massive FBI investigation efforts, which the Committee believed to be excessive.[21] Among these excesses was the storage of more than 500,000 intelligence files at FBI headquarters.[22]

A number of other abuses were detailed by the Church Committee.[23] Perhaps the most disturbing was the general revelation of the FBI's policy governing its investigation of domestic political groups. The Bureau seemed to make investigation decisions based more on a group's political doctrine than its proclivity toward criminal activity.[24]

Examples of this policy abound. For example, the FBI conducted a twenty-five year investigation of the NAACP to determine if it had any connections to the Communist Party.[25] It investigated and harassed the Socialist Workers Party for over three decades, even after the Party renounced any violent objectives.[26] The FBI infiltrated the Women's Liberation Movement.[27] FBI officials ordered an investigation of every member of the Students for a Democratic Society and every Black Student Union, whether or not the members had ever been involved in any previous disorders.[28]

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17. *See* Wilson, *supra* note 3, at 73; *see also* Cohen & Solomon, *supra* note 14, at C3.

18. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES REPORT, BOOK II, S. REP. NO. 775, 94th Cong., 2d Sess. 5 (1976) [hereinafter ACTIVITIES REPORT].

19. Broder, *supra* note 8, at A21.

20. David Berry, Note, *The First Amendment and Law Enforcement Infiltration of Political Groups*, 56 S. CAL. L. REV. 207, 208 (1982).

21. *See* ACTIVITIES REPORT, *supra* note 18, at 2–10.

22. *Id.* at 6.

23. *Id.* at 5–10.

24. Berry, *supra* note 20, at 208.

25. ACTIVITIES REPORT, *supra* note 18, at 8.

26. *Id.*

27. *Id.* at 7.

28. *Id.* at 8–9.

Shortly after these revelations became public, then Attorney General, Edward Levi, developed a written set of guidelines to govern FBI investigations.[29] The Guidelines consisted of two sets of directives.[30] The first was a set of secret regulations detailing the circumstances under which the FBI could conduct investigations of terrorist groups whom it suspected were linked to foreign powers.[31] These Guidelines are classified and unavailable to the public.[32] The second set of directives, which was made available to the public, was more restrictive.[33] It set out the procedures for FBI investigations of domestic groups.[34]

In 1983, a new set of regulations, which Attorney General William French Smith developed, superseded Levi's original Guidelines regarding domestic investigations.[35] These new rules, entitled *The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations*, deviated from their predecessors in several important aspects.[36]

Generally, the new Guidelines allowed the FBI greater freedom to begin investigations and placed fewer restrictions on the investigative techniques agents could adopt.[37] For example, the new Guidelines altered the Levi standard requiring "specific and articulable facts"[38] before the FBI could conduct a full domestic security investigation.[39] Smith's revised Guidelines provided:

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29. Wilson, *supra* note 3, at 73.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, *reprinted in FBI Domestic Security Guidelines: Oversight Hearing Before the Comm. on the Judiciary, House of Representatives*, 98th Cong., 1st Sess. 67 (Apr. 27, 1983) [hereinafter *FBI Guidelines*].

36. Mitchell S. Rubin, Note, *The FBI and Dissidents: A First Amendment Analysis of Attorney General Smith's 1983 FBI Guidelines on Domestic Security Investigations*, 27 ARIZ. L. REV. 453, 454 (1985).

37. *FBI Guidelines*, *supra* note 35, at 70–79.

38. The Attorney General's Guidelines on Domestic Security Investigations, *reprinted in FBI Domestic Security Guidelines: Oversight Hearing Before the Comm. on the Judiciary, House of Representatives*, 98th Cong., 1st Sess. 60 (Apr. 27, 1983) [hereinafter *Levi Guidelines*].

39. The *Levi Guidelines* provided for three levels of investigations. The first level was preliminary investigations, which allowed for the use of very limited investigatory techniques to determine if there was reason to open a full investigation. *Id.* at 60–61. These techniques included inquiries of existing sources or the use of surveillance for identification purposes. *Id.* at 61. The next level was limited investigations. These allowed for more intrusive investigative techniques, such as physical surveillance beyond identification purposes. *Id.* However, an agent needed written authorization from a supervisor before beginning a limited investigation. *Id.* The final level of investigations in the *Levi Guidelines* was full investigations. Full investigations had to be authorized by FBI headquarters. *Id.* at 62. They permitted agents to use informants and electronic surveillance, as well as other highly intrusive investigative tools. *Id.*

> A domestic security/terrorism investigation may be initiated when the facts or circumstances *reasonably indicate*[40] that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals...through activities that involve force or violence and a violation of the criminal laws of the United States.[41]

Another important difference between the Smith and Levi Guidelines was Smith's employment of a "limited preliminary inquiry."[42] The only techniques that Smith's Guidelines specifically bar during an inquiry are mail covers,[43] mail openings, and nonconsensual[44] electronic surveillance.[45] While Smith's Guidelines allow for more invasive techniques, they stress that agents use the least intrusive means available.[46]

B. The Guidelines Today

In the wake of the Oklahoma City bombing, the FBI announced its solution to help prevent acts of domestic terrorism.[47] Rather than ask to be granted more power, FBI officials chose to use more of the power they had already been granted[48] by interpreting their Guidelines (the current Smith version) more

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40. "Reasonable indication" is defined within the Investigations section of the *FBI Guidelines* as "substantially lower than probable cause" but bars any investigation based on a "mere hunch." *FBI Guidelines*, *supra* note 35, at 73, 79. The FBI requires an "objective factual basis" before an investigation may begin. *Id.*

41. *Id.* at 79 (emphasis added).

42. A preliminary inquiry investigation under the Smith Guidelines combines the requirements of the preliminary and limited investigations of the 1976 Levi rules. Similar unintrusive investigative methods allowed by the *Levi Guidelines* in a preliminary investigation are also permitted in an inquiry investigation. For example, both permit interviews of previous sources and examinations of current files. *See id.* at 71–72; *Levi Guidelines*, *supra* note 38, at 60–61. However, a Smith Guidelines preliminary inquiry investigation allows for further and more intrusive techniques. *See FBI Guidelines*, *supra* note 35, at 72. These more intrusive methods must be applied by the least intrusive means necessary and must be approved by a supervisory agent before employment. *Id.* at 71.

43. When conducting a mail cover, the FBI requests that postal employees record information appearing on the outside of envelopes for all mail intended for a specific suspect or group of suspects. This information, which generally includes the postmark and return address, is then turned over to the Bureau. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(a) (3d ed. 1996).

44. Nonconsensual surveillance occurs when no party to the conversation is aware of the surveillance. If any party to the conversation consents to have an electronic listening or recording device placed on his person so that others may listen, the surveillance is deemed to be consensual. Jon Wesley Wise, Comment, State v. Reeves*: Interpreting Louisiana's Constitutional Right to Privacy*, 44 LA. L. REV. 183, 192 n.43 (1983).

