The FBI and Dissidents: A First Amendment Analysis of Attorney General Smith's 1983 FBI Guidelines on Domestic Security Investigations

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The Federal Bureau of Investigation (FBI) is the government's primary criminal investigative agency. FBI investigations are conducted to protect the public against general crimes, organized crime, and political or racial terrorism that seriously endangers the public safety and national security. However, such investigations must not be permitted to violate individual rights to political expression and association.[1] Restrictions are necessary to ensure that the FBI does not investigate an individual or organization solely as a result of the parties' ideas or associations rather than to prevent harmful illegal conduct. Such restrictions may hinder the FBI in stopping politically motivated violent crime,[2] but the first amendment[3] necessarily precludes certain types of intelligence activities.

In 1976, in response to congressional concern that the FBI had gone beyond the legitimate needs of domestic intelligence gathering and had vio-

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1. In 1975 the Senate established a select bi-partisan committee to conduct an investigation of governmental intelligence activities to determine the extent to which illegal, improper, or unethical activities were engaged in. SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH REPECT TO INTELLIGENCE ACTIVITIES REPORT, *reprinted in* SEN. REP. NO. 775, Vol. II at v, 94th Cong., 2nd Sess. (1976) [hereinafter cited as Church Committee Report]. The Church Committee Report was publicly released in 1976. It not only revealed that FBI headquarters contained over 500,000 intelligence files, but also that at least 26,000 individuals were at one point listed to be rounded up in the event of a national emergency. *Id.* at 6-7. The report also revealed that the NAACP had been investigated by the FBI for over twenty-five years, that the woman's liberation movement had been infiltrated by informants, and that the FBI had ordered the investigation of every member of the Students for Democratic Society and every Black Student Union, regardless of whether they were previously involved in any disorders. *Id.* at 8-9.

2. Because "terrorism" is such an emotionally-laden subject it is important to determine the factual basis for any alleged terrorist activity. While the Seventh Circuit Court of Appeals in Alliance to End Represssion v. City of Chicago, 742 F.2d 1007, 1015 (7th Cir. 1984), cited a study indicating that between 1970 and 1980 domestic "terrorist" organizations committed more than 400 bombings in the United States, the court recognized that "the number of bombings and other violent acts by domestic terrorist organizations has not risen over this period." *Id.* at 1019.

3. The first amendment states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

lated citizens' constitutional rights,[4] Attorney General Edward Levi issued a set of guidelines for FBI investigations, which set forth standards and procedures for gathering domestic intelligence.[5] The 1976 Levi Guidelines were superseded by the *Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations*, released by Attorney General William French Smith on March 7, 1983.[6]

This Note first compares the FBI investigation standards set forth in the 1983 Smith Guidelines with the 1976 Levi Guidelines. It then discusses three authorizations granted to the FBI under the Smith Guidelines, specifically the FBI's right to conduct surveillance of peaceful public demonstrations, to use informants and infiltrators, and to investigate persons or groups advocating unlawful activities. These three are isolated because, as this Note suggests, they are subject to a first amendment challenge of constitutionality. This Note presents the first amendment and standing arguments using case law not previously argued in this context.

I. COMPARISON OF THE SMITH GUIDELINES AND THE LEVI GUIDELINES

The 1983 Smith Guidelines contain certain FBI investigation standards that are similar to those in the 1976 Levi Guidelines. Like the Levi Guidelines,[7] the Smith Guidelines permit FBI field offices to initiate a preliminary inquiry when the FBI receives information or an allegation indicating possible criminal activity.[8] Both the Levi Guidelines and the Smith Guidelines permit the FBI to examine public sources of information and federal, state, and local records, to speak with previously established informants, and to conduct physical surveillance of persons during a preliminary inquiry.[9]

The Smith Guidelines, however, depart from the Levi Guidelines in a number of areas.[10] Unlike the 1976 Levi Guidelines, which explicitly excluded the placement of new informants and infiltrators during a preliminary inquiry,[11] the Smith Guidelines permit the placement of new informants at the preliminary inquiry stage of an investigation.[12] The Smith

4. *See supra* note 1. Prior to the Smith Guidelines report, the televised 1973 congressional Watergate hearings revealed the FBI's involvement in the Nixon administration's break-in and wiretapping of the Democratic National Headquarters. *See* WHITE HOUSE TRANSCRIPTS 72-78, 82-85, 100-05, 122-23 (G. Gold ed. 1974).

5. *United States Attorney General Guidelines on Domestic Security Investigation* (1976); *reprinted in FBI Oversight: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 50-53 (1978) [hereinafter cited as 1976 Levi Guidelines].

6. *United States Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations*; *reprinted in* 32 CRIM. L. REP. (BNA) 3087 (1983) [hereinafter cited as 1983 Smith Guidelines].

7. 1976 Levi Guidelines, *supra* note 5, at 50.

8. 1983 Smith Guidelines, *supra* note 6, § I, § IIB, at 3088.

9. 1976 Levi Guidelines, *supra* note 5, at 51; 1983 Smith Guidelines, *supra* note 6, § II(B)(6), at 3089.

10. For an in depth comparison of the Levi Guidelines with the Smith Guidelines, see Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785 (1984).

11. The 1976 Levi Guidelines state that techniques such as "recruitment or placement of informants in groups may not be used as part of a preliminary or a limited investigation [inquiry]." 1976 Levi Guidelines, *supra* note 5, at 51.

12. The 1983 Smith Guidelines state that highly intrusive techniques are allowed in a prelimi-

Guidelines also permit the FBI to gather publicly available information about an individual, even if the threshold requirements for a preliminary inquiry are not satisfied. The FBI can collect such information even if there is no allegation or information indicating possible criminal activity.[13]

An important restriction in the 1976 Levi Guidelines was the requirement that there be a reasonable suspicion that an individual was involved in violent activities that violated federal law before the FBI could conduct investigation of an individual or an organization.[14] The reasonable suspicion requirement served as a filtering mechanism to distinguish dissent from unlawful conduct.[15] While the 1983 Smith Guidelines retain the reasonable suspicion standard for a full investigation,[16] they can be interpreted to permit a full investigation of a person who merely advocates unlawful activity.[17] In addition the Smith Guidelines contain a surprising provision which permits local FBI operatives to participate in an organization's activities in a manner that might influence the exercise of first amendment rights.[18] These various changes raise the issue whether the broad powers granted to the FBI by the Smith Guidelines are consistent with the liberties granted to citizens by the first amendment.[19]

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nary inquiry only in compelling circumstances and when other investigative means are not likely to be successful. 1983 Smith Guidelines, *supra* note 6, § B(6)(9), at 3089. In Alliance to End Repression v. City of Chicago, 561 F. Supp. 575 (N.D. Ill. 1983), *rev'd on other grounds*, 742 F.2d 1007 (7th Cir. 1984), the court quoted an internal FBI memorandum by which the court indicated that the development of new informants and infiltrators did not fall within this highly intrusive category. *Id.* at 582. The court concluded that informants and infiltrators could be employed in a preliminary inquiry if authorized by a supervisory agent. *Id.*

13. 1983 Smith Guidelines, *supra* note 6, § I, at 3088.

14. A full investigation was permitted only when the FBI had "specific and articulable facts" which created a reasonable suspicion that an individual was involved in violent activities that violated federal law. 1976 Levi Guidelines, *supra* note 5, at 51.

15. Attorney General Levi stated that the proposed domestic security guidelines proceeded from the proposition that government monitoring of individuals or groups, because they hold unpopular or controversial views, is "intolerable" in our society. *FBI Oversight: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 2nd Sess. 257 (1976) (Feb. 11, 1976).

16. The 1983 Smith Guidelines describe this standard as "reasonable indication" rather than "reasonable suspicion." While stating that the "reasonable indication" standard is substantially lower than probable cause, the 1983 Smith Guidelines state that the standard requires an objective factual basis for initiating the investigation. 1983 Smith Guidelines, *supra* note 6, § II(C)(1), at 3089.

17. 1983 Smith Guidelines, *supra* note 6, § I, at 3088. *See infra* notes 115-20 and accompanying text.

18. 1983 Smith Guidelines, *supra* note 6, § IV(B)(3). *See infra* notes 103-04 and accompanying text.

19. Drawing the line between protecting first amendment rights versus protecting against potential "terrorists" in the name of national security has critical implications. Alan Barth, the author of THE LIBERTY OF FREE MEN has stated:

> The relation of the individual to the state—or of the individual to national security—is the critical issue of our time. . . . The function of national security in a totalitarian society is to preserve the State, while the function of national security in a free society is to preserve freedom. Individual freedom is an invaluable means towards national survival. But it is an end as well—the Supreme end which the government of the United States was instituted to secure.

A. BARTH, THE LIBERTY OF FREE MEN 240 (1951).

II. FBI AUTHORIZATIONS UNDER THE SMITH GUIDELINES

A. *Intelligence Gathering at Peaceful Public Demonstrations*

The 1983 Smith Guidelines permit the FBI to take notes and photograph participants at public demonstrations whether or not there is any indication of criminal activity.[20] This type of information gathering may "chill" the exercise of a first amendment right to express views in a public forum by individuals or organizations. This is an inquiry which logically should have redress under the "chilling effect" doctrine.

