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Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent

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PREFACE

As we enter the third millennium of this particular era of human history, the picture is not pretty. Untold numbers of children die of malnutrition and preventable diseases every day;[1] millions of all ages are killed in ongoing wars, most of them waged by states against the peoples whose lands they are occupying.[2] It is estimated that within this generation alone, 250 lan-

[1] According to a recent U.N. report, "We the Children: Meeting the Promises of the World Summit for Children," one of every twelve children will die before age five, almost all from preventable causes. *See* United Nations, Press Release, *UN Finds One in Twelve Children Dies Before Age Five*, ICEF/1853, PI/1409, Apr. 18, 2002, *available at* www.un.org/News/Press/docs/2002/ICEF1853.doc.htm. Of the approximately 6 billion people in the world, 1.1 billion lack access to safe drinking water (12 million die from lack of water), 2.4 billion lack basic sanitation, and 1.2 billion live on less than U.S. $1 per day. BREAD FOR THE WORLD, HUNGER BASICS: INTERNATIONAL FACTS ON HUNGER AND POVERTY, *at* www.bread.org/hungerbasics/international.html (last visited Feb. 11, 2003).

[2] *See* Bernard Neitschmann, *The Fourth World: Nations Versus States, in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CEN-

guages and their attendant cultures, knowledge, and world views will disappear,[3] along with hundreds of plant and animal species.[4] Vast swaths of land have been rendered uninhabitable by the relentless quest for "progress."[5] Every day the newspapers report impending environmental disasters, the spread of AIDS, slavery and child labor, racial and religious repression, and the disappearance, torture, and murder of political dissidents around the world.

As the world's unrivaled military, economic, and political superpower, the United States plays a significant role, direct and indirect, in the perpetuation of much of this human misery. Even so, within the United States, which has only 5% of the world's population but consumes 25 or 30% of its resources,[6] the top 1% of the population controls nearly 40% of the country's wealth,[7]

TURY 225-42 (George J. Demko & William B. Wood eds., 1994) (noting that less than 200 international states occupy, suppress, and exploit more than 5000 nations and peoples, and that since World War II, state-nation conflicts have produced the most numerous and longest wars, as well as the greatest number of civilian casualties and refugees).

3 DANIEL NETTLE & SUZANNE ROMAINE, VANISHING VOICES: THE EXTINCTION OF THE WORLD'S LANGUAGES 40 (2000).

4 *See* Joby Warrick, *Mass Extinction Underway, Majority of Biologists Say*, WASH. POST, Apr. 21, 1998, at A4 (noting that at least one in eight plant species is threatened with extinction, and that nearly all biologists polled attributed the losses to human activity); *see also* THE TURNING POINT PROJECT, EXTINCTION CRISIS, *available at* www.turnpoint.org/extinction.pdf (last visited Feb. 11, 2003) (noting that species are dying at 10,000 times their natural extinction rate).

5 *See* WARD CHURCHILL, *Geographies of Sacrifice: The Radioactive Colonization of Native North America*, *in* STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 239-91 (2002) (describing federal plans to turn Indian lands contaminated by uranium mining into "National Sacrifice Areas"); *see also* ALTERNATIVE ENERGY INSTITUTE, INC., *Effects of the Current and Future Population On . . .*, *in* POPULATION, *at* www.altenergy.org/2/population/effects/effects.html (last visited Mar. 28, 2003) (noting that "[d]esertification is claiming 29% of the earth's total landmass").

6 Arlie Russell Hochschild, *A Generation Without Public Passion*, THE ATLANTIC MONTHLY, Feb. 2001 (citing a 30% consumption rate and noting also that the United States produces 25% of the world's pollution), *available at* www.theatlantic.com/issues/2001/02/hochschild.htm. *See also* U.S. CENSUS BUREAU, 2000 STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 1390, "Energy Consumption and Production by Country, 1990 and 1998" (showing that in 1998 the United States accounted for approximately 25% of the world's total energy consumption, with a per capita consumption rate nearly six times the world average), *available at* www.census.gov/prod/2001pubs/statab/sec30.pdf; NATURAL RESOURCES DEFENSE COUNCIL, A RESPONSIBLE ENERGY POLICY FOR THE 21ST CENTURY, *available at* www.nrdc.org/air/energy/rep/execsum.asp (last visited Feb. 11, 2003).

7 EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA 7 (1995) (also noting that disparities in both income and wealth have increased since the late 1970s); *see also* William Lucy, *Time to Fight—*

and those at the bottom face malnutrition, infant mortality, and unemployment rates equal to those of many "third world" countries.[8] Despite the best efforts of Hollywood, the "news" media, and most elected officials to convince us otherwise, the reality is that we have the poorest public education and health care in the industrialized world,[9] and the second highest per capita incarceration rate anywhere.[10] Eighty percent of those charged with serious crimes are unable to afford a lawyer,[11] and African American parents know their sons have a one-in-three chance of ending up in prison.[12] Reservation-based American Indian parents know their children face the country's highest infant mortality and teenage suicide rates, 60 to 90% unemployment rates, and, statistically, can expect to live only into their mid- to late-

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Again, AFSCME PUBLICATIONS, Jan./Feb. 1997 (noting that the top 10% controls nearly 70% of the wealth), *at* www.afscme.org/publications/public_employee/1997/pejf9702.htm.

8 *See infra* text accompanying notes 9 and 13.

9 On health care, see *System Overload: Pondering the Ethics of America's Health Care System*, 3 ISSUES IN ETHICS (Summer 1990) (noting that the United States is "[u]nique among the industrialized democracies" in retaining a free market health system), *at* www.scu.edu/Ethics/publications/iie/v3n3/system.html; *see also* Kempe Ronald Hope, Sr., *Child Survival and Health Care Among Low-Income African American Families in the United States*, 2 HEALTH TRANSITION REV. 151-62 (1992) (noting that a baby born in Cuba has a greater chance of survival than an African American baby born in Washington, D.C.); Thomas L. Milne, Testimony to the Institute of Health Committee on Assuring the Health of the Public in the 21st Century (Feb. 8, 2001), www.naccho.org/advocacydoc287.cfm [hereinafter Milne, Testimony]. On literacy, see *Statistics on Adult Literacy*, ORANGE COUNTY REGISTER, Sept. 22, 2002, *available at* 2002 WL 5460682 (noting that according to the U.N., the United States is forty-ninth in world literacy, and forty-four million adults are functionally illiterate); *see also Report: State Spending on Prisons Grows at 6 Times Rate of Higher Ed,* U.S. NEWSWIRE, Aug. 22, 2002, *available at* 2002 WL 22070708.

10 This means that the United States, with 5% of the world's population, accounts for 25% of its prisoners. *See Anger Grows at U.S. Jail Population*, BBC NEWS, Feb. 15, 2000, *available at* news.bbc.co.uk/1/hi/world/americans/643363.stm.

11 CAROLINE WOLF HARLOW, U.S. DEPT. OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES, Nov. 2000, NCJ 179023, *available at* www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf; *see also* SOUTHERN CENTER FOR HUMAN RIGHTS, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES, Nov. 2000 (report on file with author).

12 *See* Michael A. Fletcher, *'Crisis' of Black Males Gets High-Profile Look: Rights Panel Probes Crime, Joblessness, Other Ills*, WASH. POST, Apr. 17, 1999, at A2 (noting that in some states one in two black men are "under the supervision of the criminal justice system"); *see generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995).

forties.[13] Every night, hundreds of homeless people sleep on the streets of every major American city.[14]

All of this seems to be quite acceptable to those who have the most influence. Information about all of these situations is widely available and, in most cases, we know what could be done to solve or ameliorate these problems.[15] What stands in the way of their resolution is not lack of awareness or resources, but the priorities of those in power and those who keep them there.[16]

For many who benefit—or believe they benefit—from the status quo, living in denial is apparently a viable option. A mind-boggling number of Americans seem to accept that if "those people" would just act more like "us," they, too, would soon be enjoying the "good life." Others find that we must struggle against such policies and practices; sometimes because our very lives or the lives of our children depend on it, sometimes simply to retain

[13] *See* RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 47 (1997); Ward Churchill, *Unraveling the Codes of Oppression, in* FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS xiv-xix (2d ed., City Lights Books 1998) (1992).

[14] *See* Paul Shepard, *'State of Cities' Study Released*, ASSOCIATED PRESS, June 19, 1998 (quoting Andrew Cuomo, U.S. Secretary of Housing and Urban Development, saying that "an estimated 600,000 Americans still sleep on our streets every night").

[15] Advocacy groups and experts in each of these areas are consistently producing reports detailing workable solutions. Thus, for example, ninety percent of the diseases in developing countries result from a lack of clean water. Roger Segelken, *Mass Starvation, Disease Will Be the Inevitable Results of Population Growth*, CORNELL NEWS, Feb. 9, 1996, *available at* www.news.cornell.edu/releases/Feb96/aaaspimentel.hrs.html. Deaths caused by malnutrition result not from an inadequate global supply of food but from its unequal distribution. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, MAPPING OF THE FOOD SUPPLY GAP 1998, *available at* http://www.fao.org (last visited Apr. 18, 2003).

It has been well established that money is most effectively spent on preventive health care, but less than two percent of the American health care dollar is so directed. *See* Milne, Testimony, *supra* note 9 (noting that half the annual deaths in the United States are preventable). Similarly, studies show that money spent on education cuts the fiscal as well as social costs of incarceration, but education budgets continue to be cut and prison funding expanded. *See Use Our Resources Wisely*, COLUMBUS LEDGER-ENQUIRER, Oct. 5, 2002 (noting that between 1980 and 1995, the U.S. education budget dropped from $27 billion to $16 billion while the prison budget grew from $8 billion to $20 billion), *available at* 2002 WL 1835826.

[16] See, for example, the statement of then U.N. Ambassador, soon to be Secretary of State Madeline Albright, who responded to U.N. reports that U.S.-imposed sanctions on Iraq had by 1996 already caused the deaths of 500,000 Iraqi children by stating, "this is a very hard choice, but . . . we think the price is worth it." *60 Minutes: Punishing Saddam* (CBS television broadcast May 12, 1996). *See also* Arundhati Roy, *The Algebra of Infinite Justice*, THE GUARDIAN, Sept. 29, 2001, *available at* 2001 WL 28346627 (quoting Albright).

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our humanity. Such struggles take many forms, but all require the freedom to articulate the problems and potential solutions and the ability to organize socially and politically. Fortunately, such freedoms have not only been acknowledged historically, but are clearly articulated in the U.S. Constitution[17] and are spelled out in more detail in universally recognized international law.[18]

When the government that purports to represent us engages in genocide, war crimes, or other actions calculated to perpetuate the systematic oppression of large groups of people,[19] we not only have the right to challenge such actions, but the legal responsibility to do so. This was the primary message of the Nuremberg and Tokyo Tribunals—when a government engages in basic violations of the most fundamental human rights, it is the citizens' obligation under international law to stop those violations. The fact that the government's domestic law may deem such policies or practices legal—or resistance to them illegal—does not change this fundamental principle.[20]

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[17] *See* U.S. CONST. amends. I, IV, V, VI, VIII, XIII, XIV, XV.

[18] The U.N. Charter, the Universal Declaration of Human Rights, U.N.G.A. Res. 217 A(III), at 71, U.N. Doc. A/810 (1948), and numerous international conventions articulate the basic human right to life, food, shelter, education, medical care, cultural integrity, freedom from discrimination, and, most importantly, self-determination. State protection of the right to struggle to achieve these ends is made mandatory by the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (ratified by the United States in 1992) and other treaties which spell out the right to hold and express opinions and to participate in public affairs, to freedom of association and assembly, to freedom from arbitrary arrest or detention, and to due process of law.

This law is found not only in such treaties, but also in customary international law which is recognized as binding on the United States. *See*, *e.g.*, Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (enforcing the prohibition of torture found in customary law); Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988) (recognizing the causing of disappearance as a violation of customary international law); *see generally* LOUIS HENKIN, THE AGE OF RIGHTS (1990).

[19] For examples of such policies, see generally WILLIAM BLUM, ROGUE STATE: A GUIDE TO THE WORLD'S ONLY SUPERPOWER (2002); NOAM CHOMSKY & EDWARD S. HERMAN, THE POLITICAL ECONOMY OF HUMAN RIGHTS, VOL. I: THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM (1979); WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS: 1492 TO THE PRESENT (1998) [hereinafter CHURCHILL, A LITTLE MATTER OF GENOCIDE]; DOUGLAS V. PORPORA, HOW HOLOCAUSTS HAPPEN: THE UNITED STATES IN CENTRAL AMERICA (1990).

[20] > It is the fundamental duty of the citizen to resist and to restrain the violence of the State. Those who choose to disregard this responsibility can justly be accused of complicity in war crimes, which is itself designated as "a crime under international law" in the Principles of the Charter of Nuremberg.

Noam Chomsky, *Preface* to AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF

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It is in this context that we must assess recent "antiterrorism" legislation such as the so-called "USA PATRIOT" Act.[21] We are told that such laws impose some restrictions on our liberties but are necessary for our security.[22] In this Essay, I hope to demonstrate that such legislation needs to be understood in the context of the United States' long history of using both the law and law enforcement agencies to repress individuals and organizations who struggle for social justice. Such repression has affected all who dissent politically in order to change the status quo and force the government to respect fundamental human rights.[23]

The current policies of the U.S. government threaten to silence all who dissent, regardless of the issues or the tactics chosen. The harm embodied in the current legislation and the broad powers it gives the executive branch is not merely the silencing of political opinion. As such, the question is not whether we will be allowed to put our opinions out into some abstract "marketplace of ideas," but whether we will allow the government of the United States, in the name of "our security," to crush struggles for the most basic of human rights. If we allow ourselves to be distracted into a debate about which liberties we are willing to sacrifice for the sake of more security, we will sacrifice both the liberty and the security of those who take political positions, or represent social movements, not approved of by those in power.

I

Security or Silencing?

> In the twenty-first century, only nations that share a commitment to protecting basic human rights and guaranteeing political and economic freedom will be able to unleash the potential of their people and assure their future prosperity. People everywhere want to be able to speak freely; choose who will gov-

THE INTERNATIONAL WAR CRIMES TRIBUNAL, at xxiv (John Duffett ed., 1968). *See generally* STEPHEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997); MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL, 1945-46: A DOCUMENTARY HISTORY (1997).

21 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (signed into law Oct. 26, 2001).

22 *See generally* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002); Roy, *supra* note 16.

23 *See infra* Parts II-IV.