45. *FBI Guidelines*, *supra* note 35, at 72.

46. *Id.* at 71.

47. *Terrorism Hearings*, *supra* note 8, at *5.

48. There has been some suggestion that the harsh criticism to which the FBI was exposed in the aftermath of the publication of the Church Committee's report made the Bureau a little gun-shy. Rather than be exposed to such negative publicity again, FBI

expansively.[49] In the past, the FBI had been reluctant to begin investigations of groups that advocated violence to achieve social or political objectives, unless it anticipated an imminent violation of federal law.[50] The fact that the group may have had the ability to carry out its violent objectives was irrelevant, as long as there was no indication of an "imminent violation."[51]

According to current Director Louis Freeh, the more expansive interpretation would now allow the FBI to begin an investigation of a group advocating violence to achieve social or political objectives somewhere short of an imminent violation of federal law, if it was apparent the group had the ability to carry out its objectives.[52] Such a group would now fall within the Guidelines' "reasonable indication" requirement to begin an investigation.[53]

While this appears to be a reasonable interpretation of the Guidelines, it has caused some concern among civil libertarians, who believe that such an expansive reading will lead to an impermissible infringement upon constitutional rights.[54] They challenge this reading of the Guidelines on two grounds: the First Amendment rights of free expression and free assembly,[55] and the Fourth Amendment protections against illegal searches and seizures.[56]

Before any further discussion, it is important to establish that any challenge must be to the FBI's practices under the Guidelines and not to the Guidelines themselves. Included within the Guidelines is a "Reservations" section which reads:

> 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...enforceable at law...nor do they place any limitation on otherwise lawful investigative and litigative [sic] prerogatives of the Department of Justice.[57]

Yet, despite this disclaimer, the Guidelines could serve a dual purpose of both regulating FBI investigative activity and providing guidance for courts reviewing

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officials became reluctant to pursue any investigations other than those that were undeniably within their powers, as defined by the Guidelines. *See* Wilson, *supra* note 3.

49. *Terrorism Hearings*, *supra* note 8, at *7.

50. *Id.* at *12.

51. *Id.*

52. *Id.*

53. *See id.*

54. *See* Cohen & Solomon, *supra* note 14, at C3; Davey, *supra* note 11, at 3B; Sallee, *supra* note 3, at A11.

55. *See* John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785 (1984); Berry, *supra* note 20; Rubin, *supra* note 36.

56. Mike Bothwell, Note, *Facing God or the Government*—United States v. Aguilar*: A Big Step for Big Brother*, 1990 B.Y.U. L. REV. 1003, 1004 (1990); *see* Michael F. McCarthy, Note, *Expanded Fourth Amendment Coverage: Protection from Government Infiltration of Churches*, 3 GEO. IMMIGR. L.J. 163 (1989).

57. *FBI Guidelines*, *supra* note 35, at 85.

claims of improper investigations.[58] In fact, the Guidelines are judicially enforceable within the City of Chicago.[59]

In *Alliance to End Repression v. City of Chicago*,[60] the plaintiffs challenged FBI investigative techniques prior to the issuance of the 1976 Guidelines.[61] As part of a settlement, the FBI agreed that the Guidelines[62] would be judicially enforceable as to the plaintiff class.[63] The *Alliance* settlement provides a good example of how the Guidelines, while not technically enforceable against the FBI, may be used by a court in assessing a challenge to FBI investigative procedures.[64]

III. CONSTITUTIONAL CHALLENGES

Constitutional challenges to FBI investigations seem to take two forms. One is based on First Amendment protection of free speech and free association. Here groups argue that the Bureau's practices impermissibly intrude upon their protected rights. The second challenge is a hybrid, combining both the First and Fourth Amendments. Plaintiffs using this argument suggest that First Amendment protected activities should be entitled to greater Fourth Amendment protections against searches and seizures. The various attributes and shortcomings of these arguments will be discussed at length, beginning with the First Amendment attacks.

A. First Amendment Challenges

As mentioned, civil libertarians have two basic First Amendment concerns regarding FBI methods of investigation. They fear that FBI investigations may encroach upon a suspect domestic group member's rights to free speech and free association.[65] The claim is that investigation of a group, either overtly or undercover,[66] creates a "chilling" effect on the group members' First Amendment

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58. Elliff, *supra* note 55, at 786–87.

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

60. *Id.*

61. *Id.* at 196.

62. The plaintiffs later challenged Smith's revised version of the Guidelines, claiming there was a violation of the settlement decree, which was based on the original Levi version. The challenge failed when the Seventh Circuit Court of Appeals found that Smith's revisions were not outside the boundaries of the settlement agreement. Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1011 (7th Cir. 1984).

63. *See Alliance*, 91 F.R.D. at 196–97. Among those included within the plaintiff class were all the citizens of Chicago. *Id.* at 187.

64. For further discussion of the *Alliance* litigation, see Julie K. Rademaker, Note, Alliance to End Repression v. City of Chicago*: Judicial Abandonment of Consent Decree Principles*, 80 NW. U. L. REV. 1675 (1986).

65. *See* Elliff, *supra* note 55; Berry, *supra* note 20; Rubin, *supra* note 36; Sallee, *supra* note 3, at A11.

66. This Note will use the term "undercover investigations" to mean the use of informants or infiltration by FBI agents.

rights.[67] The chilling effect doctrine usually arises when a legislature passes overly broad laws that regulate speech or require unnecessary disclosure of information by groups or individuals.[68] The theory behind the doctrine is that certain rights, like free speech and free association, must have "breathing room, so that the dangers of self-censorship will be avoided."[69]

Defenders of civil liberties can point toward two U.S. Supreme Court cases to support their contention that expanded FBI investigations would chill First Amendment rights: *Brandenburg v. Ohio*[70] and *NAACP v. Alabama.*[71]

1. Brandenburg v. Ohio

Mr. Brandenburg was a leader of an Ohio Ku Klux Klan group.[72] He was convicted under an Ohio statute that outlawed "advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform," and "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[73] The court based Brandenburg's conviction on a speech he made at a small rally where he said, "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[74] He challenged the constitutionality of the Ohio statute under the First and Fourteenth Amendments of the U.S. Constitution.[75]

The Supreme Court of the United States found the statute unconstitutional.[76] In its opinion, the Court stated that the First Amendment forbids government from passing laws that prohibit the advocacy of violence or illegal activity, unless such advocacy is intended to incite "imminent lawless action" and is likely to produce such action.[77] The Court held that any statute failing to distinguish between mere

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67. The "chilling effect" doctrine was first used in *Wieman v. Updegraff,* 344 U.S. 183 (1952). In *Wieman,* the Court examined the effect that loyalty oaths, required of public school teachers, may have had on the association rights of all teachers.