1. *The Chilling Effect Doctrine*

Courts in the 1950s[21] developed the chilling effect doctrine to provide a judicial remedy for indirect attacks on first amendment rights. The chilling effect doctrine requires a court to analyze the effects of a government action to determine whether the action deters parties from exercising their first amendment rights.[22] The doctrine reflects concern that local, state, or federal government may indirectly restrain free speech through certain types of state action. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."[23] Since governmental interference with protected speech does not create the same type of concrete injury, such as physical injury or commercial loss, that is caused by interference with other rights, the doctrine looks at the practical consequences of the government's action on the individual's conduct.[24] Additionally, the Supreme Court recognizes that associations as well as individuals may be inhibited in the exercise of first amendment rights.[25]

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20. The Smith Guidelines state that "[n]othing in these guidelines is intended to prohibit the FBI from collecting and maintaining publicly available information consistent with the Privacy Act." 1983 Smith Guidelines, *supra* note 6, § I, at 3088. The American Civil Liberties Union interprets this statement to mean that the threshold for an inquiry or investigation is not necessary to collect publicly available information on persons and organizations. AMERICAN CIVIL LIBERTIES UNION MEMORANDUM, NEW FBI DOMESTIC SECURITY GUIDELINES 7-8 (March 14, 1983) (available from American Civil Liberties Union, Washington, D.C.). Under the Privacy Act, the FBI cannot maintain an information file on any lawful first amendment activity "unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7) (1974). The American Civil Liberties Union asserts that the Justice Department may be claiming that because domestic intelligence gathering is an "authorized law enforcement activity," the FBI can collect publicly available information about any person's first amendment activities although that person may not be suspected of any criminal activity. AMERICAN CIVIL LIBERTIES UNION MEMORANDUM, *supra*.

21. The Supreme Court first referred to the constitutionally based "chilling effect" doctrine in Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

22. *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 809-11 (1969). Examples of state action deterring parties from exercising their rights include requiring teachers to take certain types of loyalty oaths, *id.* at 824, or reclassifying selective service registrants in reaction to their participation in anti-Vietnam war demonstrations. *Id.* at 830.

23. Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan, J., concurring).

24. *See, e.g.*, Walker v. Birmingham, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting); NAACP v. Button, 371 U.S. 415, 432-33 (1967).

25. In Wieman v. Updegraff, the Court looked at the effect loyalty oaths may have on the association rights of all teachers affected:

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

If it is determined that an individual's or association's exercise of first amendment rights has been inhibited, a court will apply a compelling state interest test, even if the "chill" arises indirectly as an unintended but inevitable result of the government's acts.[26] Under such a test, the government has the burden to show a compelling state interest that justifies the encroachment on first amendment rights.[27] Moreover, even when the government can show a compelling interest, the government must also show that the means it employed were closely drawn to avoid unnecessary abridgement of first amendment rights. If a less restrictive alternative existed for satisfying the state's compelling interest, the governmental activity is unconstitutional.[28]

These principles can be applied to intelligence gathering activities. Since the threat of politically motivated violent crime is small and not increasing within the United States,[29] the government will likely have difficulty establishing that it has a compelling state interest in conducting surveillance of public demonstrations that directly or indirectly chills free speech. To ensure that the FBI has employed means closely drawn to avoid unnecessary abridgement of first amendment rights, courts should require that there be at least some allegation or information indicating possible unlawful activity, the Smith Guidelines prerequisite for a preliminary inquiry, before the FBI can conduct surveillance at public demonstrations.

Note taking and photographing participants at public demonstrations by FBI agents as sanctioned by the 1983 Smith Guidelines may inhibit constitutionally protected political expression by those present or potentially present at such events. Studies indicate that overt intelligence gathering has the effect of labeling as deviant and illegitimate the behavior of those involved in protected political expression.[30] The general public interprets overt surveillance as a judgment made by the government that the behavior subject to surveillance is not within the range of legitimate political behavior.[31] The chilling effect occurs as a result of this stigmatization. Inhibition results from people avoiding social situations that they have so categorized as threatening.[32]

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344 U.S. at 195 (Frankfurter, J., concurring).

26. Buckley v. Valeo, 424 U.S. 1, 65 (1976); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958).

27. Elrod v. Burns, 427 U.S. 347, 362 (1976).

28. *Id.* at 362-63.

29. *See supra* note 2.

30. Askin, *Surveillance: The Social Science Perspective*, 4 COLUM. HUM. RTS. L. REV. 59 (1972). Several studies have analyzed the consequences of labeling behavior deviant. *See* E. SCHUR, LABELING DEVIANT BEHAVIOR: ITS SOCIOLOGICAL IMPLICATIONS 7-36 (1971). *See also* E. GOFFMAN, STIGMA, THE MANAGEMENT OF SPOILED IDENTITY (1963).

31. Askin, *supra* note 30, at 64. For instance, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2302 (1968) defines surveillance as a close watch kept over a person, especially a suspected person. While industrial workers are supervised, criminal suspects are kept under surveillance. Askin, *supra* note 30, at 64. *See* M. WESSEL, FREEDOM'S EDGE: THE COMPUTER THREAT TO SOCIETY 33 (1974).

32. A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION (1969). Governmental action may chill first amendment activities in two ways. First, records made by intelligence agencies are sometimes misused. M. WESSEL, *supra* note 31, at 30, 32; A. WESTIN, PRIVACY AND FREEDOM 159-60 (1968). *See* A.R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS (1971). *See also infra* notes 55-58 and accompanying text. Knowledge that a specific

2. *Standing to Assert a Chilling Effect*

Despite the substantive basis to assert a chilling effect injury, an individual or group may have difficulty asserting this claim due to the federal court's standing requirements. The standing principle requires that a case present a definite and concrete controversy involving the legal relations of parties having adverse legal interests.[33] The plaintiff must have "such a personal stake in the outcome of the controversy as to . . . [ensure the] concrete adverseness which sharpens the presentation of issues" before the court. "This 'personal stake' requirement is satisfied if the person seeking redress has suffered, or is threatened with, some 'distinct and palpable injury.' "[34]

In *Laird v. Tatum*,[35] the United States Supreme Court severely restricted standing for individuals challenging certain types of governmental surveillance at public demonstrations on the basis of the chilling effect doctrine. In *Laird*, army intelligence agents gathered information and photographed participants at peaceful public rallies. The information obtained by the agents was nothing more than what a good newspaper reporter would have been able to get by attendance. Rally participants claimed that the surveillance created an impermissible chill of first amendment rights. The Supreme Court dismissed the case without reaching the merits, holding that the plaintiffs lacked standing.[36]

The *Laird* Court limited standing to assert the "chilling effect" doctrine to those individuals who can assert a "specific present objective harm" or a "threat of specific future harm."[37] The Court distinguished the injuries alleged by the *Laird* claimants from those of litigants in four earlier chilling effect cases in which the Court granted standing. The Court stated that in none of the previous cases did the chilling effect arise merely from the individual's "knowledge" of certain governmental activities or from fear that the government, armed with information from its activities, might in the future perform some other action detrimental to that individual. The Court thereby overlooked the possibility that citizens were actually inhibited from

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group or activity is under governmental surveillance may force individuals, who are fearful that records of their participation may be misused or misinterpreted at a later time, to modify their political expression. Second, when individuals know about surveillance of a group they redefine such presumably legitimate political activity as illegitimate or even illegal and are therefore reluctant to act publicly in support of the group despite their own political beliefs. Askin, *supra* note 30 at 66. Moreover, because they are prevented from participating in such activity, people may become intolerant of lawful dissident activity. This acts to reinforce the view that such activity is illegitimate. Hyman, *England and America: Climate of Tolerance and Intolerance*, in THE RADICAL RIGHT (D. Bell ed. 1963). In Jahoda & Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty & Security Programs*, 61 YALE L.J. 296 (1955), the authors evaluated the impact of governmental loyalty and security inquiries in the 1950s by conducting in-depth interviews of professionals in federal positions and faculty members in the Washington, D.C. area. The authors found that as a result of the general climate of the times and the specific security measures taken against them, a number of the interviewed persons internalized the pressure and changed their behavior not only by severing memberships in organizations on the Attorney General's list, but also by limiting their signing of petitions and refraining from joining organizations not on the Attorney General's list.