> ern them . . . and enjoy the benefits of their labor. These values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages.
>
> —George W. Bush, September 17, 2002[24]

In March 2002, the American Civil Liberties Union (ACLU) Foundation of Colorado held a press conference in which it revealed that the Denver Police Department was monitoring the peaceful protest activities of Denver-area residents and keeping files on the First Amendment-protected expressive, lawful activities of advocacy organizations.[25] In support of its allegations, the ACLU released excerpts from computerized police files which catalogued the physical characteristics, names, addresses, phone numbers, vehicles, and activities of persons involved in peaceful organizational activities and demonstrations, as well as information about their spouses and associates.[26]

Groups such as End the Politics of Cruelty and the American Friends Service Committee—a Nobel Peace Prize-winning Quaker organization—were labeled "Criminal Extremist" without any reference to criminal activity. Individuals were named for having attended meetings or simply being a phone contact for others in the file. Antonia Anthony was identified not as the Franciscan nun that she is, but as an "active protestor" with the Chiapas Coalition which, in turn, was falsely described as a "[g]roup dedicated to [the] overthrow of [the] Mexican government."[27] Subsequently, the Denver police admitted to having over 3400 such "spy files," most of them compiled since 1999 but containing information dating back to 1972.[28] Subsequent disclo-

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[24] George W. Bush, National Security Strategy of the United States (Sept. 17, 2002), www.whitehouse.gov/nsc/nssall.html.

[25] *See* Press Release, American Civil Liberties Union Foundation of Colorado, ACLU Calls for Denver Police to Stop Keeping Files on Peaceful Protesters (Mar. 11, 2002), *at* http://www.aclu-co.org/news/pressrelease/release-spyfiles.htm; Sarah Huntley, *Cops Have 'Spy File,' Groups Say*, ROCKY MOUNTAIN NEWS, Mar. 12, 2002, at 5A; *see also* NANCY CHANG, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES 120-21 (2002).

[26] See attachments to Press Release, American Civil Liberties Union Foundation of Colorado, *supra* note 25, *at* http://www.aclu-co.org/spyfiles/samplefiles.htm.

[27] *Id.* In fact, the Chiapas Coalition's purpose is to support the legitimate struggles of indigenous peoples in Mexico.

[28] John C. Ensslin, *'Spy Files' Too Broad, Webb Says*, ROCKY MOUNTAIN NEWS, Mar. 14, 2002, at 4A. *See also* Complaint filed in Am. Friends Serv. Comm. v. City

sures reveal that such information, and misinformation, has been disseminated to numerous other law enforcement agencies.[29]

In the meantime, on October 23, 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act[30] was introduced in Congress. Within three days, the Act, which contains 158 separate sections dramatically expanding the government's law enforcement and intelligence gathering powers, was passed by both the House and the Senate and signed into law by President George W. Bush.[31]

Among other things, the USA PATRIOT Act (hereinafter the "2001 Act") greatly expands the surveillance authority of federal agencies; further limits the rights of immigrants; blurs the line between criminal and intelligence investigations; and creates a new and very broadly defined crime of "domestic terrorism."[32]

Passed in the wake of the September 11 attacks on the World Trade Center and the Pentagon, Attorney General John Ashcroft and other officials assure us that the 2001 Act embodies a necessary trade off of some individual liberties for the collective security of the nation.[33] In this construction, the "liberties" being curtailed are generally thought of as the rights of speech, association, and the press articulated in the First Amendment,[34] and the freedom from unreasonable search and seizure and the right to privacy protected by the Fourth Amendment.[35] "Security" in this context implies the protection of persons and property from physical assault, but it is also extended to a broader notion of protecting the institutions which embody American "democracy." In essence, the administration is making a broader version of the argument Abraham Lincoln made when suspending the constitutionally guaranteed writ of habeas corpus: "Are all the

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& County of Denver (Mar. 28, 2002), *available at* www.aclu-co.org/spyfiles/Documents/ClassActionComplaint.pdf.

29 *See*, *e.g.*, files released on the American Indian Movement indicating that (mis)information had been disseminated to at least a dozen other agencies (copy on file with author).

30 *See supra* note 21.

31 This history of the bill can be found at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@L&summ2& (last visited Feb. 10, 2003).

32 *See infra* Part VI.

33 *See* sources cited *supra* note 22.

34 *See* U.S. Const. amend. I.

35 *See* U.S. Const. amend. IV. The inclusion of privacy rights was articulated in *Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects persons and their privacy interests, not simply places and things).

laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"[36]

While the 2001 Act has been vociferously criticized by many civil liberties advocates, the basic framing of the question as one of balancing liberty against security interests has not been effectively challenged. Instead, the debate has focused on where the line should be drawn, legally and politically, with most critics of the 2001 Act arguing that liberties are being unconstitutionally curtailed but not challenging the underlying premise that the goal is increased security. This is a very dangerous and misleading construction. Historically, the liberties at issue have been systematically sacrificed not to ensure the security of the general public, but to suppress political movements and sectors of the population which are viewed as threats to the status quo. What has been sacrificed is not just people's ability to speak openly or be free from surveillance but, in many cases, their very lives and freedom.

It has been well-documented by the Senate Select Committee on Intelligence, as well as by hundreds of thousands of documents released under the Freedom of Information Act (FOIA),[37] that the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the National Security Administration (NSA), and dozens of other federal, state, and local agencies have engaged in illegal and unconstitutional actions against U.S. citizen and noncitizen residents in an effort to silence political dissent. The FBI's COINTELPRO operations (1956-1971) are perhaps the best known, but these represent just one dimension of the ongoing political repression which has involved not just illegal surveillance and infiltration, but tactics designed to "disrupt and destroy" organizations, ranging from the manufacture of conflict among individuals and groups to the deliberate framing of people for crimes they did not commit, and—when all else failed—the outright murder of activists.[38] As the Denver "spy

[36] Abraham Lincoln, Message to Congress, July 4, 1861, *quoted in* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998). This action was subsequently held to be unconstitutional in *Ex parte Milligan*, 71 U.S. 2 (1866).

[37] *See* Freedom of Information Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a (1994)). For recent developments concerning the Freedom of Information Act (FOIA), see Wendy Goldberg, *Recent Decisions*, *Freedom of Information Act*, 68 GEO. WASH. L. REV. 748 (2000).

[38] *See infra* Part IV.B.

files" indicate, groups that engage in lawful political dissent are still being actively and illegally targeted by those entrusted with upholding the law and the Constitution.

When we look at the 2001 Act in the context of the federal government's actual use of its law enforcement and intelligence gathering powers, we see that these expanded powers have long been sought—and frequently used, even when illegal—by the executive branch. People engaged in political dissent that is supposed to be protected by the First Amendment, and communities of color generally, have not been made more "secure" in any sense of the term, but have been subjected to physical attacks on their persons and property by the very agencies that are now being given expanded powers under the 2001 Act. As Robert Justin Goldstein says in his seminal work, *Political Repression in Modern America From 1870 to 1976*:

> The holders of *certain* ideas in the United States have been systematically and gravely discriminated against and subjected to extraordinary treatment by governmental authorities, such as physical assaults, denials of freedom of speech and assembly, political deportations and firings, dubious and discriminatory arrests, intense police surveillance, and illegal burglaries, wiretaps and interception of mail.[39]

Goldstein goes on to point out that governments can carry out politically repressive activities following "legal" procedures or by utilizing means that are illegal under the country's laws.[40] It goes without saying that it is easier and more convenient for governments to use means that are at least facially lawful. The 2001 Act is most accurately seen as the latest step in the U.S. government's ongoing effort to legitimize unconstitutional practices by using the current "war on terror," perceived and promoted as a national security crisis, to obtain their legislative sanction. Legislation does not, of course, make such practices "lawful" in the deeper sense of the term. Actions which contravene the Constitution and fundamental principles of international human rights law—even if sanctioned by the executive, the legislature, or the judiciary—violate the rule of law and undermine the legitimacy of the governing power.[41]

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[39] Robert Justin Goldstein, Political Repression in Modern America From 1870 to 1976, at xxi (rev. ed. University of Illinois Press 2001) (introduction to 1978 edition).

[40] *Id.* at xxx.

[41] To note only the most glaring example in modern history, we have no trouble

The actual history of federal "law enforcement" and "intelligence" agencies reveals a deeply disturbing pattern of the use of the armed might and financial resources of the state to destroy individuals and organizations deemed politically undesirable. We must assess the 2001 Act in light of this history—the concrete use of just such powers by the very agencies now being given broader prerogative—and in light of the fundamental principles of constitutional and international law that give the government the right to act at all. The question is not whether we are willing to have our shoes x-rayed at the airport to prevent planes from being hijacked.[42] It is whether we are willing to give carte blanche to agencies which, according to their own records, have used every means at their disposal to silence us.

The United States' use of the "law" to suppress political dissent is a complex one that dates back to the beginning of the republic. In this Essay, I present only a brief sketch of a few aspects of that history that highlight the need to examine the 2001 Act in a much more critical framework than the choice of "liberty vs. security." This is a history that involves the military as well as federal, state, and local law enforcement and intelligence agencies, but for the sake of simplicity I focus primarily on the FBI. Part II presents a brief overview of the early history of the suppression of political dissent and movements for social change in this country. Part III outlines the emergence of the FBI's role in this process, and Part IV looks in more detail at its COINTELPRO (COunter INTELligence PROgram) operations. Part V briefly outlines the "antiterrorist" legislation of the recent decades as the more immediate context for the specific provisions of the 2001 USA PATRIOT Act which is discussed in Part VI. Part VII concludes that if this is, in fact, to be a democracy, it

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recognizing that the myriad of laws enacted by the German government in the 1930s and 1940s did not mean that its repressive measures comported with the rule of law. *See generally* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997); Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COM. L.J. 199 (1997) (discussing the role of lawyers in the repressive legal regime of Nazi Germany); Eli Nathans, *Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, 18 LAW & HIST. REV. 281 (2000) (using Schlegelberger, state secretary of the Reich Ministry of Justice, as a case study of why legal administrators participated in the Nazi regime).

42 Such "security" measures need to be challenged on the ground that they do not enhance security and because they contribute to the mindless acceptance of the regulation of everyday life by the state. Nonetheless, they are not the primary problem with the enhanced powers being given to law enforcement agencies.

is our responsibility to ensure that the law is used to protect, not repress, those who exercise their rights to political dissent embodied in the Constitution and in international human rights law.

II

Suppressing Movements for Social Change: A Brief Overview

> It is extremely dangerous to exercise the constitutional right of free speech in a country fighting to make the world safe for democracy.
>
> —Eugene Debs[43]

A. National Security and the Rule of Law

A government's right to protect the national security, i.e., to protect the state from both internal and external threats to its existence, is generally accepted as a given. However, the right to take otherwise repressive measures exists only to the extent that the threat is real, the state is exercising a legitimate sovereignty, and the government acts in accordance with the rule of law.

In the international community, "states" only exist as sovereign entities by virtue of mutual recognition. Recognition as a sovereign state under international law requires legitimate control over the territory occupied by the state and the peoples who reside in that territory.[44] As the white minority regime in Rhodesia discovered in 1965, simply controlling a geographic area and its population and proclaiming itself a state is not sufficient.[45] One of the fundamental principles of international law is that a state's sovereignty does not extend to the unlawfully occu-

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43 Ramsey Clark, *Preface* to *Notes on War and Freedom*, *in* Michael Linfield, Freedom Under Fire: U.S. Civil Liberties in Times of War, at xvii (1990) (quoting Eugene Debs on his way to prison for opposing the United States' participation in World War I).

44 U.S. Secretary of State James Baker, in a 1991 address to the Conference on Security and Cooperation in Europe, stated that criteria to be considered in the recognition of new states included support for democracy and the rule of law, the safeguarding of human rights, and respect for international law and obligations. Testimony of Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs (Oct. 17, 1991) 2 Foreign Pol'y Bull. 39, 42 (Nov./Dec. 1991), *quoted in* Louis Henkin et al., International Law: Cases and Materials 250 (3d ed. 1993).

45 *See* United Nations Security Council Resolution Concerning Southern Rhodesia, Nov. 20, 1965, S.C. Res. 217, SCOR, Resolutions and Decisions at 8, which "[c]ondemns the usurpation of power by a racist settler minority in southern Rhode-

pied territory of another state or nation, and the latter state or nation has the right to struggle for self-determination.[46] States, of course, often continue to exist despite changes of government. To be legitimate, the government must comply with the rule of law as embodied in both international law and the state's domestic legal structures.

The rule of law has both substantive and procedural dimensions. At a minimum, it substantively requires a state's legal system to incorporate the most fundamental principles of international law; it procedurally requires that the law can be known by the people and is applied predictably and equitably. Thus, for the United States to legitimately act in the name of "national security," the country must be lawfully sovereign over the territory, resources, and peoples that it claims; the U.S. government must be complying with the rule of law, both the international law that creates the sovereign state and the U.S. Constitution that provides for the existence and legitimacy of its government; and it must be responding to a real threat.

B. Early Suppression of Struggles for Justice

As we begin to analyze the American government's use of its law enforcement powers, we must keep in mind the distinction between threats to a lawful state or government, i.e., legitimate threats to the national security, and threats to the status quo. Although the United States has proclaimed itself to be a "freedom-loving" democracy since the beginning of the republic, we have consistently seen "national security" invoked to suppress legitimate movements for social and political change. If the United States is asserting control of land, resources, or peoples over which it does not have legitimate jurisdiction, as in the case of many American Indian nations and external colonies such as Puerto Rico, those who seek to challenge this control may not appropriately be deemed threats to the national security. Likewise,

sia and regards the declaration of independence by it as having no legal validity. . . ." *reproduced in* HENKIN ET AL., *supra* note 44, at 257-58.

[46] *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 105 (1979) ("Where a particular territory is a self-determination unit as defined, no government will be recognized which comes into existence and seeks to control the territory as a State in violation of self-determination."); *see also* RESTATEMENT (THIRD) of the FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 Comment *b* (noting that a state does not cease to be a state because it is occupied by a foreign power).

if the United States government is denying basic human rights to people within its jurisdiction, it cannot legitimately claim to be protecting the national interest when it represses protest against such policies. Furthermore, if people are exercising their lawful right to effect democratic change, their actions are not appropriately characterized as threats to the national security.

Nonetheless, since the founding of the republic, we have seen state power used to repress movements for social, racial, and economic justice, as well as movements for self-determination. The Constitution protected the institution of slavery in numerous ways, including a ban on the prohibition of the slave trade before 1808,[47] the requirement that non-slaveholding states return fugitive slaves,[48] and the increased proportional representation given to slaveholders by the "three-fifths" clause.[49] In addition, one of the reasons Congress was given the power of "calling forth the Militia" to "suppress Insurrections" was to enlist the power of the federal government in crushing slave rebellions.[50]

Few Americans would now contest the right of the people, both those who were enslaved and those who were not, to speak out against slavery and to organize to change the government's policy of support for the institution. Nevertheless, many jurisdictions considered it seditious to advocate the abolition of slavery and in certain periods the Postmaster General refused to allow abolitionist literature to be sent through the mail.[51] Despite the First Amendment's explicit protection of the right of the people "to petition the Government for a redress of grievances,"[52] the House of Representative enacted a "gag rule" under which it al-

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[47] U.S. CONST. art. I, § 9, cl. 1. This is one of the few provisions of the Constitution that cannot be amended. *See* U.S. CONST. art. V.