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who...are immediately before the Court. It has an unmisteakable [sic] tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.

Id. at 195 (Frankfurter, J., concurring).

68. Berry, *supra* note 20, at 216.

69. *Id.*

70. 395 U.S. 444 (1969).

71. 357 U.S. 449 (1958).

72. *Brandendburg,* 395 U.S. at 444.

73. *Id.* at 444–45 (citations omitted).

74. *Id.* at 446.

75. *Id.* at 444–45.

76. *Id.* at 447.

77. *Id.*

advocacy of illegal action and the actual incitement of such action, like the challenged Ohio statute, impermissibly intrudes on the First Amendment.[78]

Civil rights advocates have asserted that this decision prevents the FBI from beginning an investigation of any domestic group when the group has done nothing more than exercise its First Amendment free speech right to advocate violence and illegal activity.[79] The argument is that an FBI investigation based solely on a group's advocacy of violence, without evidence of an intent to act, would chill members' right to free expression in two ways. First, overt intelligence gathering, such as physical surveillance or interviews of current members, would lead some members of the general public to label the group targeted for investigation as deviant or outside the range of legitimate political activity.[80] This has a stigmatizing effect that inhibits others from associating with the group out of fear of also being labeled deviant.[81]

Second, undercover investigations of domestic groups, through the use of informants or infiltration, could create distrust among the group members if they suspect that one or more members are police informants.[82] If the group members believe their statements will reach the FBI, members may be less likely to condone illegal activity or express anti-governmental views.[83] Were this type of government intrusion to become commonplace within legitimate political or social groups, it could not only lead to the destruction of the groups being investigated,[84] but it might also deter the formation of new legitimate political and social groups out of fear that they too will become targets of investigation.[85]

Defenders of civil rights suggest that the infringement detailed in the previous two scenarios is exactly the type the Court was trying to prevent with its decision in *Brandenburg*.[86] The Court was clearly concerned with government action infringing upon Mr. Brandenburg's First Amendment rights.[87] Those who might challenge an FBI investigation that is based on a more liberal interpretation of the Guidelines could argue that an investigation, while not as severe as the criminal sentence Mr. Brandenburg was faced with, is a similar governmental action limiting a political

78. *Id.* "[T]he mere abstract teaching...of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." *Id.* (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

79. Rubin, *supra* note 36, at 474; *see* Sallee, *supra* note 3, at A11.

80. Rubin, *supra* note 36, at 457. This is because people generally do not believe that the FBI conducts investigations for no reason. Therefore, if a group is being investigated, many will believe that it is involved in some kind of illegal activity. *See id.*

81. *Id.*

82. Berry, *supra* note 20, at 210.

83. *Id.*

84. Conceivably, an organization that advocates illegal or violent activity could become so suspicious of government infiltration that its members would disband rather than risk having their statements reported directly to law enforcement officials. *See id.*

85. *See id.*

86. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

87. *See id.*

group and its members' First Amendment rights.[88]

2. NAACP v. Alabama

In this case, the State of Alabama asked that the NAACP turn over a number of documents, including a list of the names and addresses of all Alabama NAACP members.[89] The state claimed that the NAACP needed to submit the documents in order to comply with a state statute that required all foreign corporations to register with the Secretary of State.[90] The organization agreed to turn over most of the documents, however, it refused to release its membership lists.[91]

The NAACP claimed that both the organization's and its members' First Amendment right to assembly would be infringed upon if it were forced to produce such information.[92] It argued that if the identity of its rank-and-file members were to be made public, those members would be subject to public hostility.[93] The NAACP claimed that the threat of public hostility would be likely to both induce members to withdraw from the Association and discourage new members from joining.[94] Thus, a compelled disclosure of its membership would adversely affect the organization and its members' ability to freely associate with like-minded individuals.[95]

The Court found this line of reasoning compelling. The Justices asserted that effective advocacy is enhanced by group association.[96] Any actions by the state that may have the effect of curtailing this type of association must be subject to strict scrutiny.[97] Because the State of Alabama could not show a compelling justification to override the Court's concerns regarding unnecessary infringement upon the NAACP's freedom of association, the Court allowed the Association to withhold its membership lists.[98]

Those who question the FBI's right to investigate a domestic group on a less than probable cause basis point to the Court's holding in *NAACP v. Alabama.*[99] These civil rights advocates interpret the holding to prevent the FBI from infiltrating or placing informers within any domestic group without a compelling state interest.[100] They claim that by penetrating an organization, the FBI disrupts the "vital relationship between freedom to associate and privacy in one's associations"

88. *See* Berry, *supra* note 20, at 213–14; *see also* Rubin, *supra* note 36, at 472–75.
89. NAACP v. Alabama, 357 U.S. 449, 453 (1958).
90. *Id.* at 451–53.
91. *Id.*
92. *Id.* at 460.
93. *Id.* at 462–63.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 460–61.
98. *Id.* at 466.
99. *See* Bothwell, *supra* note 56, at 1014; *see also* Sallee, *supra* note 3, at A11 (citing *Brandenburg v. Ohio* for the right to advocate violence against the government).
100. *See* Bothwell, *supra* note 56, at 1014; Rubin, *supra* note 36, at 466–68.

that *NAACP* explicitly protects.[101] FBI infiltration or use of informants allows the Bureau to do essentially what the Court forbade the State of Alabama from doing, i.e., discovering an association's membership without a compelling interest.[102]

B. Barriers to First Amendment Challenges

The suggested *Brandenburg* and *NAACP* type First Amendment attacks on the FBI's basis for beginning an investigation of a domestic group, under a broader interpretation of the Guidelines, seem to present the FBI with significant constitutional challenges. However, courts have rarely been receptive to such challenges.[103] These attacks have run into both procedural and substantive legal problems.[104]

1. Substantive barriers

Substantively, both the free speech and free assembly arguments against FBI investigations require a leap in logic that the courts have thus far been unwilling to make.[105] The Supreme Court based its *Brandenburg* decision on criminal sanctions punishing the exercise of First Amendment rights.[106] The Court was silent as to whether the First Amendment would have protected Mr. Brandenburg from an investigation as well.

In fact, in *Alliance to End Repression v. City of Chicago*,[107] the FBI argued that the *Brandenburg* principles extended only to punishment and not to investigation. As mentioned previously, in a prior case brought by the plaintiffs in *Alliance*, the FBI agreed to be legally bound by the Levi Guidelines with respect to the plaintiff class as part of a settlement.[108] When Attorney General Smith revised the Guidelines in 1983, the plaintiffs sued, claiming that the revisions violated the *Brandenburg* principles, which were incorporated into Levi's original version.[109] In response, the FBI argued the distinction between investigations and arrests.[110]

The court did not rule, however, on the FBI's contention. Because the issue before the court was the enforcement of a settlement decree, and not a proceeding

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101. *NAACP*, 357 U.S. at 462. The Court pointed out the heightened role privacy plays when a group advocates views outside the mainstream, which would conceivably include advocacy of violence or illegal activity. *See id.* "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, *particularly where a group espouses dissident beliefs.*" *Id.* (emphasis added).