33. Allen v. Wright, 104 S. Ct. 3315, 3335 (1984).
34. *Id.*
35. 408 U.S. 1 (1972). The facts of *Laird* are set forth in 408 U.S. at 2-10.
36. *Id.* at 13-15.
37. *Id.* at 13-14.

expressing their lawful political viewpoints, the very harm that the chilling effect doctrine was designed to protect. Stating that the *Laird* plaintiffs had alleged only a "subjective chill," the Court did not permit the plaintiffs to present evidence that the government's surveillance actually inhibited their conduct.[38]

3. *Asserting a Chilling Effect Injury after* Laird v. Tatum

Meeting *Laird's* standing requirement is a major obstacle to individuals who claim that their first amendment rights have been chilled as a result of FBI activities.[39] To avoid the restrictive *Laird* standing requirement, an individual may be able to rely on a particular state's case law and permissive standing statute to challenge surveillance of political activities in state court rather than federal court.[40] A person also has standing to challenge "legitimate" surveillance activities aimed at intimidating or coercing persons.[41]

While individuals may have trouble meeting the *Laird* standing requirement, associations may be able to avoid the *Laird* restrictions on the basis that *Laird* involved individuals claiming injuries to themselves, rather than

38. *Id.* at 13-14. While the District of Columbia Court of Appeals in *Laird* had remanded the case for an evidentiary hearing, Tatum v. Laird, 444 F.2d 947, 958 (D.C. Cir. 1971), the Supreme Court did not, despite the plaintiffs' request. *See* Pyle, Laird v. Tatum: *The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244, 250 (1973). Justice Douglas, dissenting in *Laird*, concluded that the Army's dossiers were highly inaccurate and filled with unverified gossip and rumor which "directly jeopardized the employment and employment opportunities of persons seeking sensitive positions with the federal government or defense industry." 408 U.S. at 27 (Douglas, J., dissenting).

39. *See* Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972) (photographic surveillance by police at public meetings and vigils of welfare rights and anti-war groups did not create a justiciable first amendment claim); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326 (2nd Cir. 1973) (FBI surveillance of anti-Vietnam war coalition, which included inspection of the coalition's bank records, although the bank's records were scarcely within the ambit of public information, did not create a justiciable claim).

40. In White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975), University of California Professor White alleged that employees of the Los Angeles Police Department registered as students at U.C.L.A. and submitted police reports regarding class discussions, joined university recognized student organizations, attended the organizations' public and private meetings, and reported on discussions at the meetings. *Id.* at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97. The professor brought a taxpayer's suit under section 526a of California's Code of Civil Procedure to enjoin the allegedly illegal expenditure of public funds. The primary purpose of the statute, according to the court, was to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." The court stated that the standing requirements under this statute "differs fundamentally" from the restrictive federal standing requirement of *Laird*, particularly since no showing of special damage to the taxpayer is necessary to obtain standing under the statute. *Id.* at 765, 533 P.2d at 227, 120 Cal. Rptr. at 94.

Since the professor had standing under this section, the California Supreme Court held that the alleged police conduct sufficiently inhibited the plaintiff's first amendment rights of free expression, *id.* at 772, 533 P.2d at 221, 120 Cal. Rptr. at 104, and sufficiently violated the plaintiff's right of privacy, *id.* at 776, 533 P.2d at 234, 120 Cal. Rptr. at 106, to reverse the lower court's demurrer. The court suggested that the government may have difficulty demonstrating a compelling state interest that would permit the government to burden these fundamental rights because the complaint alleged that the information gathered by the undercover police officers "pertain[ed] to no illegal activity or acts." *Id.* at 772-73, 533 P.2d at 232, 120 Cal. Rptr. at 104.

41. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 151 (D.D.C. 1976) (use of improper or illegal domestic intelligence techniques to harass American dissidents living abroad). *See also* Allee v. Medrano, 416 U.S. 802 (1974) (law enforcement misconduct to prevent farmworker union organizing); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (selective law enforcement to obstruct black voter registration).

an association claiming injury to itself[42] or its members.[43] Subsequent to the *Laird* decision, the Supreme Court unanimously granted an association, independent of its members, standing to assert a housing discrimination complaint, because the association alleged a concrete and demonstrable injury to the organization's activities, which caused a drain on the organization's resources.[44] In *Havens Realty Corp. v. Coleman*,[45] a non-profit association which sought to implement equal opportunity housing alleged that Havens Realty had engaged in "racial steering" in violation of the 1968 Fair Housing Act.[46] Agents of Havens Realty allegedly told black apartment seekers that there were no apartments available while simultaneously telling white apartment seekers that apartments were available. The Court held that the association had satisfied the "injury in fact" element of the standing requirement by alleging that Havens had frustrated the association's ability to provide counseling and referral services to homeseekers and that it had incurred expenses to identify and counteract the defendant's discriminatory practices.[47]

The fact that the alleged injury resulted from the association's non-economic interest in encouraging open housing did not deprive the organization of standing.[48] The Court focused not only on the direct impairment of particular activities (the association's investigation of racial discrimination complaints), but also recognized the "ripple effect" that such impairment had on the organization's other operations (its allocation of resources from counselling and referral services to counteracting the racial steering practices).[49] Rather than resulting in any overall diminution of the association's economic viability, this ripple effect may have only shifted the association's financial resources, an activity the organization could have avoided by deciding not to counteract the real estate agent's practices.[50]

It is presently unknown whether the Court will limit its *Havens Realty* decision to racial steering claims. However, in *People Organized for Welfare and Employment Rights v. Thompson*,[51] the Seventh Circuit Court of Appeals described a situation in which *Haven Realty* would apply to an association alleging a first amendment violation under section 1983 of the Civil Rights Act.[52]

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42. The development of direct organizational standing from the first case, Pierce v. Society of Sisters, 268 U.S. 510 (1925), in which two private schools alleged sufficient injury to themselves as businesses to challenge an Oregon law requiring all school children to attend public schools, to Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), the most recent Supreme Court case on direct organizational standing, is traced in Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff*, 20 HARV. C.R.-C.L. L. REV. (1985).

43. *See infra* notes 91-93 and accompanying text.

44. *Havens Realty*, 455 U.S. at 379.

45. 455 U.S. 363 (1982).

46. *Id.* at 366.

47. *Id.* at 379.

48. In a footnote, the *Havens Realty* Court stated that merely because "the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered . . . and accordingly does not deprive the organization of standing." *Id.* at 379 n.20. *See* Burnham, *supra* note 42, at 180-81.

49. *See* Burnham, *supra* note 42, at 181-82.

50. *Id.* at 182.

51. 727 F.2d 167 (7th Cir. 1984).

52. *Id.* at 170. People Organized for Welfare and Employment Rights (P.O.W.E.R.) sought to

Applying these principles, an association may be able to satisfy the *Havens Realty* standing requirement, avoiding the restrictive *Laird* standing requirement, to assert a chilling of its first amendment rights by FBI surveillance of its demonstrations. Like the association seeking fair housing in *Havens Realty*,[53] an organization could allege a concrete and demonstrable injury to its activities of organizing Americans to work for social change through public political expression in vigils, pickets, and peaceful demonstrations. The fact that the alleged injury results from the organization's non-economic interest in promoting social change does not deprive the organization of standing. The association in *Havens Realty* alleged that the realty corporation's racial steering practices had frustrated its ability to provide counseling and referral services. Similarly, an association could allege that the FBI's information gathering at the association's peaceful demonstrations frustrates its ability to empower, organize, and mobilize Americans to participate in public activities promoting non-violent social change.

Like the association in *Havens Realty*, an organization could allege that there has been a ripple effect drain on the organization's resources due to the injury. An association could allege that it had to devote significant resources, first, to identify government agents at its activities, and second, to counteract the effect of the overt FBI surveillance. To counteract the chilling effect of FBI information gathering, an association may have to spend more money reassuring its current members and recruiting new members to participate and to contribute financially. By analogy to the *Havens Realty* decision, the association may have suffered an injury even if there was not an overall diminution of the association's economic viability, but rather only a shifting of its financial resources, which the association could have avoided by deciding not to counteract the FBI's activities.[54]

4. *FBI Dissemination of Information to Non-Law Enforcement Agencies and the Public*

Even if the *Laird* standing requirements cannot be overcome to challenge overt FBI photographing and note taking at peaceful demonstrations, current case law provides citizens with significant precedent to successfully challenge the FBI's dissemination of this information to non-law enforce-

increase the number of poor persons registered to vote by assisting the Chicago Board of Commissioners register voters inside state welfare and unemployment office waiting rooms. State officials refused to permit voter registrars to enter the waiting rooms. P.O.W.E.R. sued, contending that having registrars available to potential voters in this fashion was an integral part of its first amendment rights to encourage voter registration and to associate with potential registrants. The Seventh Circuit denied P.O.W.E.R. standing because it had alleged only that the state had interfered with what P.O.W.E.R. wanted others, the Chicago Board of Election Commissioner Registrars, to do to help achieve P.O.W.E.R.'s goal. *Id.* at 171. However, the court, citing *Havens Realty*, stated that there might be a persuasive basis for standing if P.O.W.E.R. had been trying to advance its goal by registering new voters itself. Anyone who prevented P.O.W.E.R. members from going into the waiting rooms and urging people there to register would have injured P.O.W.E.R. *Id.* at 170.