[48] U.S. CONST. art. IV, § 2, cl. 3.

[49] U.S. CONST. art. I, § 2, cl. 3. Contrary to popular understanding, this did not mean that enslaved Africans were considered "three-fifths" of a person. As articulated by the Supreme Court in *Scott v. Sandford*, 60 U.S. 393 (1856), they were not considered persons at all. This clause simply meant that citizens of the slaveholding states had more congressional representation than those of non-slaveholding states.

[50] *See* Paul Finkelman, *A Covenant with Death: Slavery and the U.S. Constitution*, AMERICAN VISIONS, May-June 1986, at 21; *see generally* Staughton Lynd, *Slavery and the Founding Fathers*, *in* BLACK HISTORY: A REAPPRAISAL 115-31 (Melvin Drimmer ed., 1968).

[51] *See* Michael Kent Curtis, *The Crisis Over The Impending Crisis: Free Speech, Slavery, and the Fourteenth Amendment*, *in* SLAVERY AND THE LAW 161-205 (Paul Finkelman ed., 1997) (noting laws passed to suppress anti-slavery press and speech).

[52] U.S. CONST. amend. I.

lowed no discussion of the slavery question.[53]

With rationalizations remarkably similar to those being used by Israel today in "defending" Jewish settlements in Palestinian territories,[54] the United States consistently invoked the security of the nation, and of Euroamerican settlers in particular, to engage in "Indian wars," a term which disguised the fact that the military was being used to crush the efforts of American Indian nations to enforce existing treaties and protect *their* national security.[55] The U.S. government's own Indian Claims Commission, established in 1946 to "quiet title" to lands expropriated from Indian nations, reluctantly concluded in the 1970s that the United States still does not have good title to at least one-third of what it claims as its territory.[56] This acknowledgment should serve to make us much more critical of the government's attempts to justify the "Indian wars" and its use of force to suppress contemporary struggles for the recognition of American Indian sovereignty. It should also make us question attempts to automatically correlate the loss of American life with a threat to the "national security." If lives are lost as a result of illegitimate governmental activity, it is the government's actions rather than the loss of life, tragic though it may be, which should be seen as threatening the nation's security.

A consistently emerging theme in the suppression of political dissent is that those who disagree with government policy are labeled "un-American" and, whenever possible, portrayed as agents of foreign powers. The Federalists who enacted the 1798 Alien and Sedition Acts[57] claimed the acts were necessary be-

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[53] *See* Curtis, *supra* note 51, at 166; WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 329-30 (1968).

[54] For a history of such justifications and the violations of international law embodied in the occupation, see generally AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD (2000); NOAM CHOMSKY, FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL & THE PALESTINIANS (1999).

[55] Furthermore, rather than being military engagements, these "wars" most often consisted of the massacre of women, children, and old men. *See* Ward Churchill, *'Nits Make Lice': The Extermination of North American Indians, 1607-1996*, *in* CHURCHILL, A LITTLE MATTER OF GENOCIDE, *supra* note 19, at 129-288.

[56] *See* WARD CHURCHILL, *Charades, Anyone? The Indian Claims Commission in Context*, *in* PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLO-AMERICAN LAW (2003) (noting that in 1979 the Claims Commission itself acknowledged that the United States did not hold valid title to as much as one-third of the territory occupied by the "lower 48" states).

[57] Alien Act, ch. 58, 1 Stat. 570 (1798) (amended at 41 Stat. 1008 (1920) (current version at 8 U.S.C. § 1424 (2001)); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

cause of the increase in U.S.-French hostility. They accused the Jeffersonians of being agents of France who were trying to bring the French Revolution's "Reign of Terror" to the United States.[58] As it turned out, only Republicans were prosecuted under the Sedition Act, and they were clearly prosecuted for political—not security—reasons. For example, Congressman Matthew Lyon received a four month prison sentence for describing President John Adams as "swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[59]

As noted below, in attacking movements for social justice, the government has often justified its actions on the ground that these were actually movements for anarchy or communism, "alien" ideologies promoted by foreign powers.[60] Not surprisingly, the linking of political protest to "sedition" has been most common in attempts to suppress antiwar activists.[61] Some interesting parallels to the impending war in Iraq, which the Bush administration insists the United States must pursue to protect its national interest, can be seen in the United States' efforts to conquer the Philippines.

In the late 1800s, after the United States had consolidated its control over the "lower 48" contiguous states, there was a great deal of political debate over explicitly imperialist expansion, particularly the acquisition of "territories" such as Hawai'i, Puerto Rico, and the Philippines.[62] The conquest of the Philippines, re-

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58 Richard O. Curry, *Introduction* to FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980s, at 3, 5 (Richard O. Curry ed., 1988) [hereinafter Curry].

59 CHANG, *supra* note 25, at 22.

60 This was also true of the suppression of the labor movement in the late nineteenth and early twentieth centuries. Union organizers were labeled "communists" and "anarchists," labor unrest was blamed on immigrants, and informants and agents provocateur were frequently used to create incidents which gave government troops and the private vigilante forces they collaborated with an excuse to crush peaceful demonstrations for better wages and working conditions. *See generally* GOLDSTEIN, *supra* note 39, at 3-101; HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES, 1492-PRESENT 206-89 (Cynthia Merman & Roslyn Zinn eds., 1995).

61 For a comprehensive survey of the repression of dissent during wartime, from the 1790s to the 1980s, see generally MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR (1990).

62 *See generally* Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 4 (Christina Duffy Burnett & Burke Marshall eds., 2001); *see also* ZINN, *supra* note 60, at 290-92.

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ferred to in 1902 by President Roosevelt as the most glorious war in the nation's history,[63] involved a particularly brutal four year campaign during which U.S. troops burned hundreds of villages to the ground, killed perhaps one million Filipinos, herded thousands into concentration camps, and engaged in systematic raping, looting, and torture.[64] The *Philadelphia Ledger* reported:

> Our men have been relentless; have killed to exterminate men, women, children, prisoners and captives, active insurgents and suspected people, from lads of ten and up, an idea prevailing that the Filipino, as such, was little better than a dog. . . . Our soldiers have pumped salt water into men to "make them talk," have taken prisoner people who held up their hands and peacefully surrendered, and an hour later . . . stood them on a bridge and shot them down one by one . . . .[65]

According to the correspondent reporting such facts, these tactics were "necessary and long overdue," for the enemy was not a "civilized" people.[66] Filipinos were routinely referred to as "savages" and "niggers,"[67] and the fighting as "Indian warfare."[68]

It is interesting to note in the context of the current "war on terrorism" and the impending war in Iraq, that U.S. officials consistently maintained that the war in the Philippines was being fought to bring freedom and civilization to the Filipinos.[69] Fili-

[63] STUART CREIGHTON MILLER, "BENEVOLENT ASSIMILATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903, at 250 (1982).

[64] *See* THE PHILIPPINES READER: A HISTORY OF COLONIALISM, NEOCOLONIALISM, DICTATORSHIP, AND RESISTANCE 5-33 (Daniel B. Schirmer & Stephen Rosskamm Shalom eds., 1987) (the estimate of one million Filipinos is discussed at 19) [hereinafter THE PHILIPPINES READER]; *see generally* MILLER, *supra* note 63.

[65] MILLER, *supra* note 63, at 211.

[66] *Id.*

[67] THE PHILIPPINES READER, *supra* note 64, at 10.

[68] This was no loose analogy, for General "Howlin' Jake" Smith who gave the orders to "kill and burn, kill and burn" and, when asked about the children, replied "[e]verything [sic] over ten," *id.* at 17, was a veteran of the 1890 Wounded Knee massacre, MILLER, *supra* note 63, at 219, in which dozens of U.S. soldiers were given the army's medal of honor for murdering approximately 300 Lakota men, women and children in cold blood. MARIO GONZALES & ELIZABETH COOK-LYNNE, POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY 107 (1999).

[69] The *Salt Lake City Tribune* editorialized:

> The struggle must continue til the misguided creatures there shall have their eyes bathed in enough blood to cause their vision to be cleared, and to understand that . . . those whom they are now holding as enemies have no purpose toward them except to consecrate to liberty and to open for them a way to happiness.

MILLER, *supra* note 63, at 74 (quoting 18 LITERARY DIGEST 387 (1899)). As early as 1899, General Shafter predicted, "It may be necessary to kill half of the Filipinos in

pino resistance was portrayed as violating the rules of "civilized warfare," thereby preventing the Americans from comporting with the laws of war.[70] Just as U.S. officials recently denounced Iraq's invitations to conduct fact-finding missions as merely a stalling tactic,[71] Filipino peace proposals were dismissed as "merely a trick" to "gain time."[72] General Douglas MacArthur decreed that captured Filipino guerrillas would not be treated as soldiers, but as "criminals" and "murderers" and summarily executed,[73] much as the Bush administration has said that the "unlawful combatants" captured in Afghanistan and held at Guantanamo Naval Base need not be accorded prisoner of war status.[74]

In a move which calls to mind provisions of the USA PATRIOT Act,[75] General MacArthur had a lawyer on the Philippine Commission draft "Treason Laws" under which treason was defined "as joining any secret political organization or even as 'the advocacy of independence or separation of the islands from the United States by forcible or peaceful means.'"[76] Press critical of the war in the Philippines was routinely censored[77] and those who opposed the war were dismissed as "liars and traitors."[78] As discussed in the following section, those who protested the United States' involvement in World War I were similarly considered treasonous or seditious and subjected to harsh repression.

As these few vignettes illustrate, in the early history of the

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order that the remaining half of the population may be advanced to a higher plane of life than their present semi-barbarous state affords." THE PHILIPPINES READER, *supra* note 64, at 11.

[70] MILLER, *supra* note 63, at 77.

[71] *See* Anthony Shadid, *U.S. Rebuffs Second Iraq Offer on Arms Inspection*, BOSTON GLOBE, Aug. 6, 2002, at A1 (noting that the overture "was quickly dismissed by US officials as a stalling tactic"); *see also White House Dismisses Offers by Iraq to UN, Congress for Weapons Inspection*, AGENCE FRANCE-PRESSE, Aug. 5, 2002, *available at* 2002 WL 23573867.

[72] MILLER, *supra* note 63, at 77.

[73] *Id.* at 163.

[74] Katharine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.'s Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6; *see also* Amnesty International, *USA: AI Calls On the USA to End Legal Limbo of Guantánamo Prisoners*, Jan. 15, 2002, AI-index: AMR51/009/2002, *available at* http://web.amnesty.org.

[75] *See infra* Part VI.

[76] MILLER, *supra* note 63, at 166.

[77] *Id.* at 83-87.

[78] *Id.* at 156.

United States, social movements which challenged the status quo were labeled seditious. The threat they were said to pose to the national security was used to justify denying First Amendment rights to freedoms of speech and press, to peaceably assemble, and to petition for redress of grievances. The criminal justice system was used to convict organizers engaged in constitutionally protected activity and to crush otherwise popular and effective movements for social change. While done in the name of "law enforcement," such actions were, in fact, undermining the rule of law.

As the United States entered the twentieth century, it was against this general background that its use of federal law enforcement powers to suppress dissent was more effectively institutionalized within the Department of Justice and, more particularly, in what was to become the Federal Bureau of Investigation.

III

The Federal Bureau of Investigation: Origins and Early Activities

> Your FBI is respected by the good citizens of America as much as it is feared, hated and vilified by the scum of the underworld, Communists, goose-stepping bundsmen, their fellow travelers, mouthpieces, and stooges.
>
> —J. Edgar Hoover, 1940[79]

The Department of Justice (DOJ) was formed in 1870, and the following year Congress appropriated $50,000 for the DOJ to engage in "the detection and prosecution of those guilty of violating Federal Law."[80] In 1906, Attorney General Bonaparte established the Bureau of Investigation within the Justice Department,[81] despite the fact that, initially, "congressional authorization was withheld because of the widely held view that

[79] Ward Churchill & Jim Vander Wall, Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement 4-6 (2d ed. 2002) [hereinafter Churchill & Vander Wall, Agents].

[80] *Id.* at 17 (citing United States Congress, *Appropriations to the Budget of the United States of America, 1872*, Section VII (1871) at 31). Until Congress forbade the practice, the DOJ employed the private Pinkerton Detective Agency, long used by industrialists to crush labor movements, to do its investigative work. Sanford J. Unger, FBI 39 (1976); Goldstein, *supra* note 39, at 29.

[81] Unger, *supra* note 80, at 40.

the establishment of such an agency would lead to 'a general system of espionage' and would be 'contradictory to the democratic principles of government.'"[82] In 1910, the Bureau's functions were described to Congress as the enforcement of:

> [T]he national banking laws, antitrust laws, peonage laws, the bucket-shop law, the laws relating to fraudulent bankruptcies, the impersonation of government officials with intent to defraud, thefts and murders committed on government reservations, offenses committed against government property, and those committed by federal court officials and employees, Chinese smuggling, customs frauds, internal revenue frauds, post office frauds, violations of the neutrality laws . . . land frauds and immigration and naturalization cases.[83]

However, it soon took on much broader functions which demonstrated that Congress' initial reservations were well-founded.

During World War I, the Bureau received added funding and personnel to investigate sabotage and violations of the Neutrality Act, and in 1917 the Justice Department tried to convince President Woodrow Wilson to allow military courts martial to try civilians accused of interfering with the war effort. This failed, but Wilson did sign the Espionage Act,[84] which made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the United States.[85] It also criminalized any interference with the war effort and allowed the post office to exclude from the mails any material advocating "treason, insurrection or resistance to any law of the U.S."[86] The 1918 Sedition Act prohibited essentially all criticism of the war or the government.[87] While these laws did nothing appreciable to stop sedition, they did effectively prevent those opposing the war from exercising their First Amendment rights. Goldstein says:

> Altogether, over twenty-one hundred [persons] were indicted under the Espionage and Sedition laws, invariably for statements of opposition to the war rather than for any overt acts, and over one thousand persons were convicted. Over one

[82] Geoffrey R. Stone, *The Reagan Administration, the First Amendment, and FBI Domestic Security Investigations*, *in* Curry, *supra* note 58, at 272-73.

[83] UNGER, *supra* note 80, at 40. Congress immediately added the "Mann Act" designed to deter interstate prostitution. *Id.*

[84] Espionage Act of 1917, ch. 30, 40 Stat. 217 (1918); *see also* UNGER, *supra* note 80, at 41-42.

[85] CHANG, *supra* note 25, at 23.

[86] GOLDSTEIN, *supra* note 39, at 108 (quoting Espionage Act of June 15, 1917).

[87] *Id.* *See* Sedition Act, ch. 75, 40 Stat. 553 (1918).