102. *See* Bothwell, *supra* note 56, at 1014; Rubin, *supra* note 36, at 466–68.

103. *See infra* notes 105–71 and accompanying text.

104. *See infra* notes 105–71 and accompanying text.

105. Berry, *supra* note 20, at 220–23; Rubin, *supra* note 36, at 475.

106. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

107. 561 F. Supp. 575 (N.D. Ill. 1983), *modified*, 733 F.2d 1187 (7th Cir. 1984), *and rev'd*, 742 F.2d 1007 (7th Cir. 1984).

108. Alliance to End Repression v. City of Chicago, 91 F.R.D. 182 (N.D. Ill. 1981); *see supra* notes 62–63 and accompanying text.

109. *Alliance*, 561 F. Supp. at 578–79.

110. *Id.* at 579.

to vindicate First Amendment rights, the question was irrelevant.[111] So, while judicially untested, this argument would seem to pose a formidable counterpoint to any challenge of FBI investigative procedures based on First Amendment *Brandenburg* principles. It is one thing to argue that the First Amendment protects citizens from punishment based solely on the advocacy of illegal activity, as the Court in *Brandenburg* held.[112] It does not necessarily follow that the First Amendment shields these same people from a governmental inquiry into whether the advocates intend to follow through on the activity expressed.

A challenge to FBI investigation practices, using the free assembly rights the Court upheld in *NAACP*, would likewise have to cross major substantive hurdles. Crucial to the Court's ruling in *NAACP* was the NAACP's showing that the disclosure of its membership lists would cause tangible and specific damages to its members.[113] Because the members were likely to be harmed by the disclosure of their membership, the disclosure affected their right to freely associate.[114] A group challenging an FBI investigation under Guideline standards may have difficulty proving that its members suffered the type of damages found in *NAACP*.

The FBI Guidelines closely regulate the dissemination of information gathered by agents during an investigation.[115] Unlike the Association's membership lists in *NAACP*,[116] information obtained by investigating agents is not available to the general public.[117] Plaintiffs asserting that a Guideline-based FBI investigation unnecessarily hinders their freedom of association may have a difficult time establishing specific and tangible damages because only the FBI and other law enforcement agencies would be aware of the plaintiffs' membership.

A final substantive barrier to asserting a constitutional claim challenging FBI investigative procedures is the Supreme Court's general deference to the government in areas of domestic security.[118] In *United States v. United States District Court*,[119] three criminal defendants challenged the President's power to authorize, through the Attorney General, electronic surveillance in domestic

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111. *Id.* "As a matter of 'pure' constitutional law, this line of argument may or may not have validity. The court expresses no opinion on this question since it is simply irrelevant." *Id.*

112. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

113. These damages included both economic losses, like the loss of employment, as well as the emotional and physical damages seen in the manifestations of public hostility. NAACP v. Alabama, 357 U.S. 449, 462–63 (1958).

114. *Id.* at 463.

115. *FBI Guidelines*, *supra* note 35, at 84.

116. 357 U.S. at 453.

117. *FBI Guidelines*, *supra* note 35, at 84. The FBI will, however, release information to other criminal justice agencies in three specific instances. First, if the information falls within that agency's jurisdiction, the FBI will release its information. Second, the Bureau may release its information if a release will assist in the prevention of a crime. Third, it will release its information when the law requires disclosure. *Id.*

118. *See* United States v. United States Dist. Court, 407 U.S. 297, 322 (1972).

119. 407 U.S. 297 (1972).

security investigations without prior judicial approval.[120] The Court found that, even in situations involving national security, a prior warrant proceeding is necessary for electronic surveillance.[121]

However, the opinion recognized that considerations affecting surveillance decisions in cases involving domestic security issues, like terrorist attacks, may be less precise than those in cases of more conventional crime.[122] Because the emphasis of security intelligence is on prevention of future acts or preparation for future crises, the government would be unduly restricted if such investigations were held to the same rigid standards as investigations of "ordinary crime."[123] So while the holding in *United States v. United States District Court* required a prior warrant proceeding before the use of electronic surveillance, it allowed the warrant proceeding to differ from those used in cases of more "typical" crime.[124] Were a court to extend this type of deference to the FBI in a case challenging the Bureau's investigation of a domestic group, the plaintiffs could face different standards than the NAACP and its members did in their case.[125]

The NAACP successfully argued that the State of Alabama needed a compelling interest before it could force the group to divulge its membership lists.[126] This was because disclosure of these lists would infringe upon the assembly rights of both the Association and its members.[127] The FBI could argue that even if its investigation of a domestic group infringed upon that group or its members' right to free assembly, an investigation was necessary in order to gather vital security intelligence. A deferential court may be more willing to overlook certain *NAACP*-type damages to both the group and its members if it believed the investigation was truly one involving domestic security.[128]

Thus, compared to the government defendants in *Brandenburg* and *NAACP*, it would seem that the FBI would be in a better position to defend its actions. Because of the important governmental interest at stake (the prevention of terrorism), the Court might be more receptive to the FBI's claims of necessity than it was to similar claims asserted by the State of Alabama. Alabama claimed it needed the NAACP's membership lists to facilitate its regulation of a foreign corporation.[129] It would seem almost silly to argue that the regulation of an out-of-state corporation rises to the same level of governmental interest, and therefore

120. *Id.* at 299.

121. *Id.* at 322.

122. *Id.*

123. *Id.* The Court also mentioned that the gathering of intelligence in a domestic security investigation can be long-term and consist of a variety of sources. Therefore, exact targets may be more difficult to define than targets of an investigation into more ordinary crime. *Id.*

124. *Id.*

125. Elliff, *supra* note 55, at 789.

126. NAACP v. Alabama, 357 U.S. 449, 466 (1958).

127. *Id.* at 460–61.

128. *See* United States v. United States Dist. Court, 407 U.S. at 297.

129. *NAACP*, 357 U.S. at 451–53.

requires the same judicial leeway, as a domestic security investigation.[130] And while the State of Ohio, in *Brandenburg*, seemed to have interests similar to those the FBI might have when it conducts an investigation, namely the prevention of future crime, the FBI may be in a more defensible position. This is because the First Amendment infringement caused by an FBI investigation would not reach the same level of severity as the criminal sanctions that the State of Ohio implemented against Brandenburg.[131] Thus, neither *NAACP* nor *Brandenburg* would seem to be particularly convincing precedent for plaintiffs attempting to challenge an FBI Guideline based investigation.