53. For a discussion of the Court's stance in *Havens Realty*, see *supra* notes 42-52 and accompanying text.

54. *See supra* notes 48-50 and accompanying text. Unlike the plaintiff P.O.W.E.R. who merely alleged that the state had interfered with what it wanted others to do, 727 F.2d at 171, an association would be alleging that the FBI surveillance interfered with the organization's own activities in advancing its goals.

ment agencies or the public. In a Third Circuit Court of Appeals decision,[55] the court held that allegations that the Philadelphia Police Department had shared its intelligence files on 18,000 individuals with non-law enforcement agencies[56] sufficiently stated a cause of action against the city and satisfied the *Laird* federal standing requirement.[57] The court also stated that the plaintiffs had standing to assert their first amendment rights as a result of the police department's public disclosure on a nation-wide television show that the plaintiffs were subjects of police dossiers.[58]

The Third Circuit Court of Appeals[59] has taken this analysis one step further in holding that a high school student had alleged sufficient injury to satisfy *Laird's* standing requirements in seeking the expungement of an FBI file based not upon the *actual* dissemination of information in the file, but rather its *possible* dissemination.[60] The file resulted from the FBI's recording the student's return address on a letter to the Socialist Workers Party sent as part of a social studies project.[61] The court stated that the file labeled "Subversive Material" may prove extremely damaging to the plaintiff in the future.[62]

Such limitations on FBI dissemination of intelligence information logically follows from the purposes of intelligence gathering. Even if there is a legitimate government need to gather intelligence information about a particular person to determine whether a full investigation is warranted, dissemination of that information to non-law enforcement agencies or to the public is beyond this legitimate need. This significant limitation is soundly rooted in public policy.

5. *Intelligence Gathering Based Upon the Investigation of a Demonstration's Co-Sponsor*

The 1983 Smith Guidelines permit the FBI to collect information about a public demonstration if one of the demonstration co-sponsors is already

55. Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335 (3rd Cir. 1975).

56. *Id.* at 1336-37.

57. *Id.* at 1338.

58. *Id.* at 1338-39. Similarly, upon allegations that United States Army intelligence agents disseminated information on certain lawful political activities to military and civilian agencies and private citizens, the District of Columbia District Court held that the plaintiffs had standing. *Berlin Democratic Club*, 410 F. Supp. at 147. The court held that the public dissemination of intelligence information is subject to challenge as being beyond "legitimate surveillance activities." *Id.* at 151. As a result of this dissemination three plaintiffs were dismissed from their jobs; another plaintiff was debarred from access to all United States military installations in Berlin; deportation proceedings were instituted against another plaintiff by German authorities; and several other plaintiffs were unable to obtain security clearances for jobs they were seeking. *Id.* at 147-48. *See also* Lowenstein v. Rooney, 401 F. Supp. 952, 959 (D. N.Y. 1975) (congressional candidate had standing in a New York District Court to challenge the FBI's delivery of information concerning his private and political activities to his congressional opponent).

59. Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975).

60. *Id.* at 868.

61. *Id.* at 865-66.

62. *Id.* at 868. Through analogy to the D.C. Court of Appeals cases on the maintenance of arrest files on individuals arrested without probable cause, the *Paton* court held that the plaintiff had suffered a legally cognizable injury and ordered that her file be removed from the custody of the government and destroyed. *Id.*

the subject of an FBI investigation.[63] This is permitted even when the FBI does not suspect there will be any illegal activity at the demonstration. Such information gathering in the absence of any suspicion of illegal activity may violate other sponsoring groups' freedom of association rights if those groups are not already under investigation. If it were known that the FBI was collecting information about a demonstration, a sponsoring group may not want to participate. The organization not under investigation could thus be injured by the stigma attached to the FBI's intelligence activity. These groups are being treated differently than other non-investigated groups who sponsor demonstrations.

The Supreme Court has consistently interpreted the first amendment to guarantee freedom of association.[64] The Court interprets the right of association to include persons and groups with common ties banding together to achieve a common end.[65] The right of association therefore encompasses the right of various organizations to co-sponsor peaceful demonstrations to achieve reform-oriented goals.

Collecting information about a peaceful demonstration merely because one of the co-sponsors is subject to an FBI investigation may infringe on other co-sponsors' first amendment rights of association. The Court in *NAACP v. Claiborne Hardware Co.*,[66] developed a two-tiered test to protect legitimate political association from impairment by government sanctions. To impose sanctions on an individual or an organization for associating with another who is involved in illegal conduct, first, the government must establish that the party being associated with has unlawful goals, and second, establish that the individual or organization associating with that party has a specific intent to further those illegal aims.[67] If the party under FBI investigation has an illegal goal, other sponsors of a peaceful demonstration may not have the specific intent to further this illegal aim. Thus the requirements of the *Claiborne* test are not satisfied. Similarly, if a group contains innocent people as well as a "suspect" under investigation, the government cannot collect information on the group, provided that the FBI suspected no illegal activity on the part of the group. However, the FBI could otherwise continue to investigate the "suspect."[68]

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63. 1983 Smith Guidelines, *supra* note 6, § III(B)(1)(c), at 3092.

64. *See* NAACP v. Alabama *ex rel.* Patterson 357 U.S. at 449 (1958).

65. In Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), an association of interest groups was formed to oppose a rent control ballot initiative. The Supreme Court decided that Berkeley's municipal ordinance placing limitations on contributions to committees, formed to support or oppose ballot measures, violated first amendment rights of speech and assembly. Justice Burger interpreted the first amendment right of association to include persons and groups, sharing common ties, banding together to achieve a common end. *Id.* at 295.

66. 458 U.S. 886 (1982).

67. *Id.* at 918-19. In *Claiborne* the Court held that the non-violent activities of black people involved in a politically motivated NAACP boycott of businesses are protected first amendment activities, even if some association members made sporadic threats or committed acts of violence. *Id.* at 908.

68. The underlying rationale of the *Claiborne* decision is that guilt by association is a philosophy alien to the traditions of a free society. *Id.* at 932. Perhaps the most notable example of an FBI investigation initiated on the basis of guilt by association was the investigation of civil rights leader Martin Luther King Jr. The FBI began its investigation of Dr. King because it believed that two of Dr. King's advisers were members of the Communist Party. Church Committee Report, *supra* note 1, Vol. III, at 84. The Church Committee Report stated that:

The injury suffered by a non-investigated co-sponsor of a demonstration can be subtle and still permit the challenge to governmental activity. The Supreme Court in *Bates v. City of Little Rock*[69] stated that the first amendment protects parties "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[70] The critical question is whether subtle governmental interference includes the FBI's "collecting information" about a peaceful demonstration.[71]

Citing the *Bates* principle, the Court in *Healy v. James*[72] held that a state-supported college's refusal to recognize a Students for Democratic Society (S.D.S.) chapter, merely because the chapter was affiliated with the national S.D.S. organization, involved impermissible guilt by association.[73] The Court took this position even though the national S.D.S. chapter had been associated with disruptive and violent campus activities. While not involving guilt by association like the *Healy* case, the Fourth Circuit Court of Appeals decision in *Gay Alliance of Students v. Mathews*[74] further reveals the subtle nature of injury involved in the *Bates-Healy* principle. In *Gay Alliance* the court held that a gay student association suffered an infringement of its first amendment association rights when a Virginia university refused to register the gay organization as a formal student organization.[75] The refusal to register the organization did not directly bar its members from meeting to discuss the problems gay people face, and taking lawful actions to ameliorate these problems. However, both the university and the court recognized that this lack of registration would hurt the recruitment effort of the organization, as well as deny it the same treatment the university afforded to other registered student organizations.[76] These subtle inter-

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> Without access to the factual evidence, we are unable to conclude whether either of those two Advisers was connected with the Communist Party when the "case" was opened in 1962, or at any time thereafter. We have seen no evidence establishing that either of those advisers attempted to exploit the civil rights movement to carry out the plans of the Communist Party. In any event, the FBI has stated that at no time did it have any evidence that Dr. King was a communist or connected with the Communist Party.

Church Committee Report, *supra* note 1, Vol. III, at 84.

> From December 1963 until his death in 1968, Martin Luther King Jr. was the target of an intensive campaign by the Federal Bureau of Investigation to "neutralize" him as an effective civil rights leader. In the words of the man in charge of the FBI's "war" against Dr. King: "No holds were barred."

Id. at 81. The Seventh Circuit Court of Appeals stated that the FBI decided to take Dr. King "off the pedestal," "reduce him completely in influence," and select and promote its own candidate to assume the role of the leadership of the Negro people. Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984).

More disturbing than the FBI's effort to discredit Dr. King with the government, churches, universities, and the press was the FBI's incursion into his personal life. According to the Church Committee Report, the FBI placed at least fifteen electronic wiretaps in Dr. King's hotel rooms across the country. The purpose of the electronic wiretaps was apparently to induce Dr. King to commit suicide. Church Committee Report, *supra* note 1, Vol. II, at 220-21.

69. 361 U.S. 516 (1960).

70. *Id.* at 523.

71. An FBI intelligence investigation can be considered a sanction. *See infra* notes 139-41 and accompanying text.

72. 408 U.S. 169 (1972).

73. *Id.* at 186-87.

74. 544 F.2d 162 (4th Cir. 1976).

75. *Id.* at 164, 167.

76. *Id.* at 165.

ferences with the organization constituted actionable harm to the organization.