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hundred persons were sentenced to jail terms of ten years or more. Not a single person was ever convicted for actual spy activities.[88]

This has become a consistent pattern in the enforcement of "national security" laws.[89]

In June 1918, populist-socialist leader Eugene Debs was sentenced to ten years in federal prison for violating the Espionage Act by making an antiwar speech in which he said, "[Y]ou need to know that you are fit for something better than slavery and cannon fodder."[90] Charles Schenck was also convicted for printing and distributing pamphlets opposing the draft. In 1919, a unanimous Supreme Court upheld his conviction, stating that the government may restrict speech without violating the First Amendment when there is a "clear and present" danger that the speech could bring about the "substantive evils" at issue.[91]

Anarchist leaders Emma Goldman and Alexander Berkman were also sentenced to ten years for violating the Espionage Act by publicly expressing opposition to the draft.[92] Goldman and Berkman were deported in 1919 under the newly amended immigration laws. These amendments made noncitizens who were members of organizations which advocated the unlawful destruction of property or the overthrow of the government by force or violence deportable. The law did not require any individualized showing of action or even belief, thus incorporating the principle of guilt by association[93] in a manner recently replicated by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.[94]

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88 GOLDSTEIN, *supra* note 39, at 113; *see also* LINFIELD, *supra* note 61, at 33-67.

89 *See infra* Part IV.

90 Debs v. United States, 249 U.S. 211, 214 (1919).

91 Schenck v. United States, 249 U.S. 47, 52 (1919). As Nancy Chang points out, this case is best known for Justice Holmes' analogy to falsely "shouting fire in a crowded theatre," but the actions in question were better described by Howard Zinn as "shouting, not falsely, but truly, to people about to buy tickets and enter a theater, that there was a fire raging inside." CHANG, *supra* note 25, at 23-24 (quoting HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 TO PRESENT 366 (1999)).

92 Goldman v. United States, 245 U.S. 474 (1918); *see also* Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1125-27 (1989); CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 19-20.

93 GOLDSTEIN, *supra* note 39, at 110.

94 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); *see generally* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigra-*

During World War I, there was a dramatic increase in federal intelligence gathering operations. Military intelligence jumped from two officers in 1917 to 1300 officers and civilian employees by 1919. There were similar increases in the intelligence divisions of the Justice Department, as well as the Post Office and the Treasury Department.[95] At the same time the Justice Department's Bureau of Investigation entered into an agreement with the American Protective League (APL), a prominent vigilante organization that soon numbered 350,000 members, which allowed these private citizens to "assist" the Bureau.[96] The APL "quickly became a largely out-of-control quasi-governmental, quasi-vigilante agency which established a massive spy network across the land," making illegal arrests and detentions, instigating attacks on activists, and infiltrating, burglarizing, wiretapping and opening the mail of organizations they considered detrimental to United States' interests.[97]

During the early 1900s, this combination of federal agents and APL members was instrumental in conducting large scale raids and vigilante actions—including outright lynchings—against members of the Industrial Workers of the World (IWW or "Wobblies") across the country. The raids, acknowledged to have been carried out "largely as a preventative matter to prevent possible violence,"[98] were followed by pre-indictment detentions of up to two years, mass trials in which the defendants were sometimes not even identified by name, and the imposition of lengthy prison sentences. These tactics succeeded in crushing the nation's most powerful union movement of that era.[99]

The Justice Department's involvement in quashing "subversive" activities increased in the aftermath of World War I. In 1919, there was a series of bombings around the country, includ-

tion Laws: Important Lessons for Citizens and Noncitizens, 28 ST. MARY'S L.J. 833 (1997).

95 GOLDSTEIN, *supra* note 39, at 110.

96 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 18; GOLDSTEIN, *supra* note 39, at 111.

97 GOLDSTEIN, *supra* note 39, at 111.

98 *Id.* at 117 (quoting a statement of the U.S. attorney for Kansas to a Justice Department official).

99 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 19; GOLDSTEIN, *supra* note 39, at 117-18. At the same time, the Justice Department and APL "volunteers" conducted "slacker raids" in which an estimated 400,000 men were seized and detained for not carrying draft cards. *Id.* at 111-12. Less than one in two hundred of those arrested were actually draft resisters. UNGER, *supra* note 80, at 42.

ing one on the residence of Attorney General A. Mitchell Palmer. Those responsible were never identified, but anarchist leaflets were found scattered around each site and Palmer reacted by declaring war on radicals and subversives.[100] Palmer created a General Intelligence Division (GID) within the Bureau of Investigation to spearhead this effort, headed by Assistant Attorney General Garvan and his twenty-four year old assistant, J. Edgar Hoover. Within three and one-half months, the GID had compiled personal files on 60,000 individuals, a number which soon grew to 200,000.[101]

Palmer lobbied Congress for peacetime sedition legislation and when that failed he relied on the 1918 Alien Act—again conflating "troublemakers" with "foreigners"—to conduct numerous raids on legal organizations such as the Communist and Communist Labor parties. On January 2, 1920, the Bureau conducted massive "Red raids" (later known as the "Palmer Raids") in thirty-three cities, arresting and holding 10,000 people, both citizens and noncitizens, as "criminal anarchists."[102] Using tactics similar to those we have seen with respect to the 1200-plus post-September 11 detainees,[103] hundreds were held for months in harsh and squalid conditions, and denied contact with their families, friends, and lawyers.[104] When the excesses came to light, Attorney General Palmer declared that the Fourth Amendment did not apply to aliens and boldly stated: "I apologize for nothing that the Department of Justice has done in this matter. I glory in it."[105] According to Sanford Unger, one of the legacies of the Palmer Raids was that "they demonstrated that the use of methods that stretched and went beyond the law were a great help and an efficient tool in undermining 'subversives.'"[106]

By 1924, Hoover was in charge of the Bureau, which was soon renamed the Federal Bureau of Investigation.[107] He proclaimed

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100 UNGER, *supra* note 80, at 43; CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 20-22.

101 UNGER, *supra* note 80, at 43.

102 *Id.* at 43-44.

103 *See infra* text accompanying note 308.

104 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 22-23. One detainee, Andrea Salsedo, after being held in isolation for two months in a New York Bureau office, was found on the pavement below the building. According to Bureau agents, he had jumped fourteen floors to his death. *Id.*

105 UNGER, *supra* note 80, at 44.

106 *Id.* at 45.

107 *Id.* at 54-55.

that "the bureau must be divorced from politics" and, most interestingly, stated: "It is, of course, to be remembered that the activities of Communists and other ultra-radicals have not up to the present time constituted a violation of federal statutes . . . and consequently, the Department of Justice, theoretically, has no right to investigate such activities. . . ."[108] However, this was exactly what Hoover proceeded to do with unprecedented vigor. He gave priority to what became the Files and Communications Division, which by 1975 had 6.5 million "Active Investigation" files, an undisclosed but higher number of other files, and a "General Index" containing about 58 million cards. In 1930, Hoover obtained permission to collect fingerprints, and by 1974 the Division of Identification and Information (DII) had on file the prints of about 159 million Americans and was adding 3000 sets each day.[109]

One of the Bureau's early targets was the Universal Negro Improvement Association (UNIA), the largest and most vibrant organization of African Americans ever to exist in this country,[110] which Hoover succeeded in destroying through "a campaign against Marcus Garvey which resulted in his frameup on false charges, and ultimately his deportation as an 'undesirable alien.'"[111] In the meantime, as noted by Ward Churchill and Jim Vander Wall, "the DII kept tabs and accumulated increasing amounts of sensitive information on all manner of socialists, communists, union organizers, black activists, anarchists and other 'ultra-radicals' as they painstakingly rebuilt their shattered movements."[112]

In 1936 Hoover obtained the President's explicit authorization to resume investigation of "subversive activities" in the country.[113]

> By 1938, the FBI had launched significant and tacitly illegal . . . investigations of supposed subversion in [numerous] industries, as well as various educational institutions, organized la-

[108] *Id.* at 48-49.

[109] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 26-27.

[110] *See generally* E. DAVID CRONON, BLACK MOSES: THE STORY OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (1969).

[111] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 27 (quoting Flynt Taylor & Margaret Van Houten, *Counterintelligence: A Documentary Look at America's Secret Police*, National Lawyers Guild Task Force on Counterintelligence and the Secret Police 3 (1978)).

[112] *Id.*

[113] *Id.*

> bor, assorted youth groups, black organizations, governmental affairs and the armed forces. . . . More explicit illegality was involved in the methods of intelligence-gathering themselves; wiretapping . . . , bugging, mail tampering/opening and breaking-and-entering were a few of the expedients routinely applied by agents, whose investigative output was promptly summarized and transmitted "upstairs" to the White House.[114]

By January 1940, Hoover revived the General Intelligence Division, announcing his intent to create an alphabetical and geographical "general index" which would allow the Bureau to locate anyone it wanted to investigate for "national security" purposes at any time.[115]

Shortly thereafter, Congress passed the Smith Act which made it a crime to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence, or by assassination of any officer of such government."[116] This law extended the prohibitions on speech found in previous sedition laws to peacetime, illustrating the government's intent to restrict freedom of expression in the name of national security without limiting the scope or duration of the restrictions and without demonstrating that the speech was likely to result in any concrete action.

In *Dennis v. United States*,[117] the Supreme Court upheld the convictions of eleven leaders of the Communist Party under the Smith Act, using a test of whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Even though the Party had not used force or violence, the Court justified the convictions on the ground that the Party (or the "conspiracy," as the Court referred to it) was highly organized, and because its leaders, who could not be shown to be foreign agents, were "ideologically attuned" to countries with whom the United States had "touch-and-go" relations.[118] Again, we see a similar stretching of

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114 *Id.* at 29 (citations omitted). *See also* FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM 30-78 (1981).

115 UNGER, *supra* note 80, at 103.

116 Alien Registration (Smith) Act of 1940, ch. 439, 54 Stat. 670 (1940) (Smith Act is Title I of Alien Registration Act); *see* CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 29; LINFIELD, *supra* note 61, at 75-79.

117 341 U.S. 494 (1951).

118 *Id.* at 510.

the national security rationale being invoked in the "if you're not with us you're against us" rhetoric of the current war on terrorism.[119]

During World War II, the U.S. government imprisoned all persons of Japanese descent then living on the west coast, over 70,000 of whom were U.S. citizens, without any semblance of due process. Despite the fact that there was *no* evidence of sabotage or espionage by Japanese Americans, this was upheld by the Supreme Court as justified by "military necessity," a claim asserted by the military on the grounds that it had no way of distinguishing the "loyal" from the "disloyal."[120]

In 1947, as the United States moved from World War II into the Cold War, President Truman issued Executive Order 9835, authorizing the Justice Department to seek out "infiltration of disloyal persons" within the U.S. government, again demonstrating that such measures were not to be limited to periods of actual warfare.[121] The Order required the DOJ to create a list of organizations which were "totalitarian, fascist, communist or subversive . . . or seeking to alter the government of the United States by unconstitutional means,"[122] a measure similar to that authorized by the 1996 Antiterrorism and Effective Death Penalty Act[123] and expanded by the 2001 Act.[124] By 1954, the Justice Department had created a list of hundreds of organizations, and "sympathetic association" as well as membership was considered evidence of disloyalty.[125]

The Internal Security Act of 1950, also known as the McCarran Act, required all members of "Communist-front" organiza-

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119 *See* Roy, *supra* note 16; Hugo Young, *A New Kind of War Means a New Kind of Discussion*, THE GUARDIAN, Sept. 27, 2001, *available at* 2001 WL 28345801; Darryl Fears, *Deep Distrust of Government Still Simmers*, WASH. POST, Oct. 29, 2001, at A2.

120 Korematsu v. United States, 323 U.S. 214 (1944); *see generally* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Eric K. Yamamoto, Korematsu *Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

121 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 32.

122 *Id*. Again, we see parallels in recent legislation which authorizes the creation of lists of "terrorist" organizations. *See infra* text accompanying notes 291-92, 354-59.

123 *See infra* text accompanying notes 291-92.

124 *See infra* text accompanying notes 354-59.

125 *Id.* This, too, is similar to the "guilt by association" provisions of AEDPA. *See infra* text accompanying note 295.

tions to register with the federal government, and adopted a proposal—which was not rescinded until 1968—that special "detention centers" be established for incarcerating those so registered, without trial, any time the president chose to declare an "internal security emergency."[126] Between 1945 and 1957, the House Un-American Activities Committee (HUAC) subpoenaed thousands of Americans for hundreds of public hearings and required them to testify about their associations with the Communist Party and their knowledge of the political activities of their friends, neighbors and co-workers. Those who refused to testify were jailed for contempt.[127] Although Hoover personally disliked Joseph McCarthy, he worked closely with HUAC and the McCarthyites until 1954.

During this period, the FBI placed hundreds of informants within social and labor organizations and conducted "security investigations" of approximately 6.6 million Americans.[128] The stage was set for the next step: the COINTELPRO operations.

IV

COINTELPRO: "Abhorrent in a Free Society"[129]

> Many of the techniques used [by the FBI in its COINTELPRO operations] would be intolerable in a democratic society even if all of the targets had been involved in violent activity, but COINTELPRO went far beyond that. The unexpressed

[126] Churchill & Vander Wall, Agents, *supra* note 79, at 33; Zinn, *supra* note 60, at 423-24. *See generally* Mari Matsuda, *McCarthyism, The Internment and the Contradictions of Power*, 40 B.C. L. Rev. 9, 19 B.C. Third World L.J. 9 (1998) (joint issue) (foreword to Symposium: *The Long Shadow of Korematsu*). Again, we see parallels in the recent statement of Attorney General Ashcroft that such detention centers or concentration camps are currently being considered for the incarceration of U.S. citizens. *See infra* note 307.

[127] *See generally* Corliss Lamont, Freedom Is As Freedom Does (4th ed. 1990); Frank Wilkinson, *Revisiting the "McCarthy Era": Looking at* Wilkinson v. United States *in light of* Wilkinson v. Federal Bureau of Investigation, 33 Loy. L.A. L. Rev. 681 (2000) (discussing his conviction for refusing to testify to HUAC in light of documents the FBI was forced to produce in his FOIA action); Alan Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 Ohio N.U. L. Rev. 885, 890 (1993).

[128] Churchill & Vander Wall, Agents, *supra* note 79, at 36.

[129] Senate Select Comm. To Study Government Operations with Respect to Intelligence Activities, Final Report: Intelligence Activities and the Rights of Americans, S. Rep. No. 755, 94th Cong., 2d Sess. bk. III, at 8 (1976) [hereinafter Senate Select Comm., Final Report].

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> major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.
>
> —Final Report of the Senate Select Committee on Intelligence Activities[130]

Properly used, the term "counterintelligence" refers to efforts to combat the "intelligence" or spying activities of foreign powers. Officially, "the FBI's counterintelligence functions have always been administratively lodged in its Counterintelligence Division (CID) and [were] legally restricted to 'hostile foreign governments, foreign organizations and individuals connected with them.'"[131] Nonetheless, since first receiving President Truman's 1936 mandate to investigate subversive activities, Hoover had initiated domestic counterintelligence programs within the Bureau. Some were officially named "COINTELPROs" (COunter INTELligence PROgrams) and others were not, but the term has come to refer to a broad range of FBI programs, generally illegal, intended to repress political dissent.[132] Although these programs had almost nothing to do with countering foreign intelligence, the use of the term illustrates the agency's proclivity to invoke the fear of external threats to the national security while quashing domestic movements which were primarily engaged in lawful—indeed, constitutionally protected—activities.[133]

Even if one looks only at FBI actions between 1956 and 1971, the period of officially acknowledged COINTELPRO operations, the scope of the operations and their sheer volume is overwhelming. This section will present a brief summary of how the program was exposed, the kinds of tactics used and the movements that were the primary targets, giving a few illustrative examples. While constituting a particularly intense period of governmental repression of political dissent, the COINTELPRO era represents not an aberration but the logical outgrowth of the previous use of law enforcement agencies to suppress movements

130 *Id.* at 3.