2. Procedural barriers

While the substantive barriers to a challenge of FBI investigative procedures are significant, procedural barriers may present a plaintiff's greatest problem. Plaintiff groups challenging law enforcement's use of surveillance and informants/infiltration have had severe difficulty getting standing to assert a constitutional claim.[132] Federal courts have yet to find that law enforcement use of surveillance or informants, by itself, gives rise to a cause of action for targeted groups or their members.[133]

In *Laird v. Tatum*,[134] the U.S. Supreme Court set its standing requirements for challenges to law enforcement use of surveillance. The plaintiffs in *Laird* brought a class action suit claiming that Army surveillance of their lawful civilian activity "chilled" their First Amendment rights.[135] The plaintiff class was made up of participants at rallies that Army officials perceived to have the potential for disorder.[136] Army intelligence agents were sent to these rallies to gather information and photograph the participants/plaintiffs.[137] The agents then reported their findings to Army Intelligence headquarters, where the information was placed into the Army's computers and disbursed to bases throughout the country. The plaintiffs alleged that the Army's activities and general presence at these rallies created an impermissible chill on their First Amendment rights.[138]

The Court found the plaintiff class lacked standing to bring its claim.[139] In order to invoke judicial review of a government action, a plaintiff must show that

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130. *See* Elliff, *supra* note 55, at 789. Parts of Justice Powell's *United States v. United States District Court* opinion, concerning the difference in investigations of domestic groups for security reasons and investigations involving more conventional crime, are cited within the *FBI Guidelines*. *FBI Guidelines*, *supra* note 35, at 76. This may suggest that the FBI already assumes some deference when it conducts a security investigation.

131. *See supra* notes 105–12 and accompanying text.

132. *See infra* notes 134–71 and accompanying text.

133. Berry, *supra* note 20, at 222–23.

134. 408 U.S. 1 (1972).

135. *Id.*

136. *Id.* at 6.

137. *Id.*

138. *Id.* at 3.

139. *Id.* at 13–14.

he or she sustained, or is in immediate danger of sustaining, a direct injury as a result of that action.[140] The plaintiffs here could make no such claim. The Court found that the fact that the Army may, at some time in the future, misuse the information it obtained to in some way cause harm to the plaintiffs was too far removed to substantiate a direct injury.[141] "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts...do not render advisory opinions.'"[142]

The Army in *Laird* conducted what Justice Douglas deemed a "massive and comprehensive" investigation using undercover agents,[143] yet the plaintiffs lacked standing because the act of gathering information did not equate to a direct harm. An FBI Guideline-based investigation would, under the same circumstances, be unlikely to reach the same proportions and would be no more likely to result in a direct harm on the subjects of the investigation.[144] Were the FBI to conduct an investigation at a rally similar to the ones in *Laird*,[145] the Bureau would seem to be bound by the rules governing preliminary inquiries.[146] Under these rules, the FBI can use undercover agents or informants only if other investigative means are not likely to be successful.[147] Therefore, undercover agents or informants may be barred since it is likely that less intrusive means of investigation, like physical surveillance, would be successful at a large public rally.[148] And, while nothing in them specifically bars a preliminary inquiry from being "massive and comprehensive," like the Army's investigation in *Laird*, a large scale investigation would seem to violate the spirit of the Guidelines.[149]

So long as an investigation is conducted within the scope of the FBI Guidelines, plaintiffs may have a difficult time proving the investigation caused direct harm. The Court, in *Laird*, has already allowed what it considered massive

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140. *Id.*

141. *Id.*

142. *Id.* (quoting United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947)).

143. *Id.* at 26–27 (Douglas, J., dissenting).

144. *See infra* notes 146–53 and accompanying text.

145. This, of course, assumes that the FBI could, under the Guidelines, conduct an investigation at all, which certainly is debatable.

146. Preliminary inquiries are, as previously mentioned, the most restrictive type of investigations available to the FBI. *See supra* notes 42–46 and accompanying text. A full investigation would seem to be barred since the facts surrounding the rallies in *Laird* do not suggest a reasonable indication of federal crime. Should it receive information about a rally that may require further scrutiny beyond limited lead checking, the FBI could begin a preliminary investigation. From the facts of *Laird*, however, it seems unlikely that even these lower standards would be met, due to the rally's peaceful nature. *FBI Guidelines*, *supra* note 35, at 71–72.

147. *Id.* at 72.

148. Both the Philadelphia and Richmond Police Departments gathered information similar to that which the Army obtained in *Laird*, at public meetings through simple physical surveillance, without the use of undercover agents or informants. *See infra* notes 154–71 and accompanying text.

149. *See FBI Guidelines*, *supra* note 35, at 72.

investigations, using invasive investigatory techniques, at seemingly peaceful public rallies.[150] The Guidelines appear to permit an investigation of that scale only upon a reasonable indication that the group is engaged in a terrorist enterprise.[151] In such a case, *Laird* may not apply because of the deference granted to the government in areas of national security.[152] Otherwise, the investigation would be significantly limited by the rules governing preliminary inquiries.[153] It would be quite a stretch to argue that the *less* invasive, *less* massive information gathering techniques of an FBI investigation would result in a *more* direct harm than the Army's permissible investigations in *Laird.*

The Third and Fourth Circuit Courts of Appeals reached decisions similar to *Laird* in *Philadelphia Yearly Meetings of the Religious Society of Friends v. Tate*[154] and *Donohoe v. Duling*,[155] respectively. In *Friends*, the plaintiffs, two organizations and six individuals, alleged that practices of the Philadelphia Police Department chilled and deterred their rights to free speech and assembly.[156] The plaintiffs objected to police surveillance of lawful public assemblies and demonstrations.[157] They claimed that police practices of both photographing those in attendance and recording the event constituted a violation of their First Amendment rights in three ways.[158] First, such practices deprived the plaintiffs of anonymity in their political activity and associations.[159] Second, the police surveillance chilled their rights of speech and assembly.[160] Third, the Department's practices interfered with the plaintiffs' right to associate with others in support of unpopular views.[161] Similar to the holding in *Laird*, the court found that the plaintiffs lacked standing because they failed to state a claim of a specific present harm or a threat of specific future harm.[162]

The plaintiffs in *Donohoe v. Duling* filed a complaint very much like the one filed in *Friends*. The complaint challenged the practices of the Richmond Police Department.[163] Plaintiffs objected to police presence and surveillance at public meetings.[164] Similarly, they were opposed to the Police Department's practice of photographing participants and maintaining these photos in files shared with other

150. Laird v. Tatum, 408 U.S. 1, 13–14, 26–27 (1972).

151. *FBI Guidelines*, *supra* note 35, at 73.

152. *See supra* notes 118–24 and accompanying text.

153. *FBI Guidelines*, *supra* note 35, at 70–73.

154. 519 F.2d 1335 (3d Cir. 1975).

155. 465 F.2d 196 (4th Cir. 1972).

156. 519 F.2d at 1336.

157. *Id.*

158. *Id.* at 1337.