Similarly, when the FBI is "collecting information" about a peaceful demonstration, members of a non-investigated sponsoring organization can meet to plan and discuss problems concerning the demonstration, and lawfully march and demonstrate. However, if it becomes known that the FBI is collecting information about the demonstration, the resulting stigma could attach to the organization and could hurt its recruitment effort. Just as the gay student organization was injured by the university treating it differently than other student organizations, an association could be injured by the FBI treating the association differently than other groups not associated with parties under FBI investigation. The 1983 Smith Guidelines do not state what techniques can be used to "collect information" about such peaceful demonstrations.[77] Even if the FBI is restricted to the techniques of a preliminary inquiry, an organization not under investigation may not want to attend a planning meeting of the demonstration's co-sponsors if it believes that an informant will be there.

The 1983 Smith Guidelines, which permit the FBI to gather information at a demonstration where no illegal activity is even suspected and simply because one of the sponsoring organizations is under investigation, may be found to sanction a constitutional violation. Indeed, the FBI's collection of information may represent a greater interference with fundamental first amendment rights than a university's denial of recognition to a student organization. The former is an affirmative act of government interference, while the latter is a refusal to act which hinders first amendment freedoms.

B. *FBI Use of Informants*

1. *Attendance at Private Meetings*

The 1983 Smith Guidelines permit the FBI to use informants[78] and to infiltrate groups during a preliminary inquiry.[79] The use of informants can be based solely upon unsubstantiated information or allegations.[80] No reasonable suspicion by the FBI that the law is being violated is required. In contrast, under the 1976 Levi Guidelines the use of informants was permitted only during a full investigation.[81] Because of the widespread use of informants[82] and the quantity and confidential nature of the information collected[83] on lawful political activity,[84] the use of informants must be care-

77. 1983 Smith Guidelines, *supra* note 6, § III(B)(1)(c), at 3092.

78. *Id.* § IV(B)(1), at 3093. BLACK'S LAW DICTIONARY 701 (5th ed. 1979) defines an informer as an undisclosed person who confidentially volunteers material information of law violations to officers.

79. *See supra* note 12.

80. *See supra* note 8.

81. *See supra* note 11.

82. Informants are used in approximately 85% of the FBI's domestic intelligence cases. *General Accounting Office, Domestic Intelligence Operations of the FBI* quoted in Church Committee Report, *supra* note 1, Vol. II, at 220-21.

83. The Church Committee Report stated that when informants infiltrated an organization they reported "any and everything they saw or heard pertaining to a group's members" serving, in the words of both FBI officials and an informant, as a "vacuum cleaner" of information. *Id.* Vol. III, at 229-30.

fully restricted, if not by guidelines then by first amendment protections.

When informants attend private meetings, first amendment rights may be violated. Freedom of speech is undermined when people fear to speak freely in private meetings.[85] However, because of the *Laird* strict standing requirements, an affected party may not be protected from the chilling effect of informant activity. An alternative recourse for parties claiming a first amendment violation would be to claim that their constitutional right to freedom of association had been violated.[86] In particular, a party could claim that his or her right to associate with an organization and to be free from compulsory disclosure of that membership has been violated as a result of infiltration of the organization's private meetings.

In *NAACP v. Alabama ex rel. Patterson*,[87] the United States Supreme Court unanimously held that a state's order to the NAACP to turn over its membership list violated the NAACP members' personal first amendment rights of freedom of association.[88] The Court noted that group association undeniably enhances the ability to effectively advocate controversial points of view. The Court also recognized that privacy in group association may "be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs."[89] The Court concluded that the compelled disclosure was likely to adversely affect the NAACP's members' ability to collectively foster beliefs that they have a right to advocate, inducing members to withdraw from the association and dissuading others from joining it due to fear of exposing their beliefs to the public. Applying the compelling state interest test to the state's action, the Court also held that

84. In his book, NAMING NAMES, Victor Navasky interviewed 139 informants, victims, and other participants involved in the 1950s House Committee on Un-American Activities investigation of Hollywood. He analyzed the complex motives and behavior of certain informants in American society. He claims that for a time betraying one's friends, particularly by liberals who purged themselves of any "Communist" taint (and thereby retaining their jobs) by attacking other liberals, was elevated to a public virtue. V. NAVASKY, NAMING NAMES (1980).

85. Lopez v. United States, 373 U.S. 427, 470 (1963) (Brennan, J., dissenting).

86. No federal court has held that the fourth amendment prohibits the use of informants as permitted by the 1983 Smith Guidelines. *See* Hoffa v. United States, 385 U.S. 293 (1966) (law enforcement agencies may use informants without obtaining a warrant); United States v. White, 401 U.S. 745 (1971) (Hoffa rule expanded to informants who carry radio equipment which transmits the conversation elsewhere). The rationale of these cases is questioned in Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406 (1974). At least five states require search warrants before an informant or infiltrator can record or broadcast a conversation. *See* State v. Glass, 583 P.2d 872 (Alaska 1978); Tollett v. State, 272 So. 2d 490 (Fla. 1973); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975); State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978); State *ex rel.* Arnold v. County Court of Rock County, 51 Wis. 2d 434, 187 N.W.2d 354 (1971). The majority of these states require a search warrant on the basis of their state constitution specifically guaranteeing the right of privacy.

The Supreme Court in United States v. United States District Court, 407 U.S. 297 (1972) held that the fourth amendment requires the government to obtain a search warrant in order to conduct electronic surveillance (wiretapping) for domestic security purposes. In A. KINOY, RIGHTS ON TRIAL (1983), the attorney representing the defendants in United States v. United States District Court suggests that had the case gone the other way, the wiretapping of the Democratic National Headquarters at Watergate "would have been 'legal' and 'proper' and could have been openly acknowledged as 'authorized by the Attorney General' on behalf of the President." *Id.* at 35.

87. 357 U.S. 449 (1958).

88. *Id.* at 462, 466.

89. *Id.* at 462. In Talley v. California, 362 U.S. 60, 64 (1960), the Court stated that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."

the state lacked justification for such a significant invasion of the members' right of association.[90]

In *NAACP v. Alabama ex rel. Patterson*, the NAACP asserted its members' constitutional right to freedom of association.[91] The Supreme Court rejected the state's argument that the NAACP lacked standing because its members were not actual parties to the litigation. The Court noted that to require individual NAACP members to assert their right to anonymity would result in nullification of that right at the very moment the individual asserted it.[92] Thus, under *NAACP v. Alabama ex rel. Patterson*, an association has standing on its members' behalf when its members are constitutionally entitled to withhold their connection with the association.[93]

In determining whether the use of informants as sanctioned by the 1983 Smith Guidelines violates freedom of association, *NAACP v. Alabama ex rel. Patterson* may be particularly important. Informant surveillance of a private meeting is analogous to forced disclosure of membership.[94] When an informant is used for surveillance of a political organization, the informant will likely attend the organization's private meetings and identify people at those meetings whether or not the people desire to remain anonymous.[95] Similar to the Court's analysis in *NAACP v. Alabama ex rel. Patterson*,[96] the information likely to be obtained by an informant attending private meetings results in the nullification of the right to concealed membership. "Inviolability of privacy in group association" is necessary, as it was in *NAACP v. Alabama ex rel. Patterson*, to preserve freedom of association, especially when a

90. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. at 463-65. A compelling state interest, according to the Sixth Circuit Court of Appeals interpretation of NAACP v. Alabama, would be investigations germane to the detection of specific criminal conduct. Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 781 n.3 (6th Cir. 1983).

91. 357 U.S. at 458.

92. 357 U.S. at 459. In Singleton v. Wulff, 428 U.S. 106, 115-16 (1976), the Court explained that in such a situation the purposes of standing are met since the individual party's absence from the court "loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes the right's best available proponent."

93. Satisfying the standing requirement in such a case may be easier than satisfying the difficult *Laird* standing requirement that the party demonstrate a "specific present harm" or a threat of "specific future harm." Laird v. Tatum, 408 U.S. at 13-14.

94. However, *NAACP v. Alabama* probably only applies when the infiltrated group is conducting lawful or non-violent activity. That case did not involve any unlawful conduct except for the non-violent violation of the registration statute done in order to test its constitutionality. While the FBI does not know whether a group is law abiding or non-violent in advance of an inquiry, other less intrusive preliminary inquiry techniques could be used to determine whether there is a basis for a reasonable suspicion that a group plans to engage in crime, particularly crimes of violence.

In Lopez v. United States, 373 U.S. 427 (1963), the Supreme Court had an opportunity to determine whether *NAACP v. Alabama*'s protection of anonymity in certain circumstances applied when an undercover agent secretly recorded a suspect's bribe of an Internal Revenue agent in the suspect's private office. Three dissenting members of the Court asserted that it did. However, the Court majority, deciding that the suspect did not have protection from this activity on other grounds, did not address the dissent's contention. Even if the Court had held that *NAACP v. Alabama* does not protect people from this type of activity, the situation in *Lopez* could be distinguished from the situation where an FBI informant attends a private meeting of a group of dissidents in which no unlawful conduct took place. The party could contend that NAACP v. Alabama *ex rel.* Patterson recognized that the first amendment freedom of association included the right of anonymity only under certain circumstances involving groups rather than individuals, political dissidents rather than non-dissidents, and lawful or non-violent activity rather than criminal activity.