131 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 37.

132 *Id.* at 37-38.

133 As the Senate report on COINTELPRO noted, "Counterintelligence program" is a "misnomer for domestic covert action." SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 4.

for social change, a process that is still at work in the laws and policies being enacted in the name of countering terrorism.

A. COINTELPRO Exposed

In 1976, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (known as the "Church Committee" because it was chaired by Senator Frank Church), characterized the FBI's COINTELPRO operations as "a secret war against those citizens it considers threats to the established order."[134] To quote the Committee's Final Report, "[i]n these programs the Bureau went beyond the collection of intelligence to secret actions designed to 'disrupt' and 'neutralize' target groups and individuals. The techniques were adopted wholesale from wartime counterintelligence, and ranged from the trivial . . . to the degrading . . . and the dangerous."[135] The Committee noted that from 1956, when the FBI officially labeled its anti-communist efforts as a "COINTELPRO," to 1971, when the program was officially terminated, the FBI approved more than 2000 COINTELPRO actions as part of "a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence."[136]

Despite a very constricted review which was abruptly terminated in mid-stream,[137] the Church Committee hearings and its four-volume Final Report provide more than enough evidence to show that the FBI, the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, Army Intelligence, and numerous other federal agencies engaged in thousands of illegal and unconstitutional operations spanning several decades with the explicit intention of destroying social and political movements they considered a threat to the status

134 *Id.* at 77.

135 *Id.* at 3; *see generally* BRIAN GLICK, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT (1989); NELSON BLACKSTOCK, COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM (Cathy Perkus ed., 1975).

136 SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 3. The Report also notes that COINTELPRO began "in part because of frustration with Supreme Court rulings limiting the Government's power to proceed overtly against dissident groups." *Id.*

137 *See* PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE, 125-26 (1991).

quo.[138]

There is much that we do not know about COINTELPRO and similar operations. Nonetheless, what we do know is more than sufficient to cause alarm. The following sections focus on what is known about FBI COINTELPROs, but it is important to remember that the Bureau was but one of perhaps dozens of federal agencies engaging in such practices.

B. The Tactics Employed

The illegal practices employed by the FBI in its COINTELPRO operations are far too numerous to list specifically, but they fall into several basic categories: surveillance and infiltration, dissemination of false information, creation of group conflict, abuse of the criminal justice system, and collaboration in assaults and assassinatons.[139]

1. Surveillance and Infiltration

One category of operations involves the acquisition of information through illegal means, including mail interception, wiretaps, bugs, live "tails," break-ins and burglaries, and the use of informants.[140] The FBI has acknowledged that between 1960 and 1974 it illegally utilized over 2300 wiretaps, 697 bugs, and 57,000 mail openings.[141] It is worth noting that this kind of "intelligence gathering" is the activity most commonly associated with COINTELPRO—and is also the most hotly debated aspect of the 2001 Act's expansion of executive power[142]—but is, in fact, the *least* egregious of the practices involved. Perhaps more sig-

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138 SENATE SELECT COMM., FINAL REPORT, *supra* note 129.

139 This categorization is based on the cogent summary of the kinds of illegal practices employed by the FBI in its COINTELPRO-type operations compiled by Ward Churchill and Jim Vander Wall in CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 39-53, and by Ward Churchill, *'To Disrupt, Discredit and Destroy': The FBI's Secret War Against the Black Panther Party*, *in* LIBERATION, IMAGINATION AND THE BLACK PANTHER PARTY 78-117 (Kathleen Cleaver & George Katsiaficas eds., 2001) [hereinafter Churchill, *To Disrupt*].

140 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 39. *See generally* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81 (1994) (regarding problems inherent in the use of informants).

141 WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES 304 (2d ed. 2002) [hereinafter CHURCHILL & VANDER WALL, COINTELPRO].

142 *See infra* Part VI.A-B.

nificant than the resulting violations of privacy is the fact that these tactics were not utilized simply for the purpose of acquiring information, but were explicitly intended to induce "paranoia" in movements for social change. As Hoover stated, he wanted his targets to believe that there was "'an FBI agent behind every mailbox.'"[143] In other words, the executive branch of the federal government was engaging in such activities precisely because of the chilling effect they would have on speech and associational activities protected by the First Amendment.

2. *Dissemination of False Information*

A second level of tactics employed in COINTELPRO operations encompasses the dissemination of information known to be false. One version, sometimes called "gray propaganda," was the systematic release of disinformation (i.e., false and misleading information) designed to discredit organizations in the eyes of the public and to foster tensions between groups.[144] The Church Committee's Final Report notes that the Bureau used "confidential sources," i.e., unpaid informants and "friendly" media sources "who could be relied upon not to reveal the Bureau's interests" to leak derogatory information about individuals and to publish unfavorable articles and fabricated "documentaries" about targeted groups.[145] Among such groups were the Nation of Islam, the Poor People's Campaign, the Institute for Policy Studies, the Southern Students Organizing Committee, and the anti-war National Mobilization Committee.[146]

Another form of disinformation, known as "black propaganda," involved the fabrication of leaflets and other publications purporting to come from targeted individuals and organizations. Thus, for example, the FBI had an infiltrator in the Sacramento chapter of the Black Panther Party (BPP) produce a coloring book for children which promoted racism and violence. Although the Panther leadership immediately ordered it destroyed, the Bureau mailed copies to companies which had been contributing food to the Panthers' Breakfast for Children program to get them to withdraw their support.[147] Such

[143] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 39-40.
[144] *Id.* at 43-44.
[145] SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 35-36.
[146] *Id.*
[147] CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 159.

fabrications did much to promote the image of the BPP as violent "cop-killers," an impression still widely held by the American public.[148]

In another example, FBI artists, imitating the drawing styles used by the BPP and a Black cultural nationalist organization known as the United Slaves (US), created a series of leaflets in which each organization appeared to be advocating the elimination of the other's leadership.[149] The FBI's intent can be seen in this excerpt from a 1969 report on its San Diego operations:

> In view of the recent killing of BPP member Sylvester Bell, a new cartoon is being considered in the hopes that it will assist in the continuance of the rift between BPP and US. This cartoon, or series of cartoons, will be similar in nature to those formerly approved by the Bureau and will be forwarded to the Bureau for evaluation and approval immediately upon their completion.[150]

3. Creation of Intra- and Inter-Group Conflict

This brings us to the third level of COINTELPRO operations, the FBI's destruction of targeted organizations both by creating internal dissension and by setting up groups to attack each other. As reported by the Church Committee:

> Approximately 28% of the Bureau's COINTELPRO efforts were designed to weaken groups by setting members against each other, or to separate groups which might otherwise be allies, and convert them into mutual enemies. The techniques used included anonymous mailings (reprints, Bureau-authored articles and letters) to group members criticizing a leader or an allied group; using informants to raise controversial issues; forming a "notional"—a Bureau-run splinter group—to draw away membership from the target organization; encouraging hostility up to and including gang warfare, between rival

[148] Thus, when Jamil al-Amin, formerly known as H. Rap Brown, was accused of killing a deputy sheriff in 2000, he was not referred to as a Muslim community leader, which he had been for twenty years, but as a former Black Panther, which he had been for only a few months. *See*, *e.g.*, *Police Hunt for Ex-Black Panther Accused of Killing, Wounding Cops*, CHI. TRIB., Mar. 18, 2000 at 3; Lyda Longa, *Officers Vow to Find Former Black Panther*, ATLANTA J. & ATLANTA CONST., Mar. 18, 2000, at A1.

[149] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 42-43; some of the leaflets and related FBI memoranda are reproduced in CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 130-33.

[150] Excerpt is reproduced in CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 133.

groups; and the "snitch jacket."[151]

Thanks in part to such efforts, the Bureau managed to escalate US-BPP tensions to the point that two US members, widely believed to be informants, shot and killed BPP members Jon Huggins and Bunchy Carter at a meeting on the campus of the University of California at Los Angeles in January 1969.[152]

Fabricated correspondence was also a favored tactic, as illustrated by Hoover's authorization of an anonymous letter directed to Dr. Martin Luther King, Jr.—accompanied by a tape compiled from bugs of his Washington, D.C. hotel room—suggesting that he commit suicide to avoid the disgrace of the exposure of alleged sexual misconduct.[153] Nearly one hundred instances of fabricated correspondence between BPP leaders Huey Newton and Eldridge Cleaver were instrumental in creating intra-party violence and ensuring the 1971 split within the Party.[154]

Because of its success in actually infiltrating organizations, the FBI was able to further disrupt their functioning by creating suspicions about legitimate leaders. In a practice known as "badjacketing" or "snitch-jacketing," the Bureau spread rumors and manufactured evidence that key members were informers or were otherwise undermining the organization by subverting its activities or stealing its funds. This tactic succeeded not only in discrediting many activists, but also resulted in the murders of some who were falsely accused of betraying others within the organization.[155]

4. *Abuse of the Criminal Justice System*

A fourth level of COINTELPRO operations involved the deliberate misuse of the criminal justice system. Working with local police departments, the FBI had activists repeatedly arrested, not because it anticipated convictions, "but to simply harass, increase paranoia, tie up activists in a series of pre-arraignment incarcera-

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[151] SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 40. *See infra* text accompanying note 155 (discussing "snitch jackets").

[152] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 42-43.

[153] *Id.* at 55, 57; SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 82.

[154] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 40-42.

[155] *Id.* at 49-51 (noting FBI infiltrator Thomas E. Mosher's explanation to the Senate Internal Security Committee of how Black Panther Party leader Fred Bennet was successfully bad-jacketed, leading to his assassination by Jimmie Carr, who was in turn bad-jacketed and subsequently killed). *See also* SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 46-49.

tions and preliminary courtroom procedures, and deplete their resources through the postings of numerous bail bonds (as well as the retention of attorneys)."[156] Using this tactic, the Revolutionary Action Movement in Philadelphia was effectively destroyed despite the fact that no criminal convictions were ever obtained against members of this group.[157] Similarly, the government made 562 arrests in the wake of the 1973 occupation of Wounded Knee by members of the American Indian Movement (AIM). Even though these massive arrests only resulted in a total of fifteen convictions, they succeeded in depleting AIM's resources and keeping its leaders tied up in court for years.[158]

Virtually all of the Bureau's surveillance and infiltration revealed that the targeted groups were engaging in entirely lawful activity.[159] Rather than turning its focus elsewhere, one of its responses was to place within groups agents provocateur who advocated violence or illegal activities which, if carried out, would then be used as an excuse to crush the organizations.[160] Another response was to make it appear that the groups were engaging in illegal conduct by obtaining convictions in questionable cases by using fabricated evidence or perjured testimony and by explicitly framing people for crimes they had not committed.

Prominent cases in which the FBI used perjured testimony and falsified evidence to convict activists include that of New York Black Panther Dhoruba bin Wahad (Richard Moore), whose murder conviction was overturned in 1993 after he had spent twenty years wrongfully incarcerated,[161] and AIM activist Leonard Peltier, who is still incarcerated after twenty-seven years,

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156 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 44.

157 *Id.* at 47; *see also* Airtel of Mar. 4, 1968, *reproduced in* CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 109 (stating that in response to RAM activity in the summer of 1967, the Philadelphia FBI office "alerted local police, who then put RAM leaders under close scrutiny. They were arrested on every possible charge until they could no longer make bail. As a result, RAM leaders spent most of the summer in jail and no violence traceable to RAM took place.").

158 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 176, quoting *Hearings Before the Subcomm. on Civil and Constitutional Rights*, 97th Cong., 1st Session on FBI Authorization, Mar. 19, 24, 25; Apr. 2 and 8, 1981; *see generally* JOHN WILLIAM SAYER, GHOST DANCING THE LAW: THE WOUNDED KNEE TRIALS (1997).

159 *See*, *e.g.*, *infra* text accompanying note 184 (noting the conclusions of the judge in the SWP case).

160 *See* CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 219-33.

161 *See generally* Wahad v. City of New York, 1999 WL 608772 (S.D.N.Y. 1999); DHORUBA BIN WAHAD, MUMIA ABU-JAMAL, & ASSATA SHAKUR, STILL BLACK, STILL STRONG: SURVIVORS OF THE U.S. WAR AGAINST BLACK REVOLU-TIONARIES (1993); Churchill, *To Disrupt*, *supra* note 139, at 103-04.

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despite the acknowledgment that his conviction for the 1975 deaths of two FBI agents on the Pine Ridge Reservation was obtained with the use of perjured testimony and falsified ballistics evidence[162] and despite worldwide recognition of his status as a political prisoner.[163]

The best known case may be that of Los Angeles BPP leader Geronimo ji Jaga (Pratt), who was the subject of constant surveillance and numerous failed attempts to convict him of various crimes. Finally, in 1972, the government succeeded in convicting him of the 1968 "tennis court" murder of a woman in Santa Monica on the basis of the perjured testimony of an FBI informant, and despite the fact that the FBI, thanks to its surveillance, knew that Pratt had been 350 miles away at a BPP meeting in Oakland at the time of the murder.[164]

In these cases, which were by no means aberrational but rather an explicit part of the government's strategy to eliminate the leadership of movements it did not sanction, the Department of Justice—the nation's highest law enforcement agency—was turning the criminal justice system on its head. It was not enforcing the law but was deliberately engaging in illegal practices, misusing criminal laws and the courts to imprison activists, not because they had engaged in criminal conduct but because of their political beliefs, actions and associations.

5. *Collaboration in Assaults and Assassinations*

A fifth level of COINTELPRO operations involves the government's participation in direct physical assaults and assassina-

[162] *See generally* JIM MESSERSCHMIDT, THE TRIAL OF LEONARD PELTIER (1983); MATTHIESSEN, *supra* note 137; CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 294-96, 304-05, 319.

[163] Leonard Peltier's clemency petition to President Clinton was accompanied by letters of support from, among many others, Amnesty International, Archbishop Desmond Tutu, the Dalai Lama, the Archbishop of Canterbury, and a resolution of the European Parliament (on file with author). For a discussion of the heightened post-September 11 repression of political prisoners, many of them COINTELPRO victims, see J. Soffiyah Elijah, *The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them*, 18 HARV. BLACKLETTER L.J. 129 (2002).