159. *Id.*

160. *Id.*

161. *Id.* at 1336–37.

162. *Id.* at 1337–38. The court agreed with the plaintiffs in one aspect of their claim. The plaintiffs' complaint about police sharing surveillance information with non-law enforcement personnel was sufficient to state a cause of action. *Id.*

163. Donohoe v. Duling, 465 F.2d 196, 197 (4th Cir. 1972).

164. *Id.* at 197–98.

law enforcement agencies.[165] The plaintiffs' claim in *Donohoe* met a fate similar to those in *Laird* and *Friends*.[166] The court concluded that no showing of direct injury or threat of specific future injury meant no standing.[167]

The lesson plaintiffs should take from the courts' holdings in "standing" cases like *Laird, Friends*, and *Donohoe* is that, in order to challenge FBI investigative techniques, they will have to show some sort of tangible damages.[168] A claim of a subjective "chill" of constitutional rights caused by surveillance, or even infiltration, without any further allegations,[169] will almost certainly be rejected.[170] A plaintiff would need to show a specific injury, such as loss of a job or active harassment by FBI agents, before a court would rule on the legitimacy of the FBI's investigative methods.[171]

C. Fourth Amendment Challenges

The Fourth Amendment challenge to government investigations of domestic groups is a fairly recent approach presented in two parallel cases. The claim essentially combines the First Amendment right to free religious exercise with the Fourth Amendment protections against illegal searches and seizures.[172] This challenge was raised by criminal defendants in *United States v. Aguilar*[173] and by two plaintiff churches in the civil case *Presbyterian Church v. United States.*[174] Both cases involved the following set of facts. In 1984 the Immigration and Naturalization Service (INS) recruited two informants to obtain evidence for use in the prosecution of persons involved in a movement[175] to provide sanctuary to illegal

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165. *Id.*

166. *Id.* at 201–02.

167. *Id.*

168. *See* Laird v. Tatum, 408 U.S. 1 (1972); Philadelphia Yearly Meetings of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975); *Donohoe*, 465 F.2d at 196.

169. Two cases that would have presented scenarios more favorable to plaintiffs were settled out of court. Berry, *supra* note 20, at 222–23. These two cases were *Handschu v. Special Services Division*, 349 F. Supp. 766 (S.D.N.Y. 1972) and *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 575 (N.D. Ill. 1983), *modified*, 733 F.2d 1187 (7th Cir. 1984), *and rev'd*, 742 F.2d 1007 (7th Cir. 1984). In *Handschu*, plaintiffs alleged summary punishment, electronic surveillance and the specific use of undercover agents as provocateurs. 349 F. Supp. at 768. The *Alliance* plaintiffs alleged electronic surveillance and harassment by government agents. 561 F. Supp. at 577; Berry, *supra* note 20, at 222–23.

170. *See Laird*, 408 U.S. at 1; *Friends*, 519 F.2d at 1335; *Donohoe*, 465 F.2d at 196.

171. Berry, *supra* note 20, at 221.

172. *See* Bothwell, *supra* note 56; McCarthy, *supra* note 56, at 172–73, 179–81.

173. 871 F.2d 1436 (9th Cir. 1989), *amended by*, 883 F.2d 662 (9th Cir. 1989), and *cert. denied*, 498 U.S. 1046 (1991).

174. 752 F. Supp. 1505 (D. Ariz. 1990).

175. Participants in the "sanctuary movement" directed political refugees from Central America through several Arizona churches to Chicago, where the illegal aliens were then dispersed throughout the United States. Bothwell, *supra* note 56, at 1004.

aliens.[176] These undercover agents attended several church services, without a warrant, where they collected a vast amount of taped and untaped information.[177] The agents, in turn, gave this information to the INS.[178] On the basis of this information, the government obtained eight criminal convictions.[179]

In *Aguilar*, the criminal defendants challenged their convictions.[180] They claimed that the First and Fourth Amendments intertwined to forbid government agents from infiltrating church services without a warrant.[181] The defendants moved to suppress any evidence obtained by government infiltration.[182] The *Presbyterian* plaintiffs, two churches, sought declaratory and injunctive relief, arguing that the INS' warrantless infiltration of their church services violated their First and Fourth Amendment rights.[183] Both claims were essentially the same. Each party argued that because it was exercising a protected First Amendment right, the free exercise of religion, it should receive greater Fourth Amendment protection.[184] In analyzing this argument, the courts[185] first examined the protections that the Fourth Amendment provides against the government's use of informants.[186] The courts ultimately used the invited informer doctrine[187] developed by the U.S. Supreme Court in two cases: *Hoffa v. United States*[188] and *United States v. White*.[189]

In *Hoffa*, Mr. Hoffa challenged his criminal conviction, claiming the government obtained evidence through an unconstitutional search and seizure.[190] He claimed that the government's use of a secret informer placed in his "quarters and councils" constituted a violation of his Fourth Amendment rights.[191] A government informant discussed and overheard a number of incriminating statements made by Mr. Hoffa while the informant was in Mr. Hoffa's hotel suite.[192] He then reported

176. McCarthy, *supra* note 56, at 163.

177. *Id.* at 164.

178. The agents provided the INS with nearly 100 hours of taped information, as well as a great deal of untaped information, on various church activities. These activities included Bible study classes, church sponsored social events and church services. *Id.*

179. *Id.*

180. United States v. Aguilar, 871 F.2d 1436, 1441 (9th Cir. 1989), *amended by*, 883 F.2d 662 (9th Cir. 1989), and *cert. denied*, 498 U.S. 1046 (1991).

181. 871 F.2d at 1470–73.

182. *Id.*

183. Presbyterian Church v. United States, 752 F. Supp. 1505, 1507–08 (D. Ariz. 1990).

184. *Aguilar*, 871 F.2d at 1472; *Presbyterian*, 752 F. Supp. at 1512.

185. The court of record in *Aguilar* was the Ninth Circuit. The Arizona District Court decided *Presbyterian*.

186. *Aguilar*, 871 F.2d at 1471; *Presbyterian*, 752 F. Supp. at 1509.

187. The agents used by the INS did not sneak into the church services but were allowed in, thus qualifying them as "invited informers." *See* Hoffa v. United States, 385 U.S. 293, 302 (1966).

188. 385 U.S. 293 (1966).

189. 401 U.S. 745 (1971).

190. *Hoffa*, 385 U.S. at 295.