95. *See supra* note 83.

96. 357 U.S. at 459-63. *See also* notes 87-93.

group espouses dissident beliefs. Similar to the NAACP members, an association's members may have a rational fear of public hostility and reprisals should their membership become publicly known. Just as the Court in *NAACP v. Alabama ex rel. Patterson* recognized that it makes no difference if the abridgement of the first amendment right of association was unintended if such results are the inevitable consequence of the government's acts,[97] it makes no difference that the FBI does not intend such interference when it uses informants under the 1983 Smith Guidelines.

While there are no cases that expressly analogize the compulsory disclosure of membership to FBI attendants at private meetings,[98] the United States Supreme Court has recognized that official surveillance, whether its purpose is criminal investigation or ongoing intelligence gathering, "risks infringement of constitutionally protected privacy of speech."[99] Additionally, the Supreme Court cited three compulsory disclosure of membership cases, including *NAACP v. Alabama ex rel. Patterson*, as authority for the principle that "[t]he dangers inherent in undercover investigation are even more pronounced when the investigative activity threatens to dampen the exercise of First Amendment rights."[100] Other courts have similarly used the first amendment compulsory disclosure of membership cases as a basis for challenging the use of informants.[101]

Assuming that the informant attends private meetings and that the organization is engaged in lawful or non-violent activities, the FBI's use of informants during a preliminary inquiry, as sanctioned by the 1983 Smith Guidelines, may thus be challenged. Courts are starting to recognize that the use of informants in such fashion infringes on the inviolability of privacy in group association, a right that is protected by the first amendment.

2. *Covert "COINTELPRO Type" Interference*

While the 1976 Levi Guidelines explicitly prohibited intentional or unintentional interference with first amendment rights,[102] the 1983 Smith Guidelines are ambiguously written so that they can be read to explicitly

97. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. at 461.

98. United States v. United States District Court, 407 U.S. 297 (1972).

99. *Id.* at 320.

100. Socialist Workers Party v. Attorney General, 419 U.S. 1314, 1319 (1974) (Marshall, J., In Chambers Opinion). Justice Marshall's opinion can be interpreted as implicitly making the analogy. The Socialist Workers Party sought a preliminary injunction to bar FBI informants at the organization's youth convention. While the party satisfied the standing requirement, Justice Marshall would not affirm the granting of a preliminary injunction. A major factor in that decision was that the informants were monitoring a public rather than a private convention. Justice Marshall noted that any member of the public under the age of 29 could register and attend all aspects of the convention. *Id.* at 1317, 1320.

101. In White v. Davis, 13 Cal. 2d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975), the California Supreme Court enjoined surveillance of U.C.L.A. student organization meetings. The court stated that the United States Supreme Court has repeatedly recognized that when the government compels people to disclose their political ideas or affiliations to the government, it deters the exercise of first amendment rights. *Id.* at 768, 533 P.2d at 229, 120 Cal. Rptr. at 101. Similarly, in Founding Church of Scientology v. Director, 459 F. Supp. 748 (D.D.C. 1978), the District of Columbia District Court, citing *Socialist Workers Party v. Attorney General* for authority, held that where the FBI's use of informants "interfered with the lawful associational and religious activities of the organization," the organization had a claim against the government. *Id.* at 761.

102. The Levi Guidelines state that all investigations undertaken on the basis of the guidelines

sanction knowing interference with first amendment rights by an infiltrator. The Smith Guidelines state: "Undisclosed participation in the activities of an organization by an undercover employee or cooperating private individual in a manner that may influence the exercise of rights protected by the First Amendment must be approved by FBI headquarters with notification to the Department of Justice."[103] While the Smith Guidelines require approval before an agent may influence the exercise of first amendment rights, such approval has been given rather freely in the past.[104] If the guidelines permit activities similar in nature to those formerly conducted under the FBI's Counterintelligence program (COINTELPRO)[105] courts will find such activities unconstitutional.[106]

A number of federal courts have determined that certain informant ac-

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"shall be designed and conducted so as not to limit the full exercise of rights protected by the Constitution and U.S. Laws." 1976 Levi Guidelines, *supra* note 5, at 50.

103. 1983 Smith Guidelines, *supra* note 6, § IV(B)(3), at 3093. However, in an internal FBI memo, FBI Director Webster interpreted this provision to be a safeguard that investigations did not unintentionally influence the exercise of first amendment rights. March 17, 1983 internal FBI memo, *quoted in* Alliance to End Repression v. City of Chicago, 561 F. Supp. 575, 582 (N.D. Ill. 1983).

If the FBI interprets this provision to permit intentional interference with first amendment rights of suspects, FBI officials and agents sanctioning or undertaking such interference would not be immune from a 42 U.S.C. § 1983 Civil Rights action. A public official has qualified immunity from civil liability if the official reasonably believed in good faith that the conduct was lawful. However, this good faith defense is not available to a public official who knows or should know that the constitutional rights of another will be violated by the official's conduct. Butz v. Economous, 438 U.S. 478 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975); Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978).

104. Not only had the FBI approved 2,370 separate covert activities which interfered with first amendment rights, *see infra* note 105 and accompanying text, but President Reagan pardoned certain of the officials responsible. This pardon took place after a federal district court jury had convicted former FBI Acting Director, L. Patrick Gray, and former Associate Director, Mark W. Felt, of "conspiracy to deprive citizens of their Fourth Amendment rights by authorizing domestic breakins without a warrant." *See New York Times and Boston Globe* editorial, *reprinted in* Nat'l L.J., Apr. 20, 1981, at 8, col. 3.

105. COINTELPRO is an acronym for "counterintelligence program," a sophisticated fifteen year program aimed squarely, according to the Church Committee Report, at preventing exercise of first amendment rights of speech and association. Church Committee Report, *supra* note 1, vol. III, at 3-4. The COINTELPRO program involved a series of covert actions designed to "disrupt" groups and "neutralize individuals deemed to be threats to national security and to prevent the propagation of dangerous ideas." *Id.* at 3. The report divulged that the FBI had approved 2,370 separate covert COINTELPRO actions. *Id.* at 8. These included: attacking the political beliefs of a target to induce the target's employer to fire him or her, making anonymous letters to spouses to destroy marriages, anonymously and falsely labeling a member of a violence-prone group as a government informant so that the falsely-labeled member would be expelled or subject to physical attack, and sending an anonymous letter to a leader of a violent street gang that the Black Panthers were after him, to encourage the gang leader to take retaliatory action. *Id.* Vol. II, at 10-11.

106. One political analyst has taken a dim view of the protections courts have provided from these intelligence abuses. He writes that only with the recent disclosures of the scope and impact of political intelligence abuses in previous years has it become possible for its victims to obtain relief from the courts.

> Yet at this late date, courts can only order the wrongdoer to pay damages, in taxpayer's dollars of course, for past injuries inflicted on the rights of political dissenters, and to sin no more in the future. Such relief cannot restore to bloom in the political desert of our time the movements and groups that are targeted by the intelligence community in the past. Related redress for the invasion of individual rights is, indeed, a cheap price for the protection of the status quo and the neutralization of change movements. In effect, our court structure has served as a shield for political intelligence by offering deceptive relief from its excesses without disturbing its power.

F. DONNER, AGE OF SURVEILLANCE xiiii (1980).

tivities are so "outrageous" as to involve a constitutional violation.[107] In *United States v. Russell*[108] the Supreme Court, in dicta, recognized that there may be some conduct of law enforcement agents "so outrageous" that due process would absolutely bar the government from using the courts to obtain a conviction.[109] At least six subsequent federal cases have attempted to define what informant activities are so "outrageous" as to involve a constitutional violation.[110] For example, in *Hobson v. Wilson*[111] the plaintiffs alleged that while they were engaged in lawful protest against United States intervention in Vietnam, the FBI had systematically violated their first amendment rights. The various FBI COINTELPRO activities included preparing and distributing false press releases, encouraging informants to take leadership roles in order to stimulate dissension, distributing fictitious housing addresses to demonstrators thereby causing numerous demonstrators to make useless trips to nonexistent addresses, engaging in an intensive campaign of harassing interviews to intimidate politically active people, and anonymously writing racially inflammatory leaflets.[112] The District of Columbia Court of Appeals held that government action, taken with intent to disrupt or to destroy lawful organizations or to deter membership in those groups, is absolutely unconstitutional. The court noted that since the government could not constitutionally make such participation lawful, the government could not surreptitiously undertake to do what it may not do openly.[113] In *Hobson* not only did the plaintiffs satisfy the standing requirement, but they were also entitled to compensatory and punitive damages against the FBI for those COINTELPRO activities.[114]

The 1983 Smith Guidelines permit FBI undercover informants to engage in activities that influence the exercise of first amendment rights. As a

107. The rationale for judicial protection from covert COINTELPRO-type activities can be found in the language of Justice Brandeis' dissent in Olmstead v. United States, 227 U.S. 435 (1929), in which he said that crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every person to become a law unto themselves. To declare that the end justifies the means, that the government can commit crimes to secure a persons' conviction "would bring terrible retribution." *Id.* at 438 (Brandeis, J., dissenting).