[164] *See generally* JACK OLSEN, LAST MAN STANDING: THE TRAGEDY AND TRIUMPH OF GERONIMO PRATT (2000); *see also* CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 77-94. After being wrongly imprisoned for twenty-seven years, including eight years in solitary confinement, Pratt's conviction was overturned, and he subsequently received out-of-court settlements of $1.75 million from the FBI and $2.75 million from the City of Los Angeles. OLSEN, *supra*, at 487.

tions. This is, of course, the hardest area to document, but as Churchill and Vander Wall note, while the Bureau has "almost always used surrogates to perform such functions, [it] can repeatedly be demonstrated as having provided the basic intelligence, logistics or other ingredients requisite to 'successful' operations in this regard."[165]

The most infamous of these is probably the 1969 murder of Chicago Black Panthers Fred Hampton and Mark Clark. At the time, twenty-one year old Hampton was widely recognized as one of the most charismatic leaders emerging in the black community and, despite his characterization by the government as a "black nationalist," it was his success in cross-racial coalition building that the FBI found most threatening.[166]

The prominent role played by FBI informant William O'Neal, who was by then in charge of security for the Chicago BPP chapter, and the FBI's collaboration with local police which culminated in a pre-dawn assault on Hampton's apartment is well documented.[167] Despite evidence that hundreds of shots were fired into the apartment, killing Hampton and Clark and wounding several others, including Hampton's pregnant fiancee, with only one shot fired in response, all government officials were cleared of criminal charges.[168] Nearly fifteen years later there was a civil finding of a government conspiracy to deny the victims' civil rights and a $1.85 million settlement,[169] but the FBI had long since accomplished its purpose of destroying the Black Panther Party in Illinois.[170]

In the meantime, as part of its concerted program to destroy the American Indian Movement, the FBI provided direct support to the self-proclaimed "Guardians of the Oglala Nation" or

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[165] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 53.

[166] *See* Nikhil Pal Singh, *The Black Panthers and the "Undeveloped Country" of the Left*, *in* THE BLACK PANTHER PARTY RECONSIDERED 57, 79-80 (Charles E. Jones ed., 1998) (noting that Fred Hampton organized the original "rainbow coalition").

[167] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 64-77; Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *rev'd in part*, 446 U.S. 754 (1980), *remanded to* 499 F. Supp. 640 (1980) (holding that gross negligence in the raids resulting in the deaths of Hampton and Clark was actionable).

[168] For an excellent summary of this attack, see ROY WILKINS & RAMSEY CLARK, SEARCH AND DESTROY: A REPORT BY THE COMMISSION OF INQUIRY INTO THE BLACK PANTHERS AND THE POLICE (1973).

[169] *Hampton*, 600 F.2d at 600.

[170] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 77; GOLDSTEIN, *supra* note 39, at xvi.

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"GOONS" on the Pine Ridge Reservation in South Dakota who have been implicated in the "unsolved" deaths of at least seventy individuals associated with AIM between 1972 and 1976.[171] Particularly chilling is the fate of the family of John Trudell, AIM's last national chairman:

> In February 1979, Trudell led a march in Washington, D.C. to draw attention to the difficulties the Indians were having. Although he had received a warning against speaking out, he delivered an address from the steps of the FBI building on the subject of the agency's harassment of Indians . . . Less than 12 hours later, Trudell's wife, Tina, his three children [ages five, three and one], and his wife's mother were burned alive in the family home in Duck Valley, Nevada—the apparent work of an arsonist.[172]

As noted above, what is at stake in allowing the government unrestrained powers is not merely an abstract notion of First Amendment freedoms but, in many cases, the very survival of those who protest.

C. The Groups Targeted

Literally hundreds of organizations, most of them related only by a desire to effect social or political change through constitutionally protected means, were the targets of various COINTELPROs. The Church Committee identified five overarching categories of targets: the Communist Party USA, the Socialist Workers Party, "White Hate Groups," "Black Nationalist Hate Groups," and the "New Left." As the Final Report noted, these were "labels without meaning"[173] as the categories included an extremely wide range of often unrelated organizations. Thus, all of the predominantly black organizations targeted, including Martin Luther King, Jr.'s Southern Christian Leadership Conference (SCLC) and numerous Black Student Unions, were "Black Nationalist Hate Groups," while the Communist Party USA heading covered the National Committee to Abolish the House

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[171] *See* CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 164-97. For the FBI's report on these deaths, see Report of the Federal Bureau of Investigation, Minneapolis Division: Accounting for Native American Deaths, Pine Ridge Indian Reservation, South Dakota, Department of Justice (May 2000), *available at* http://www.freepeltier.org/fbi_pine_ridge_report.htm. For a detailed response, see Ward Churchill, *The FBI's "Accounting" of AIM Fatalities on Pine Ridge, 1973-1976*, *available at* http://www.freepeltier.org/analysis_fbi.htm.

[172] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 361 (quoting *Freedom*, Sept. 1986, at 7).

[173] SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 4.

Un-American Activities Committee and numerous civil rights leaders.[174] The "New Left," which the Bureau could only define as "more or less an attitude," encompassed targets from the Students for a Democratic Society (SDS) to anyone involved in protesting the war in Vietnam.[175] This section provides a few examples of how these organizations were targeted.

1. Communist and Socialist Organizations

Throughout the 1940s and 1950s, COINTELPRO-type operations were directed almost exclusively at the Socialist Workers Party (SWP), the Communist Party USA (CPUSA), and groups believed to be affiliated with them.[176] As previously noted, groups identified as "communist" have been targeted by the government since the 1870s, and the FBI, or its predecessors, had been trying to crush the CPUSA since its emergence in 1919. The FBI's first formal COINTELPRO, initiated in 1956, was directed at the CPUSA, a lawfully constituted organization which had not been shown to have engaged in any criminal activity. The Bureau specifically instructed agents and infiltrators to generate "acrimonious debates," "increase factionalism," and generate "disillusionment and defection."[177] Apparently it was quite successful. Goldstein says: "Although the precise results of FBI efforts cannot be determined, between 1957 and 1959, what was left of the CP was virtually destroyed by factional infighting."[178]

Nonetheless, "[e]ven as the CP collapsed into a tiny sect of a few thousand members, FBI COINTELPRO activities increased and expanded"[179] to the point where by the mid-1960s the FBI was attempting to engineer the assassination of "key communist leaders" by creating a conflict between the CP and organized crime.[180] The FBI undertook 1,388 separate actions against the CPUSA between 1956 and 1971.[181]

In 1973, following public disclosure of COINTELPRO, the Socialist Workers Party and its youth organization, the Young So-

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[174] *Id.* at 4-5.

[175] *See id.* at 23-27; *see generally* CHURCHILL & VANDER WALL, COINTEL-PRO, *supra* note 141, at 165-230; WILLIAM C. SULLIVAN, THE BUREAU: MY THIRTY YEARS IN HOOVER'S FBI 147-61 (1979).

[176] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 37.

[177] CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 39.

[178] GOLDSTEIN, *supra* note 39, at 408.

[179] *Id.*

[180] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 44-46.

[181] CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 47.

cialist Alliance (YSA), sued the government for illegally subjecting them to infiltration, disruption, and harassment in violation of their constitutional rights. After fifteen years of litigation, the SWP and YSA were awarded $264,000 in damages.[182] The suit documented FBI surveillance that began in 1936 and included fifty-seven operations conducted by the FBI. These included poison-pen letters, malicious articles planted in the press, instances of harassment and victimization, covert attempts to get SWP members fired from their jobs, and efforts to disrupt collaboration between the SWP and civil rights and anti-Vietnam war groups.

Judge Griesa's opinion for the Southern District of New York notes that between 1943 and 1963 the FBI illegally engaged in 20,000 days of wiretaps, 12,000 days of listening "bugs," and 208 burglaries of office and homes, and that between 1960 and 1976 it employed about 300 member informants (constituting, at any given time, from two to eleven percent of the membership) and 1000 non-member informants.[183] Griesa concludes:

> Presumably the principal purpose of an FBI informant in a domestic security investigation would be to gather information about planned or actual espionage, violence, terrorism or other illegal activities designed to subvert the governmental structure of the United States. In the case of the SWP, however, there is no evidence that *any* FBI informant *ever* reported an instance of planned or actual espionage, violence, terrorism or efforts to subvert the governmental structure of the United States. Over the course of approximately 30 years, there is no indication that any informant ever observed any violation of federal law or gave information leading to a single arrest for any federal law violation. What the informant activity yielded by way of information was thousands of reports recording peaceful, lawful activity by the SWP and YSA.[184]

2. *The Civil Rights Movement*

By the early 1960s, J. Edgar Hoover began expanding COINTELPRO operations to the civil rights movement, adding Dr. Martin Luther King, Jr. to the Atlanta field office's pick-up list of persons who would be interned under the Detention Act in

[182] FBI ON TRIAL: THE VICTORY IN THE SOCIALIST WORKERS PARTY SUIT AGAINST GOVERNMENT SPYING 6-7 (Margaret Jayko ed., 1988).

[183] Socialist Workers Party v. Attorney General of the United States, 642 F. Supp. 1357, 1379-80 (S.D.N.Y. 1986).

[184] *Id.* at 1380 (emphasis added).

the event of a national emergency.[185] Despite the fact that the Atlanta office had submitted a thirty-seven-page report confirming that neither King nor the SCLC were under any kind of communist influence, Hoover rationalized the operation with the assertion that King associated with "known Communists."[186]

Shortly after King's "I Have a Dream" speech, William Sullivan, who was responsible for COINTELPRO nationally, stated in an internal FBI memorandum, "We must mark [King] . . . as the most dangerous Negro in the future of this Nation from the standpoint of communism, the Negro, and national security. . . ."[187] Acknowledging the FBI's intent to use illegal methods, he continued, "it may be unrealistic to limit [our actions against King] to legalistic proofs that would stand up in court or before Congressional Committees."[188] When the Bureau failed to convince King to commit suicide, it stepped up the campaign to discredit King and the SCLC, an effort that continued even after King's death.[189] Numerous other civil rights organizations such as the Student Nonviolent Coordinating Committee (SNCC), the Congress of Racial Equality (CORE), the Mississippi Democratic Freedom Party, and various church and student organizations were similarly targeted.[190]

3. *The Ku Klux Klan and "White Hate" Groups*

Prior to the murders of three young northern "freedom riders" in Mississippi in the summer of 1963, the FBI's investigation of "racial matters" focused not on the Ku Klux Klan or other white supremacist organizations, but on subverting civil rights groups and their relationships with predominantly white "new left" organizations. The Bureau routinely fed information to police departments enforcing the apartheid regime in the South, with full knowledge that the police often transmitted the information directly to the Klan and related organizations.[191] While the FBI

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[185] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 54.

[186] *Id.*; *see generally* DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING, JR. (1981).

[187] CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 96-97 (quoting a Memorandum from William C. Sullivan to Alan H. Belmont, *Communist Party, USA, Negro Question, IS-C*, Aug. 30, 1963).

[188] *Id.* at 97.

[189] *Id.* at 97-98.

[190] *Id.* at 170-71.

[191] *Id.* at 166-70. For an overview of this period in Mississippi history based on documents finally released to the public in 1998, see generally YASUHIRO KATAGIRI,

had informants in the Klan, it did not use the intelligence it gathered to prevent violence against civil rights workers.

According to Kenneth O'Reilly, the FBI had been aware of plans to attack two buses of freedom riders arriving in Alabama in the spring of 1961 for weeks, but simply looked on, doing nothing to intervene, when the first bus was destroyed and riders on the second were attacked with bats, chains, and lead pipes.[192] Indeed, the FBI had given the Birmingham police "details regarding the Freedom Riders' schedule, knowing full well that at least one law enforcement officer relayed everything to the Klan."[193]

An internal report indicates that the Bureau was aware that during the Freedom Summer of 1963 at least thirty-five SNCC workers were murdered and about 1000 arrested while engaging in constitutionally protected activities, primarily a joint SNCC-CORE voter registration drive intended to support the Mississippi Freedom Democratic Party.[194] Moreover, informants had told the FBI that a Mississippi Klan leader had told his followers, who included a significant number of law enforcement officers, to "catch [activists] outside the law, then under Mississippi law you can kill them."[195]

Nonetheless, the Bureau did not act on reports that civil rights activists James Cheney, Andrew Goodman, and Michael Schwerner—two of whom the FBI was monitoring as "subversives"—were missing until the Justice Department came under intense pressure as a result of widespread publicity about the disappearances.[196] Responding to the public outcry, President Lyndon Johnson himself began pressuring the Bureau to solve the case, and the FBI eventually sent 258 agents to Mississippi.[197] Even then, they found the bodies only after giving a Klan partici-

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THE MISSISSIPPI STATE SOVEREIGNTY COMMISSION: CIVIL RIGHTS AND STATES' RIGHTS (2001).

192 KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILES ON BLACK AMERICA, 1960-1972, at 84 (1989).

193 *Id.* at 86.

194 CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 168 (citing FBI monograph no. 1386, *Student Nonviolent Coordinating Committee* (FBI File No. 100-43190)).

195 *Id.* (quoting a report of the Atlanta field office which noted the comment had been made in early 1963).

196 *Id.* at 168-69.

197 *Id.*

pant $30,000 and immunity from prosecution.[198] Twelve of the participants in the murders went free and the remaining only served short sentences for conspiracy to violate civil rights, not for murder.[199] What is particularly interesting is the FBI's strategy afterwards. Their "sit by and watch" approach having been nationally exposed, they seem to have developed a strategy to control the Klan, but not necessarily to render it ineffective.[200]

4. *The "New Left" and the Antiwar Movement*

Between 1968 and 1971 "New Left" COINTELPROs targeted a wide range of primarily white activist organizations, from Students for a Democratic Society to the Institute for Policy Studies, the Peace and Freedom Party, and "a broad range of anti-war, anti-racist, student, GI, veteran, feminist, lesbian, gay, environmental, Marxist, and anarchist groups, as well as the network of food co-ops, health clinics, child care centers, schools, bookstores, newspapers, community centers, street theaters, rock groups, and communes that formed the infrastructure of the counter-culture."[201]

Given the government's long history of suppressing anti-war activists,[202] it is not surprising that opponents of the war in Vietnam were a primary target. A series of COINTELPRO operations were conducted with the aim of causing splits within anti-war organizations and among coalitions of such organizations.[203] College campuses, and even high schools, were a primary focus of FBI operations, with informants placed in classrooms and student organizations.[204] Their tactics included false media reports,

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198 *Id.* at 169.

199 *Id.*

200 Sullivan states that in 1964 he instructed the special agent in charge in Mississippi to merge separate Mississippi klans into one in order to "'control it and if necessary destroy it.'" SULLIVAN, *supra* note 175, at 129-30. By late 1965 the FBI "operated nearly 2,000 informants, 20 percent of overall Klan and other white hate group membership, including a grand dragon. . . ." O'REILLY, *supra* note 192, at 217. Nonetheless, from 1964-1970 Mississippi averaged 250 acts of White Hate violence per year. *Id.* at 223. During the period Sullivan claims FBI "control" of the Mississippi klan, the Mississippi Knights alone bombed a synagogue and burned twenty-six churches. WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 343 (1987).