191. *Id.*

192. *Id.* at 296.

these statements to government agents who used them to help obtain Mr. Hoffa's conviction.[193] Mr. Hoffa argued that the government should have obtained a warrant before they used an agent in his hotel room.[194]

The Court rejected this argument.[195] While it acknowledged that Fourth Amendment protections extended to Mr. Hoffa's hotel room,[196] his conversations with the informant were not protected.[197] Mr. Hoffa invited the informant into his room and relied on his own misplaced confidence that the informer would not reveal what was said to him.[198] The Court refused to extend the Fourth Amendment to protect a "wrongdoer's misplaced belief that a person to whom he voluntarily disclosed his wrongdoing will not reveal it."[199]

In *White*, the Court carried this same line of reasoning a step further. Mr. White challenged his narcotics conviction, arguing that it was based in part on evidence obtained by government agents in violation of his Fourth Amendment rights.[200] He objected to the testimony of government agents, who related incriminating conversations that occurred between White and a government informant.[201] The agents' testimony was based on conversations they overhead by monitoring the frequency of a radio transmitter carried and concealed by the informant.[202] The Court found no violation, saying that White's claims were virtually the same as the ones it rejected in *Hoffa*.[203] It reasoned that an invited informer would not violate Mr. White's rights by writing down conversations he had with the defendant and turning the writings over to government agents.[204] Taking this to be true, the Court reasoned that "for constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with the defendant...wears a recording or transmitting device"[205] that either records the conversation or transmits it to agents monitoring the frequency. Therefore, Mr. White was in no better position to assert a Fourth Amendment claim than was Mr. Hoffa.[206]

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193. *Id.*

194. *Id.* at 300–02.

195. *Id.* at 302.

196. The Fourth Amendment applies differently depending on a person's reasonable expectation of privacy. People in their homes, for example, would be provided greater Fourth Amendment protections than people in public parks. The Court said the Fourth Amendment would extend to Mr. Hoffa's hotel room the same protections that would be afforded to his home or office. *Id.* at 301.

197. *Id.* at 302.

198. *Id.* at 301–02.

199. *Id.* at 302.

200. United States v. White, 401 U.S. 745, 746–47 (1971).

201. *Id.*

202. *Id.*

203. *Id.* at 749–54.

204. *Id.* at 751.

205. *Id.*

206. The Court did not believe that a person contemplating illegal activities would distinguish his behavior, in the company of possible informers, between possible informers

Applying the "invited informer" doctrine of *Hoffa* and *White* to the facts in *Aguilar* and *Presbyterian*, the courts both found that the INS's use of informants was entirely within the scope of the Fourth Amendment.[207] "[T]he Supreme Court unmistakably declared that persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting."[208] The courts were not willing to grant extended Fourth Amendment "invited informer" protections to the *Aguilar* defendants or the *Presbyterian* plaintiffs. The fact that they claimed additional First Amendment interests was not persuasive.[209]

In both cases, the courts did acknowledge the First Amendment interests raised by the parties.[210] First, the Arizona District Court granted the *Presbyterian* plaintiffs standing on their claim of a subjective chill of their First Amendment rights.[211] The court granted standing because the churches were able to show cognizable injury caused by government infiltration.[212] This injury was manifested in the form of: a) fear and distrust among the congregants and b) withdrawal of members from their churches.[213] Though standing was granted, this claim lost on its merits.[214]

Second, and more importantly, both courts recognized restrictions on undercover agents when conducting an investigation of activities protected by the First Amendment. The government must conduct its investigations in a good faith manner and cannot simply interfere with First Amendment freedoms.[215] The courts further ruled that agents conducting an investigation where protected activity is involved must strictly adhere to the "scope of the defendant's invitation to participate in the organization."[216]

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wearing wires and ones not wearing wires. Taking this to be true, the defendants' security interests were no different than the ones addressed in the *Hoffa* decision. *Id.* at 752–53.

207. United States v. Aguilar, 871 F.2d 1436, 1473 (9th Cir. 1989), *amended by*, 883 F.2d 662 (9th Cir. 1989), and *cert. denied*, 498 U.S. 1046 (1991); Presbyterian Church v. United States, 752 F. Supp. 1505, 1512–13 (D. Ariz. 1990).

208. *Aguilar*, 871 F.2d at 1472.

209. *Id.* at 1473; *Presbyterian*, 752 F. Supp. at 1512–13; McCarthy, *supra* note 56, at 176.

210. *See infra* notes 211–16 and accompanying text.

211. *Presbyterian*, 752 F. Supp. at 1509–10.

212. *Id.*

213. *Id.* at 1510.

214. *Id.* at 1516. The plaintiffs ultimately lost their claim of chilled First Amendment rights because the government had a compelling interest in conducting its investigation and used the least restrictive alternative for adequate protection of the governmental interest. *Id.* at 1514–15.

215. United States v. Aguilar, 883 F.2d 662, 705 (9th Cir. 1989), *amending*, 871 F.2d 1436 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991); *Presbyterian*, 752 F. Supp. at 1515.

216. *Aguilar*, 883 F.2d at 705; *Presbyterian*, 752 F. Supp. at 1515 (quoting *Aguilar*, 883 F.2d at 705).

It is this last restriction[217] which would seem to offer plaintiffs a useful tool in challenging FBI investigations conducted within the scope of the Guidelines. The Guidelines allow for the use of any lawful investigative technique.[218] An agent acting outside of his or her invitation to participate in an organization would seem to be using a lawful investigative technique permitted by the Guidelines, yet such conduct is restricted by the courts. Conceivably, a domestic group or its members could successfully challenge an FBI investigation if they were able to show that the undercover agents were involved in the group's activities beyond the extended invitation.

D. Barriers to Fourth Amendment Challenges

Fourth Amendment challenges to Guideline-based FBI investigations face perhaps the greatest obstacle of all—no compelling precedent. The government has successfully defended against these new expanded Fourth Amendment claims in both the criminal and civil cases.[219] Although critics of the *Aguilar* and *Presbyterian* decisions have pointed to a number of reasons why the courts should have expanded the protections,[220] the courts simply did not.[221] A plaintiff asking a court for greater protections will have to do so in the face of two cases specifically rejecting similar claims.[222] Unless the plaintiffs are able to present facts showing something beyond the FBI's infiltration or the use of informants, such as improper conduct by government agents, a successful challenge seems unlikely.

As discussed earlier, the restrictions covering investigations of cases involving First Amendment protections, which the court mentioned in *Aguilar,* might provide some grounds for a plaintiffs' challenge to an FBI investigation.[223] Plaintiffs may argue that the investigation was initiated simply to interfere with their First Amendment rights, or that the agents conducting the investigation participated in the organization beyond the scope of the plaintiffs' invitation.[224] On the other hand, the protections afforded by the Ninth Circuit, in *Aguilar,* and the Arizona District Court, in *Presbyterian,* to an investigated group do not seem significant.

First, the Guidelines presumably bar an investigation initiated solely to interfere with a group's First Amendment freedoms.[225] A properly conducted Guideline investigation could never be attacked on this basis.[226] Second, the FBI

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217. The first restriction, a ban on bad faith investigations, is already incorporated into the Guidelines. *FBI Guidelines, supra* note 35, at 69–76, 79–83.

218. *Id.* at 72, 81.