108. 411 U.S. 423 (1973).

109. *Id.* at 432.

110. *See* Hobson v. Wilson, 737 F.2d 1, 11-12, 29, 66-67 (D.C. Cir. 1984) *cert. denied* 105 S. Ct. 1843 (1985); Alliance to End Repression v. City of Chicago, 561 F. Supp. 537, 541 (N.D. Ill. 1982) (motion to dismiss complaint alleging infiltration, physical or verbal coercion, photographic, electronic or physical surveillance, summary punishment and harassment by the City of Chicago was denied); Martin Luther King, Jr. Movement v. City of Chicago, 435 F. Supp. 1289, 1291 (N.D. Ill. 1977) (civil rights organization that alleged that City of Chicago engaged in a program of police surveillance, harassment and intimidation stated a cause of action); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 147, 151 (D.D.C. 1976) (U.S. Army intelligence infiltrators' disruption of legitimate political activities by either providing false information or encouraging illegal activity was subject to challenge); Philadelphia Resistance v. Mitchell, 58 F.R.D. 139, 145 (E.D. Penn. 1972) (the taking of photographs, when combined with allegations of physical violence, threats, excessive surveillance, illegal searches and seizures, and the denial of the right to counsel is suspect of being excessive); Handschu v. Special Servs. Div., 349 F. Supp. 766, 768-70 (Bill of Rights protects individuals against excesses and abuses of informant activity when the informants initiate and induce the party to participate in an armed robbery and a planned bombing of a government facility).

111. 737 F.2d 1 (D.C. Cir. 1984) *cert. denied* 105 S. Ct. 1843 (1985).

112. *Id.* at 11-12.

113. *Id.* at 29.

114. *Id.* at 66-67.

result of *Hobson* and other federal court decisions, such informant activities may be found to be a violation of constitutional rights.

C. *Investigating Advocacy of Nonimminent Illegal Conduct*

The 1983 Smith Guidelines permit the FBI to investigate persons and groups who advocate illegal conduct. The guidelines authorize such investigations even if there is no imminent likelihood of illegal conduct occurring.[115]

While the Smith Guidelines state that it is important that investigations begun in advance of criminal conduct not be based solely on constitutionally protected activities, the Guidelines create a broad and vague exception: "When, however, statements advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence, an investigation under these guidelines may be warranted unless it is apparent, from circumstances or the context in which the statements are made, that there is no prospect of harm."[116] In an internal FBI memorandum, FBI director William Webster remarked that the guidelines "should eliminate any perceptions that actual or imminent commission of a violent crime is a prerequisite to investigation."[117] To justify an investigation under the 1983 Smith Guidelines, then, there need only be the possibility of carrying out the illegal conduct advocated, not the probability of such illegal conduct. In *Alliance to End Repression v. City of Chicago*[118] a federal district court stated that if the Smith Guidelines are read literally, "an investigation may be warranted even if there exists only 'some' prospect of harm, however small."[119]

Plainly read, the 1983 Smith Guidelines authorize an investigation when 1) a party "advocates criminal activity" and when 2) it is not "apparent . . . that there is no prospect of harm."[120] As such, the Smith Guidelines are written in the backward approach of proving a negative. Under these Guidelines, an investigation of one who advocates illegal conduct is authorized until it becomes apparent "that there is no prospect of harm." This means that even if no evidence warranting a reasonable suspicion of criminal activity is turned up, the investigation may continue. The investigation continues until such evidence is found or until evidence making a reasonable suspicion of criminal activity impossible is discovered. Such a Guideline permits the investigation to continue ad infinitum. Past experience with the proving-the-negative approach reveals that it permits sweeping intelligence operations that may impact first amendment freedoms adversely.[121]

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115. 1983 Smith Guidelines, *supra* note 6, § I, at 3088.

116. *Id.*

117. FBI Director Webster, *quoted in* Alliance to End Repression v. City of Chicago, 561 F. Supp. 575, 578 n.5 (N.D. Ill. 1983).

118. 561 F. Supp. 575 (N.D. Ill. 1983).

119. *Id.* at 578 n.6.

120. *Id.* at 578. 1983 Smith Guidelines, *supra* note 6, § I, at 3088.

121. The Church Committee Report revealed that both President Johnson and President Nixon pressed the Central Intelligence Agency to determine the "extent of hostile foreign influence on domestic unrest" among students, Vietnam war opponents, and minorities. The CIA's operation "CHAOS" office prepared half a dozen reports which concluded that foreign elements did not play

Investigation of a group that advocates illegal activity may be necessary when there is evidence of criminal conduct by that group. However, investigation of those who merely advocate such conduct permits the FBI to monitor dissidents.[122] This is especially true because the Smith Guidelines may be interpreted to authorize investigations based not only on a group's advocacy of violent crime, but also on its advocacy of non-violent illegal activity such as civil disobedience.[123]

The 1983 Smith Guidelines authorize a full scale investigation of individuals or groups advocating illegal conduct, rather than a preliminary inquiry of limited scope.[124] Such an investigation may be carried out using all the surveillance techniques that a sophisticated governmental intelligence agency can muster.[125]

In *Brandenburg v. Ohio*[126] the Supreme Court set forth a standard protective of speech: the first amendment does not permit a state to "forbid or prescribe advocacy except where such activity is directed to inciting or producing imminent action and is likely to produce such action." The *Brandenburg* test thus has two distinct parts.[127] Under the incitement test,[128] the court objectively scrutinizes the specific words uttered to determine whether they counsel illegal action. If such advocacy was not present, the words are immune from governmental action. The second part of the test focuses on the imminence of the danger. The court analyzes the words by examining them within the circumstances and context in which they were spoken to determine whether they created a clear and present danger of

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any significant part in the various protest movements. "This repeatedly negative finding met with continued skepticism from the coverage of Americans in order to increase White House confidence in the accuracy of its findings." Church Committee Report, *supra* note 1, Vol. III, at 681. In the process, 300,000 Americans were indexed in the CHAOS computer system. *Id.* at 695.

122. In United States v. United States District Court, the Court stated: "History abundantly documents the tendency of government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." 407 U.S. 297, 314 (1972).

123. It is not absolutely clear whether the Smith Guidelines permit investigations based on advocacy of non-violent law breaking (civil disobedience). The language of the "General Principles" provision authorizing the investigation of advocacy discusses "statements which advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence," and does not limit investigations to the advocacy of violent crimes. 1983 Smith Guidelines, *supra* note 6, § I, at 3088. However, the provision granting general authority for investigations states that an investigation may be initiated when two or more persons seek to further political or social goals, wholly or in part through "activities that involve force or violence." 1983 Smith Guidelines, *supra* note 6, § III(B)(1), at 3091. The provision suggests that non-violent activities would not be investigated. The Seventh Circuit Court of Appeals in *Alliance to End Repression*, 742 F.2d at 1018, adopts the latter interpretation. The court states that the Guidelines do not authorize the FBI to base an investigation on the advocacy of non-violent crimes such as draft resistance and civil disobedience.

124. 1983 Smith Guidelines, *supra* note 6, § I, at 3088.

125. These techniques include mail covers (copying the names and addresses listed on the covers of letters addressed to the suspect), mail openings, informants, wiretapping, and search and seizures. 1983 Smith Guidelines, *supra* note 6, § II(B)(5)(a)-(c), § IV(B)(1), (B)(4), and (B)(7).

126. 395 U.S. 444 (1969).

127. *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

128. The incitement test was set forth by Judge Learned Hand in Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.) *rev'd* 246 F. 24 (2nd Cir. 1917). Judge Hand's test distinguished between words that are "keys to persuasion" and words that are "triggers of action." 244 F. at 540.

harmful activity that the state has a right to prevent.[129]

The Smith Guidelines look only to the first part of the *Brandenburg* test, focusing on the fact that advocating illegal conduct might incite such behavior. The guidelines fail to consider the second part of the *Brandenburg* test which requires that such illegal conduct be imminent.[130] The Smith Guidelines therefore fail to comply with the test for legitimate restrictions of free speech as laid out by the Supreme Court in *Brandenburg*.

However, before it can be determined that investigation of advocacy of illegal conduct alone interferes with expression protected by the Supreme Court's interpretation of the first amendment in *Brandenburg*, the two part test must first be found applicable to the situation. In *Brandenburg*, the state of Ohio had imposed a criminal penalty for making certain statements in violation of its Criminal Syndicalism statute.[131] The critical and undecided issue is whether the Supreme Court's decision in *Brandenburg*, which involved a criminal *penalty*, is applicable to a criminal or intelligence *investigation*, an investigation which is preliminary to the possible imposition of a criminal penalty.