201 GLICK, *supra* note 135, at 12.

202 *See supra* Parts II.B., III.

203 *See* BLACKSTOCK, *supra* note 135, at 111-36 (reproducing a series of FBI memoranda describing these operations).

204 *See generally* GLICK, *supra* note 135.

fabricated correspondence, the widespread use of informants and infiltrators, and "snitch-jacketing." Government agents also actively subverted the logistics, such as the housing, transportation, and meeting places of anti-war activities.[205]

5. "Black Nationalist" Organizations and the Black Panther Party

The FBI has, of course, a long history of suppressing the efforts of African Americans to obtain racial justice, from its destruction of Marcus Garvey's UNIA to the undermining of civil rights groups discussed above.[206] Not surprisingly, the most intense of its official COINTELPRO operations were directed at "Black Nationalist" groups, a classification which appeared to include any predominantly African American organization. According to a 1967 memorandum from J. Edgar Hoover, "The purpose of this new counterintelligence endeavor is to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalists, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder."[207]

One of the program's explicitly stated goals was to "prevent the *rise of a 'messiah'*" who could unify the movement for Black liberation. According to Hoover, "Malcolm X might have been such a 'messiah;' . . . Martin Luther King, Stokely Carmichael and Elijah Muhammed all aspire to this position."[208] Another primary goal was to "[p]revent militant black nationalist groups and leaders from gaining *respectability*. . . ."[209] Hoover instructed his agents:

> You must discredit these groups and individuals to, first, the responsible Negro community. Second, they must be discred-

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205 *Id.*

206 *See supra* Parts III, IV.C.2.

207 Memorandum of Aug. 25, 1967, *Counterintelligence Program; Black Nationalist-Hate Groups; Internal Security*, *reprinted in* CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 92. In the world of actual counterintelligence directed at foreign espionage, the sphere from which the Bureau was taking its tactics, to "neutralize" is not just to render ineffective but to eliminate. *See*, *e.g.*, *id.* at 102, 104 (reproducing FBI documents taking credit for the assassination of Malcolm X and proposing to provoke the murder of comedian Dick Gregory). On the origin of "counterintelligence" activity as directed at foreign espionage, see UNGER, *supra* note 80, at 96-118.

208 Airtel, *supra* note 157, at 108-11.

209 *Id.*

> ited to the white community, both the responsible community and to "liberals" who have vestiges of sympathy for militant black nationalist [sic] simply because they are Negroes. Third, these groups must be discredited in the eyes of Negro radicals, the followers of the movement.[210]

All predominantly Black activist organizations were targeted, from King's adamantly nonviolent SCLC to the Nation of Islam. However, by 1968 the Bureau had decided that the Black Panther Party (BPP) was most likely to serve as an effective catalyst for black liberation movements and declared the BPP to be "the greatest [single] threat to the internal security of the country."[211] Field offices were instructed to submit proposals for "imaginative and hard-hitting counterintelligence measures aimed at crippling the BPP."[212] The Bureau has acknowledged conducting 295 official COINTELPROs against Black activist organizations. Of these, 233 operations, most of which took place in 1969, directly targeted the Black Panther Party.[213] However, as Kenneth O'Reilly says, "It is impossible to say how many COINTELPRO actions the FBI implemented against the Panthers and other targets simply by counting the incidents listed in the COINTELPRO-Black Hate Group file. The Bureau recorded COINTELPRO-type actions in thousands of other files."[214] We do know that ultimately:

> [T]he assault left at least twenty-eight Panthers dead, scores of others imprisoned after dubious convictions, and hundreds more suffering permanent physical or psychological damage. The Party was simultaneously infiltrated at every level by agents provocateurs, all of them harnessed to the task of disrupting its internal functioning. Completing the package was a torrent of disinformation planted in the media to discredit the Panthers before the public, both personally and organizationally, thus isolating them from potential support.[215]

Ward Churchill concludes that "[a]lthough an entity bearing its name remained in Oakland, California, for another decade . . . the Black Panther Party in the sense that it was originally con-

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210 *Id.* at 110-11.

211 CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 123 (quoting the *New York Times*, Sept. 8, 1968, *reproduced in* SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 187).

212 SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 22.

213 Churchill, *To Disrupt*, *supra* note 139, at 82.

214 O'REILLY, *supra* note 192, at 291.

215 Churchill, *To Disrupt*, *supra* note 139, at 78 (citations omitted).

ceived was effectively destroyed by the end of 1971."[216] Among the other things destroyed by COINTELPRO were the BPP newspaper, schools, breakfast for children programs, sickle cell anemia and other health care programs, and programs for free clothing, shoes, housing, transportation to prisons and hospitals, and child care.[217] This further illustrates that it was not criminal activity but challenges to the status quo that were perceived as threats by the government.

6. The American Indian Movement

Soon after Hoover announced the termination of COINTELPRO in 1971, the FBI was launching a massive operation against American Indian organizations which moved from "counterintelligence" actions to the use of tactics which are probably more accurately described as "counterinsurgency warfare." Their primary target was the American Indian Movement (AIM), founded in Minneapolis in 1968. In many respects, AIM emulated the Black Panther Party with street patrols intended to counter police brutality by "policing the police" and the establishment of alternative schools and media, legal and health clinics, free food programs, and services to assist with housing and employment.[218] More threatening to the federal government, however, was AIM's emerging focus on reasserting American Indian sovereignty and its success in linking the poverty and despair of Indian communities directly to federal policies.[219]

AIM leaders organized the 1972 "Trail of Broken Treaties" march across the country to Washington, D.C., where they occupied the Bureau of Indian Affairs (BIA) office and obtained classified documents which showed, among other things, that American Indians were receiving only about ten percent of the market value of mineral and land leases—and even that money

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216 *Id.*

217 *See* Charles E. Jones & Judson L. Jeffries, *Don't Believe the Hype: Debunking the Panther Mythology*, *in* THE BLACK PANTHER PARTY RECONSIDERED 25, 30 (Charles E. Jones ed., 1998). Positions and perspectives articulated by the BPP are compiled in THE BLACK PANTHERS SPEAK (Philip S. Foner ed., 1970), and excellent collections of contemporary analyses can be found in LIBERATION, IMAGINATION AND THE BLACK PANTHER PARTY, *supra* note 139 and Jones & Jeffries, *supra*.

218 Ward Churchill, *Civil Rights, Red Power and the FBI: Rise and Repression of the American Indian Movement* (forthcoming) (copy on file with author) [hereinafter *Civil Rights*).

219 *See generally* REX WEYLER, BLOOD OF THE LAND: THE GOVERNMENT AND CORPORATE WAR AGAINST THE AMERICAN INDIAN MOVEMENT (1984).

was not accounted for—and uncovering a secret Indian Health Services program which had resulted in the sterilization of forty percent of American Indian women of childbearing age.[220]

Many of the subsequent FBI operations centered on the Pine Ridge Reservation, where federal agents had installed a tribal president who was willing to turn over a large, mineral-rich portion of the reservation to the government.[221] There, in 1973, the FBI led a paramilitary invasion against AIM activists gathered for a symbolic protest at Wounded Knee, the site of the 1890 massacre.[222] During their 71-day siege the government deployed over 100 FBI agents, nearly 300 federal marshals, 250 BIA police, Army warfare experts, and local vigilantes known as the GOONS (Guardians of the Oglala Nation).[223] In their attempt to remove the activists, government forces fired approximately 500,000 rounds of ammunition into the area.[224] The government followed up with the hundreds of bogus criminal charges intended to keep AIM leaders tied up in court and to deplete the organization's funds.[225]

From 1973 to 1976 the GOONS, often using arms supplied them by the FBI,[226] murdered at least sixty-nine AIM members and supporters on the Pine Ridge Reservation and assaulted another 340. The FBI, which exercised criminal jurisdiction on the reservation, was too "short of manpower" to investigate these murders.[227] In 1975 it was revealed that AIM's national security chief, Doug Durham, was an undercover FBI operative. Among other things, Durham had been AIM's liaison with the Wounded Knee legal defense team and had authored the AIM documents consistently cited by the FBI to demonstrate the group's alleged tendencies toward violence.[228]

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220 *Id. See also* Ward Churchill, *The Bloody Wake of Alcatraz: Political Repression of the American Indian Movement During the 1970s*, *in* AMERICAN INDIAN ACTIVISM: ALCATRAZ TO THE LONGEST WALK 242-84 (Troy Johnson et al., eds. 1997). The effort to force the government to account for at least $10 billion of "missing" Indian trust fund monies continues to this day. *See* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) (holding that the Interior Dept. had breached its fiduciary duty and must conduct an accurate accounting).

221 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 135-41.

222 *Id.* at 141-170.

223 *See* Churchill, *Civil Rights*, *supra* note 218; GLICK, *supra* note 135, at 22.

224 *See* Churchill, *Civil Rights*, *supra* note 218.

225 *See supra* text accompanying note 158. *See generally* SAYER, *supra* note 158.

226 *See* Churchill, *Civil Rights, supra* note 218.

227 *Id.*

228 *See* GLICK, *supra* note 135, at 22.

On June 23, 1975, the Church Committee announced that it would hold hearings on the FBI operations targeting the American Indian Movement. Three days later, two FBI agents were killed in a firefight on Pine Ridge,[229] triggering, in the words of the Chair of the U.S. Civil Rights Commission, "a full-scale military-type invasion of the reservation"[230] and allowing the Church Committee to "postpone" the hearings indefinitely.

D. Assessing COINTELPRO: Is It Over?

Even the Church Committee's carefully worded Final Report acknowledged:

> [I]n the course of COINTELPRO's fifteen-year history, a number of individual actions may have violated specific criminal statutes; a number of individual actions involved risk of serious bodily injury or death to the targets . . . ; and a number of actions, while not illegal or dangerous, can only be described as "abhorrent in a free society."[231]

Given the massive documentation of illegal and unconstitutional activities conducted by the United States' highest law enforcement agency against its own citizens, the paucity of legal analysis of these activities is quite stunning.[232] There is a tendency to dismiss the COINTELPRO era as "an awkward period in the history of the FBI"[233] rather than recognizing, as the Church Committee did, that it was, in fact, a *war* against social and political dissent in the United States.[234]

By 1989, a federal district court was already discounting COINTELPRO activities as "[r]elatively ancient governmental

229 Bob Robideaux, Dino Butler and Leonard Peltier were charged with the agents' deaths. (No one has ever been charged with the death of AIM activist Joe Killsright Stuntz). After a jury acquitted Butler and Robideaux, Peltier was extradited from Canada on the basis of perjured affidavits, his case transferred to a judge more sympathetic to the government, and he was convicted on the basis of perjured testimony and falsified evidence. *See* AMNESTY INTERNATIONAL, PROPOSAL FOR A COMMISSION OF INQUIRY INTO THE EFFECT OF DOMESTIC INTELLIGENCE ACTIVITIES ON CRIMINAL TRIALS IN THE UNITED STATES OF AMERICA 41-46 (1981); *see generally* MESSERSCHMIDT, *supra* note 162; MATTHIESSEN, *supra* note 137.

230 BRUCE JOHANSEN & ROBERTO MAESTAS, WASI'CHU: THE CONTINUING INDIAN WARS 95-96 (1979).

231 SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 7-8.

232 A September 2002 Westlaw search of law review articles written since 1975 referencing "COINTELPRO" yielded seventy-two articles. The vast majority mentioned it only in passing; a few discussed COINTELPROs against particular organizations; and none discussed the overall phenomenon in any detail.

233 Campbell v. Dep't of Justice, 164 F.3d 20, 26 (D.C. Cir. 1998).

234 *See supra* text accompanying note 134.

misconduct" irrelevant to indictments being brought against white activists in the "Resistance Conspiracy" case.[235] Can we safely relegate this era to history, perhaps acknowledging that, as Senator Church put it, it was "one of the sordid episodes in the history of American law enforcement,"[236] but accepting it as an aberration generated by the FBI's zeal for protecting the national security? There are a number of reasons why such an approach, while perhaps comforting to some, is not warranted.

First, we must look at the "excesses" of the COINTELPRO era in light of the earlier history of the FBI and its predecessor organizations. While the earlier efforts to suppress political dissent were not nearly as well funded or efficiently organized, this country has a consistent history of using its police powers—federal, state, local and private—not to enforce the law and uphold the Constitution, but to crush what are perceived as threats to the status quo. The purposes of COINTELPRO, as articulated by the Church Committee, illustrate that it was the logical extension of this history:

> Protecting national security and preventing violence are the purposes advanced by the Bureau for COINTELPRO. There is another purpose for COINTELPRO which is not explicit but which offers the only explanation for those actions which had no conceivable rational relationship to either national security or violent activity. The unexpressed major premise . . . is that the Bureau has a role in maintaining the existing social order, and that its efforts should be aimed toward combating those who threaten that order.[237]

Second, we must remember that information about COINTELPRO was only made available to the American public because a group of citizens burglarized the FBI's Media, Pennsylvania office and stole files which were subsequently published in the press—an activity that would today probably be classified

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[235] United States v. Whitehorn, 710 F. Supp. 803, 813 (D.D.C. 1989), *rev'd on other grounds sub. nom.* United States v. Rosenberg, 888 F.2d 1406 (D.C. Cir. 1989). For a description of this case, known as the "Resistance Conspiracy," see CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 312-15. Three of the activists convicted for an alleged conspiracy to bomb government buildings, Laura Whitehorn, Linda Evans and Susan Rosenberg, were granted clemency by President Clinton in January 2001 and released after spending fifteen to twenty years in prison. Amy Goldstein & Susan Schmidt, *Clinton's Last-Day Clemency Benefits 176*, WASH. POST, Jan. 21, 2001, at A1.

[236] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 62.

[237] SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 6-7.

as "domestic terrorism" under the 2001 Act[238]—and because the Watergate scandal, not the crushing of the political movements in question, spurred the Senate to convene the Church Committee hearings.[239] Almost all of the additional documentation of COINTELPRO abuses has been obtained by piecing together censored files released under the Freedom of Information Act,[240] an avenue dramatically curtailed by Attorney General Ashcroft in October 2001.[241] There is no reliable way for the American public to know what programs are continuing or may be instituted in the future.

Third, what we do know about the FBI's activities from 1956 to 1976, generally believed to be the height of COINTELPRO-type operations, is far from complete. The Church Committee's findings are based on the depositions of select Bureau agents and targets, and the review of only about 20,000 of the millions of pages of documents generated by the Bureau.[242] It could not, of course, review files that were withheld or destroyed or operations that were not documented.[243] More significantly, the Church Committee "temporarily" suspended its investigation before reaching scheduled hearings on some of the FBI's most intense operations, notably those targeting the American Indian Movement and the movements for Puerto Rican independence, just as the repression of these groups was reaching its zenith.[244]

238 *See infra* text accompanying notes 345-47.