219. *See Aguilar,* 871 F.2d at 1436; *Presbyterian,* 752 F. Supp. at 1505.

220. *See* Bothwell, *supra* note 56; McCarthy, *supra* note 56.

221. *See Aguilar,* 871 F.2d at 1436; *Presbyterian,* 752 F. Supp. at 1505.

222. *See supra* notes 208–09 and accompanying text.

223. *See supra* notes 215–16 and accompanying text.

224. *See* United States v. Aguilar, 883 F.2d 662, 705 (9th Cir. 1989), *amending* 871 F.2d 1436 (9th Cir. 1989), *cert. denied,* 498 U.S. 1046 (1991); *Presbyterian,* 752 F. Supp. at 1515.

225. *FBI Guidelines, supra* note 35, at 69–76, 79–83.

226. *See id.* at 69–83.

may only be slightly restricted by the requirement that agents not act beyond the extent of the agents' invitation to participate. The Bureau would still be able to conduct all Guideline-permissible investigations using invasive techniques, such as the use of both undercover agents and informers, but would have to caution these agents to stay within the scope of their invitation. This restriction does not seem to address some of the largest problems groups have with governmental investigations.[227] Keeping agents and informants within the scope of their invitation does not provide any protections from the chilling effect felt by an investigated group and its members' First Amendment rights.[228] The security this restriction gives a suspect group seems minimal.

IV. PROPOSAL

FBI attempts to prevent terrorist attacks do not necessarily translate into proportional attacks on civil liberties.[229] Certainly, a middle ground can be found to balance the need of the FBI to investigate threatening domestic groups, without intruding unnecessarily upon the guaranteed rights of those groups and their members. The tension between investigations and intrusions upon civil liberties stems from the fact that the most effective investigatory techniques, like the use of informants or infiltration, tend to be the most invasive.[230] The FBI should alter its Guidelines slightly, curbing the use of the most invasive techniques when First Amendment rights are at the core of an investigation. At the same time, however, agents should be allowed more time to complete these investigations because the more effective and more intrusive techniques will be less available.

The Guidelines already include a statement regarding First Amendment concerns in the "General Principles" section.

> In its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct. It is important that such investigations not be based solely on activities protected by the First Amendment.... When, however, statements advocate criminal activity or indicate an apparent intent to engage in...crimes of violence, an investigation under these Guidelines may be warranted unless it is apparent...that there is no prospect of harm.[231]

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227. *See supra* notes 65–102 and accompanying text.

228. *See supra* notes 65–102 and accompanying text.

229. "[T]he choice between civil liberties and a safe society is a false choice. We need not, and will not, trade off the guarantees of the Bill of Rights to uphold our duty to ensure domestic tranquility." *Terrorism Hearings*, *supra* note 8, at *4 (statement of Deputy Attorney General Gorelick).

230. Because domestic terrorism investigations involve the prevention of future acts, the best way to preempt these attacks is through intelligence gained from inside the organization. While many groups may advocate violence, without some inside knowledge, it is virtually impossible to tell which groups are likely to act. *See Gingrich: Let FBI Spy on Terrorists*, CHI. SUN TIMES, Apr. 23, 1995, at 32; Johnson, *supra* note 1, at D1; Wilson, *supra* note 3; *see also* United States v. United States Dist. Court, 407 U.S. 297, 322 (1972).

231. *FBI Guidelines*, *supra* note 35, at 69.

As an addition to these First Amendment concerns, the FBI should institute the following changes:

> 1) Any agent wishing to conduct a preliminary inquiry, in which First Amendment activities will be crucial to the investigation, must first obtain prior authorization from a supervisory agent, except in exigent circumstances.

Authorization from a supervisory agent is already required before an agent may use a "highly intrusive" technique in a preliminary investigation.[232] This change would require similar authorization when a protected activity provides the motivation for an agent to conduct an inquiry. One of the biggest concerns civil libertarians share about FBI investigations of domestic groups is that these investigations may hinder the group members' ability to speak and assemble freely.[233] Requiring authorization from a supervisory agent before *any* investigative measure is taken should help ensure that all such investigations are necessary and within Bureau policy.

> 2) Inquiries based on First Amendment concerns shall be completed within 120 days after the initiation of the first investigative step. If, however, a highly intrusive investigative technique is utilized, the inquiry shall be completed within forty-five days after its initiation. The initiation of a highly intrusive technique may not be utilized to extend the original 120 day completion deadline.

The current Guidelines allow ninety days for all inquiries.[234] This change attempts to allow the FBI more time to conduct preliminary inquiries of suspect domestic groups when the Bureau's suspicion is based upon First Amendment-protected activity, so long as the FBI uses less invasive techniques. Agents may need more time to conduct these inquiries if they are using less intrusive, and less effective techniques. However, once a supervisory agent determines that more intrusive methods are needed, the inquiry must be completed within forty-five days of its initiation. This will prevent the possibility of a three-month long, highly intrusive, inquiry based mainly on activities protected by the First Amendment.

> 3) A domestic security/terrorism investigation, in which First Amendment protected activities will be crucial to the investigation, may be initially authorized for a period of up to 120 days.

This suggestion would cut the time period the current Guidelines allot for an investigation by sixty days.[235] It attempts to allow the FBI enough time to conduct a thorough investigation while decreasing the period of invasiveness of an investigation by two months.

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232. *Id.* at 72.

233. *See* sources cited *supra* notes 11–14, 17.

234. *FBI Guidelines*, *supra* note 35, at 71. Note that this alteration does not attempt to change the 30 day period of extension for inquiries. These 30 day extensions may be granted by headquarters upon written request by the investigating agent. *Id.*

235. *Id.* at 81. This alteration also would change the renewal period of 180 days, which may be obtained from the Director or designated Assistant Director, to 120 days. *Id.*

These suggestions are certainly not radical. Radical change would seem unnecessary. The suggested alterations attempt to force the FBI to consider the motivations for its investigations and tailor its techniques accordingly. When a preliminary inquiry is motivated solely on the basis of a protected activity, like a speech advocating violence to achieve social or political goals, the agents would need supervisory approval to begin.[236] The current Guidelines do not call for such supervision.

When the FBI initiates an inquiry or investigation on the basis of protected activity, the agents would have less time to use intrusive measures before they were required to demonstrate to a supervisor why the investigation should be extended.[237] If agents are able to demonstrate this, the investigation may proceed as usual. If not, the investigation must end. Thus, these restrictions would not handcuff FBI agents conducting investigations, for if the investigation showed merit, it would continue. If not, the members of an investigated group would be the beneficiaries of less intrusion. The suggested changes would move the FBI Guidelines closer to that elusive middle ground where civil liberties meet domestic tranquillity, neither encroaching too much upon the other.

236. *See supra* notes 232–33 and accompanying text.

237. *See supra* notes 234–35 and accompanying text.