The FBI contends that speech advocating illegal conduct is not protected from investigation although it may be protected from prosecution.[132] However, in a series of cases involving loyalty oaths and possible Communist Party membership, the Supreme Court has not strictly limited the principles underlying *Brandenburg* to criminal punishment of speech. The cases reveal that *Brandenburg*'s incitement and imminence tests have been applied not only to statutes that directly forbid or proscribe advocacy, but also to regulatory schemes[133] resulting in the refusal to place a political party's candidates on the ballot,[134] the discharge of public employees,[135] prohibition of a law student from taking a bar examination,[136] and the denial of property

129. The test was first stated by the Supreme Court in Schenck v. United States, 249 U.S. 47, 52 (1919). In Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943), the Court stated that this rule "is now commonplace." The Supreme Court in 1969 incorporated this test with an incitement test in Brandenburg v. Ohio, 395 U.S. 444 (1969).

130. By leaving out the imminence test, the Smith Guidelines take an all-or-nothing approach to the advocacy of illegal conduct. The speech is determined to be either unprotected incitement to illegal action or constitutionally protected speech. However, Justice Holmes has stated that it is a "question of proximity and degree" whether the words that are used were used in such a circumstance and are of such nature as to actually create a clear and present danger. Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). Such an all-or-nothing approach may be unrealistic. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 176 (1964).

131. 395 U.S. at 444-45.

132. Alliance to End Repression v. City of Chicago, 561 F. Supp. at 579.

133. In Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 448-49 (1974), the Supreme Court stated:

> This principle that "the constitutional guarantee of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" has been applied not only to statutes that directly forbid or proscribe advocacy, but also to regulatory schemes that determine eligibility for public employment, tax exemptions and moral fitness justifying disbarment [citations omitted].

134. *See id.* (Indiana State Election Board's refusal to place both Communist Party's presidential and vice presidential candidates' names on the 1972 Indiana ballot because candidates had failed to file a statutory required loyalty oath was overruled by Brandenburg).

135. *See* Cramp v. Board of Pub. Instruc., 368 U.S. 278, 283 (1961) (Court struck down a Florida statute that required each state employee to execute a particular loyalty oath).

136. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 234 (1957) (Court reversed the New

tax exemptions.[137] *Brandenburg* principles have been applied to administrative regulations as well.[138] Each of these cases involved some official punitive governmental action against the party. None of them involved a domestic intelligence investigation. While there is a distinction between official governmental punitive action and a domestic intelligence investigation, the distinction may not be important enough to warrant a different outcome since a domestic intelligence investigation also involves officially sanctioned punitive governmental action.[139] The Seventh Circuit Court of Appeals in *Alliance to End Repression*[140] implicitly acknowledged this characterization by stating that an intelligence investigation can have a "repressive effect" on the exercise of first amendment rights, although less repressive than a prosecution.[141] While it would be a step to expand the reach of the *Brandenburg* requirements to cover domestic intelligence investigations, such a step logically follows from the nature of rights protected by *Brandenburg*.

The closest a court has come to deciding whether the *Brandenburg* test is applicable to domestic intelligence investigations is the federal district court's decision in *Alliance to End Repression v. City of Chicago*.[142] That case involved the interpretation of the following sentence from a court settlement decree between the FBI and various groups in Chicago: "The FBI shall not conduct an investigation solely on the basis of activities protected by the First Amendment." While the court did not decide whether the *Brandenburg* protections would be applicable in the absence of a settlement decree,[143] the district court interpreted the settlement to incorporate the *Brandenburg* protections of first amendment activities.[144] Applying this test, the court held that the 1983 Smith Guidelines violated the decree by permitting investigation of speech when there was no imminent likelihood of illegal conduct occurring.[145]

The Seventh Circuit Court of Appeals read the critical decree sentence differently. While conceding that the decree's language would bear the district court's interpretation,[146] the Seventh Circuit read the sentence as

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Mexico Board of Bar Examiners' refusal to permit a law student to take the bar examination on the basis of the student's former membership in the Communist Party).

137. *See* Speiser v. Randall, 357 U.S. 513, 515-18 (1958) (Court characterized a California statute that denied a property tax exemption to any person who failed to sign an oath stating that he or she did not advocate the overthrow of the government as a penalty for persons who engage in certain forms of speech).

138. *See* Keyishian v. Board of Regents, 385 U.S. 589, 592-93 (1967) (Court applied the *Brandenburg* principles to the Regent's administrative regulations that banned state employment to persons advocating or distributing material that advocated the forceful overthrow of the government).

139. The Church Committee Report states that aggressive investigation can be quite disruptive. For instance, an overt approach by an FBI agent to the employees, family members, and neighbors of a suspect cannot be very easily dismissed. "The line between information collection and harassment can be extremely thin." Church Committee Report, *supra* note 1, Vol. III, at 12-13.

140. 742 F.2d 1007 (7th Cir. 1984).

141. *Id.* at 1016. The court stated that "since the repressive effect of an investigation is less than that of a prosecution but the benefits in preventing violent crime may be as great, a less immediate danger will justify the government's action." *Id.*

142. 561 F. Supp. 575 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1007 (7th Cir. 1984).

143. *Id.* at 578-79.

144. *Id.* at 580.

145. *Id.*

146. Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1011 (7th Cir. 1984).

merely "prohibiting improperly *motivated* investigations."[147] The Seventh Circuit interpreted the sentence to mean "that the FBI may not base an investigation solely on the political views of a group or individual; rather, its investigation must have a basis in a genuine concern for law enforcement."[148] The Seventh Circuit thereby held that the Smith Guidelines' investigation-of-advocacy provision did not violate the settlement decree.[149] Since the settlement decree was interpreted not to include the *Brandenburg* protections, the court did not determine whether such protections are applicable to FBI investigations.

The 1983 Smith Guidelines permit the investigation of parties who advocate illegal conduct even if there is no imminent likelihood of illegal conduct occurring.[150] The Supreme Court's *Brandenburg* decision forbids the state from criminally punishing advocacy unless it involves inciting language and is likely to produce imminent illegal activity.[151] Other Supreme Court decisions have applied the *Brandenburg* protections to regulatory schemes involving various punitive, but non-criminal, governmental actions.[152] However, no court to date has expanded the *Brandenburg* protections to cover domestic intelligence investigations, a type of officially sanctioned punitive conduct. If a court were to take such a step, the 1983 Smith Guidelines' advocacy provision may be found to violate first amendment rights.

III. CONCLUSION

The government has a legitimate interest in protecting the public from politically motivated violent crimes. The FBI's activities in the late 1960s and early 1970s with regard to anti-Vietnam war and civil rights advocates illustrate that the FBI is not immune from the governmental tendency to view suspiciously those who fervently dispute the government's policies.

The 1983 Smith Guidelines permit the FBI to overstep constitutional limitations. The various types of surveillance activities triggered by mere advocacy or association sanctioned by the 1983 Smith Guidelines blur the critical first amendment distinction between lawful dissent and criminal conduct. Such surveillance inhibits robust and open debate on public issues and restricts the freedom of association that is necessary to effectively advocate controversial points of view.

Current first amendment case law indicates that an organization may have a remedy in the courts for the chilling effects of overt FBI information gathering at peaceful public demonstrations under the 1983 Smith Guidelines. Under the Guidelines, it is probable that FBI informants will attend private meetings of lawful dissident organizations. By analogy to the compulsory disclosure of membership cases, members who attend such meetings may successfully claim that the FBI has violated their rights of association.

There are additional constitutional limitations on the FBI's use of infor-

147. *Id.* at 1019-20 (emphasis in original).
148. *Id.* at 1015.
149. *Id.* at 1020.
150. 1983 Smith Guidelines, *supra* note 6, § I, at 3088.
151. *Brandenburg*, 495 U.S. 444 (1969).
152. *See supra* notes 133-38 and accompanying text.

mants. Courts will not allow informants to act "outrageously" even if the informants were granted permission to interfere with first amendment rights from FBI headquarters and the Justice Department as sanctioned by the 1983 Smith Guidelines. The courts should take the logical step of applying the *Brandenburg* test, which protects speech except where such speech is directed toward inciting imminent action and is likely to produce such actions, to officially sanctioned punitive intelligence investigations. By so applying the *Brandenburg* protections, the courts are likely to hold that the 1983 Smith Guideline provision which authorizes the investigation of persons who advocate illegal conduct, even if there is no imminent likelihood of illegal conduct, is unconstitutional. In these ways courts can ensure that constitutional liberties are not sacrificed to protect Americans from politically motivated crimes.

Congress should place enforceable restrictions on the FBI to ensure that the FBI does not investigate individuals or organizations solely as a result of their first amendment protected ideas or associations, rather than for any harmful illegal conduct. Executive orders are not adequate.

The 1983 Smith Guidelines superseded the more restrictive 1976 Levi Guidelines. This change suggests that there is no assurance that such executive orders will remain in force at times of growing dissent, the time when protection will be most needed.[153] Until Congress enacts such enforceable restrictions, the judicial branch must play a critical part in protecting the first amendment rights of Americans from FBI intelligence abuses.

153. Emerson, *Controlling the Spies*, CENTER MAG., Jan.-Feb. 1979, at 63.