239 Noam Chomsky, *Introduction* to BLACKSTOCK, *supra* note 135.

240 *See generally* CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141. There are significant limitations on what the government is obliged to disclose under FOIA, but it is worth noting in addition that the D.C. Circuit has said that documents can be exempted from disclosure as investigatory records even if they were unlawfully obtained. Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982).

241 *See* John Ashcroft, Memorandum for Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/04foia/011012.htm; *see also* Steven L. Hensen, *The President's Papers Are the People's Business*, WASH. POST, Dec. 16, 2001, at B1.

242 SENATE SELECT COMM., FINAL REPORT, *supra* note 129.

243 The FBI withheld information from Congress about its involvement in the 1969 assassinations of Fred Hampton and Mark Clark, and its failure to disclose exculpatory evidence in the murder trials of Black Panther leaders Geronimo Pratt and Dhoruba bin Wahad (Richard Moore). CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 303. Both Pratt and bin Wahad have since been released—after being incarcerated for twenty-seven and nineteen years, respectively—on the basis of evidence that they were framed. *See supra* text accompanying notes 161, 164.

244 CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 119-34, 366-70; *see also supra* Part IV.C.5-6.

Twenty-six years later the hearings have not been resumed.[245]

Fourth, what has been done about the abuses that were exposed? One of the fundamental principles of American law, and of the rule of law more generally, is that there is a remedy for legally acknowledged wrongs. Despite the thousands of instances of illegal conduct on the part of the government that were documented by both Senate and House committees, no changes were made in the law and no government official has spent a day in jail as a result.[246] A handful of victims or their surviving families have managed to obtain civil judgments or settlements for damages, but these cases are by far the exception.[247]

No one disputes that governmental agencies at the highest level engaged in long-term, systematic and deliberate violation of the laws and the Constitution. Yet the legislature which enacts the laws, the executive which is charged by the Constitution with "faithfully Executing the laws," and the judiciary whose responsibility it is to see that the laws are enforced have all looked the other way and, by doing so, have implicitly sanctioned this undermining of the rule of law. All of this confirms the accuracy of FBI Director Kelley's testimony to the Church Committee that "the FBI employees involved in these programs did what they felt was expected of them by the President, the Attorney Gen-

245 In the summer of 2001, Congresswoman Cynthia McKinney (D-Ga.) had begun introducing legislation to reopen investigations into COINTELPRO and related governmental misconduct, but the events of September 11 ensured that the legislation would not be considered (draft legislation on file with author).

246 The only two officials convicted of COINTELPRO-related wrongdoing were pardoned by President Reagan before they had even exhausted their appeals. *See infra* text accompanying note 273.

247 Individual damages were recovered by Fred Hampton's family and by Geronimo Pratt and Dhoruba bin Wahad, *see supra* text accompanying notes 161, 164. The SWP recovered nominal damages on behalf of the organization, *see supra* text accompanying note 182. In *Hobson v. Brennan*, 646 F. Supp. 884 (D.D.C. 1986), the court awarded $29,000 in compensatory damages and allowed punitive damages for persons targeted by anti-war and civil rights COINTELPROs.

But more commonly suits have been unsuccessful. *See* Smith v. Black Panther Party, 458 U.S. 1118 (1982) (mem. opin. dismissing BPP complaint); Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) (holding that claim by residents of Pine Ridge Reservation for unlawful seizure and confinement by military and federal officials was insufficient to state cause of action); Obadele v. Kelley, 1988 WL 40282, at *4, *16 (D.D.C. Apr. 26, 1988) (dismissing claims brought by Republic of New Afrika for being time-barred, lacking jurisdiction, failing to state a claim, and/or being related to a criminal conviction); United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980) (suit for damages for COINTELPRO operations barred by statute of limitations).

eral, the Congress, and the people of the United States."[248]

Fifth, despite the barriers to public access to such information, there is on-going evidence that COINTELPRO-type operations continue. On April 27, 1971, in response to the release of classified information obtained in a break-in of the Media, Pennsylvania, FBI office, Hoover officially terminated all COINTELPROs for "security reasons."[249] The FBI "termination" memo provided, however, that "[i]n exceptional circumstances where it is considered counter-intelligence action is warranted, recommendations should be submitted to the Bureau under the individual case caption to which it pertains."[250]

Despite the Bureau's initial contention that there was no post-1971 COINTELPRO activity, the Church Committee documented several post-1971 COINTELPRO-type operations,[251] and noted that it had not been able to determine with any greater precision the extent to which COINTELPRO may be continuing, because any proposals to initiate COINTELPRO-type action would be filed under the individual case caption. The Bureau by then had over 500,000 case files, and each one would have to be searched.[252] In fact, the number of illegal bugs and wiretaps utilized by the Bureau in the three years after 1971 increased significantly.[253]

In the meantime, evidence of on-going operations continues to surface. During the 1980s the FBI and CIA used classic COINTELPRO tactics against organizations opposed to U.S. policy in Latin America. Operating under classified "Foreign Intelligence/Terrorism" guidelines promulgated by the Reagan administration,[254] the government targeted the nonviolent Committee In Solidarity with the People of El Salvador

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[248] SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 14.

[249] *Id.* at 3 n.1.

[250] *Id.* at 13. *See also* Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm'n, 678 F.2d 416 (2d Cir. 1982) (holding that the CPUSA did not have to disclose contributors' names as that would have a chilling effect on them). The court noted that even though the CPUSA COINTELPRO was terminated in 1971, "the record in this case includes an affidavit by the Assistant Director of the Intelligence Division of the FBI stating that the Communist Party of the United States remains under active investigation by the FBI." *Id.* at 423.

[251] SENATE SELECT COMM., FINAL REPORT, *supra* note 129, at 13-14, noting three operations it had uncovered and the subsequent disclosure of five additional ones.

[252] *Id.* at 13.

[253] CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 304.

[254] FBI ON TRIAL, *supra* note 182, at 15.

(CISPES) and groups involved in the "Sanctuary" movement.[255] When their own field reports consistently confirmed that the activities of CISPES and other Latin America solidarity organizations were "legitimate" and "respectable," the FBI took the position that CISPES's overt activities were "designed to cover a sinister *covert* program of which most CISPES members were unaware," and that it must be a "front group" for more dangerous organizations.[256] Using this rationale, the FBI extended its operations to encompass hundreds of other groups, including Amnesty International, Clergy and Laity Concerned, the U.S. Catholic Conference and the Maryknoll Sisters, utilizing its standard tactics of infiltrators and agents provocateur, disinformation, black bag jobs, telephone monitoring, and conspicuous surveillance designed to induce paranoia.[257] Ultimately, in this context

> the FBI gathered information on the political activities of approximately 2,375 individuals and 1,330 organizations, and initiated 178 related investigations that appear to have been based on political ideology rather than on suspicion of criminal activity. Yet this massive government intrusion into the lives of thousands of lawful political activists failed to yield a single criminal charge, let alone a criminal conviction.[258]

Using the rubric of "counter-terrorism" rather than "anti-communism," the FBI has continued to conduct numerous operations against anti-war and anti-nuclear groups such as the pacifist organization Silo Plowshares;[259] environmental activists such as Earth First!;[260] supporters of the Puerto Rican independence movement, including the coordinator of the National Lawyers Guild's anti-repression task force;[261] and perhaps black elected

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[255] On the repression of the Sanctuary movement, see generally Michael McConnell & Renny Golden, *The Sanctuary Movement*, *in* FREEDOM AT RISK, *supra* note 58, at 301-14.

[256] CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 373-74.

[257] CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 306; CHURCHILL & VANDER WALL, AGENTS, *supra* note 79, at 370-76.

[258] CHANG, *supra* note 25, at 36; *see also* Don Edwards, *Reordering the Priorities of the FBI in Light of the End of the Cold War*, 65 ST. JOHN'S L. REV. 59 (1991).

[259] CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at 307.

[260] Brian Glick, *Preface* to *The Face of COINTELPRO*, *in* CHURCHILL & VANDER WALL, COINTELPRO *supra* note 141, at xiv (noting that Earth First! leaders were convicted on the basis of the testimony of an FBI infiltrator) [hereinafter Glick, *Preface*].

[261] *Id.* at xv.

officials in general.[262] As Brian Glick states:

> The targets [of ongoing domestic covert action] . . . include virtually all who fight for peace and social justice in the United States—from AIM, Puerto Rican *independentistas* and the Coalition for a New South, to environmentalists, pacifists, trade unionists, homeless and seniors, feminists, gay and lesbian activists, radical clergy and teachers, publishers of dissident literature, prison reformers, progressive attorneys, civil rights and anti-poverty workers, and on and on.[263]

Finally, the best evidence that COINTELPRO-type operations, and the more general repression of political dissent that they represent, cannot be relegated to history may be the consistent efforts of the executive branch to roll back the minimal reforms mandated by Congress in the wake of the Church Committee investigations, to further shield their activities from public scrutiny, and to legalize many of the tactics routinely employed by the FBI in its efforts to suppress dissent, before, during and after the COINTELPRO era.[264] These efforts are discussed in Part V.

V

"Antiterrorist" Legislation and Governmental Policy, 1975-1996

> The American people need to be assured that never again will an agency of the government be permitted to conduct a secret war against those citizens it considers threats to the established order. Only a combination of legislative prohibition and Departmental control can guarantee that COINTELPRO will not happen again.
>
> —Church Committee, Final Report[265]

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262 *See generally* Bernard P. Haggerty, *"Fruhmenschen": German for COINTELPRO*, 1 How. Scroll 36, 38 (1993) (detailing campaigns of harassment of black elected officials).

263 Glick, *Preface, supra* note 260, at xiv.

264 For a summary of how COINTELPRO-type activities have been incorporated into "routine" law enforcement practice, and an analysis which extends to the more recent FBI operations in Ruby Ridge, Tennessee and Waco, Texas, see Ward Churchill, *Preface to the Second Edition, in* Churchill & Vander Wall, COINTELPRO, *supra* note 141 at xxiii-lxxxviii. *See also* Tony Poveda, Lawlessness and Reform: The FBI in Transition 167-82 (1990) (concluding that the "new," i.e., post-Hoover, FBI is less autonomous but potentially more dangerous because its priorities are more aligned with those of the incumbent administration, and it has vastly increased technological capacities).

265 Senate Select Comm., Final Report, *supra* note 129, at 77.

Despite the Church Committee's conclusion that dozens of governmental law enforcement and intelligence agencies had engaged in massive abuses of the constitutional rights of U.S. citizens and residents, very little happened as a result. The hearings were suspended in mid-stream and never reopened, no individuals were sent to prison on criminal charges, no laws were passed proscribing such activities, and no provision was made to rectify on-going wrongs or to compensate the victims. The Carter administration imposed some very limited internal constraints on "domestic security" investigations but, as we will see, even these were soon rolled back.

As a result of the Church Committee's findings, as well as investigations by a select committee in the House of Representatives and a General Accounting Office review of FBI domestic intelligence policies requested by the House Judiciary Committee,[266] the Department of Justice issued its first set of public guidelines for FBI domestic security investigations in 1976. Known as the "Levi guidelines," after then-Attorney General Edward Levi, they prohibited investigations or operations designed to disrupt organizations based solely on unpopular speech.[267] They also limited the basis on which investigations would be authorized.

Under the Levi guidelines, the FBI could initiate a "preliminary" investigation on the basis of any allegation or information that a group or individual "may be engaged in [unlawful] activities" which "involve or will involve the use of force or violence." These were authorized to determine whether the factual basis existed for launching a "full" investigation, and the Bureau was to be limited to public, law enforcement, or pre-existing sources of information. More intrusive "limited" investigations, including physical surveillance and personal interviews were authorized if the preliminary investigation proved inadequate to determine whether a full investigation was warranted. "Full" investigations were authorized on the—still very broad—basis of "specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in [unlawful] activities which involve the use of force or violence."[268] Reportedly, the number of do-

266 Stone, *supra* note 82, at 275.

267 William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 69 (2000).

268 Stone, *supra* note 82, at 276.

mestic security investigations being conducted by the FBI dropped from 4868 in March 1976 to 26 in December 1981.[269]

Even this requirement of a very tentative connection to criminal activity was resisted. Senator Denton, chair of the Senate Judiciary Committee's Subcommittee on Security and Terrorism, insisted that "the support groups that produce propaganda, disinformation, or 'legal assistance' may be even more dangerous than those who actually throw the bombs."[270] Another member of the subcommittee, Senator East, said that the "conduct of subversion itself consists in large measure in the utilization of legal activities to undermine . . . legally established institutions."[271]

The scant protection provided by the Levi guidelines did not last long. In 1981, President Ronald Reagan issued Executive Order (EO) 12333 reauthorizing many of the techniques prohibited by the guidelines. In 1983, Reagan issued EO 12345 which claimed to give the Bureau and other intelligence agencies "legal authority" to withhold information about their use of counterintelligence methods.[272] In the meantime, he pardoned W. Mark Felt and Edward S. Miller, the only FBI officials ever convicted on COINTELPRO-related charges, before they spent a day in jail or even had to bother appealing their sentences.[273]

By 1982, FBI Director William Webster had declared that the Levi guidelines were "no longer adequate to guide us in dealing with the kinds of terrorist groups that we are confronted with today,"[274] and they were replaced in 1983 by Attorney General William French Smith. The new "Smith guidelines" eliminated the "preliminary" and "limited" stages altogether and removed the "specific and articulable facts" requirement from full investigations. The new standard authorized investigations whenever "facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence."[275] The Smith guidelines extended the

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269 *Id.* at 277.

270 *Id.* (citing *Hearings Before the Subcomm. on Security and Terrorism of the Comm. of the Judiciary of the United States Senate on The Domestic Security Investigation Guidelines*, 97th Cong., 2d Sess. 4 (1982)) [hereinafter *Hearings*].

271 *Id.* (citing *Hearings*, *supra* note 270 at 35-41).

272 Churchill & Vander Wall, COINTELPRO, *supra* note 141, at xlviii.

273 *Id.* at il.

274 Stone, *supra* note 82, at 278.

275 *Id.* at 278-79.

"enterprise concept" from investigations of organized crime to groups that do not engage in criminal activity but are believed to "knowingly support" the criminal objectives of other groups and allowed the Bureau to continue to monitor groups that were inactive.

In 1969, the Supreme Court had restricted *Schenck* and *Dennis*, the cases upholding convictions under the Smith Act,[276] by stating in *Brandenburg v. Ohio* that the First Amendment did not allow the government 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."[277] However, the Smith guidelines turned this standard upside down by declaring that investigations of groups that advocated criminal activity were warranted "unless it is apparent . . . that there is no prospect of harm."[278] According to Attorney General Smith, the targets' constitutional rights were protected by the guidelines' caveat that investigations could not be "based *solely* on activities protected by the First Amendment."[279]

Further illustration of the fact that the measures of the COINTELPRO era were not aberrational but part of a more general effort to suppress political dissent can be seen in the implementation of the 1984 Bail Reform Act,[280] which dramatically expanded the use of preventive detention. While purportedly designed to keep "drug kingpins, violent offenders and other obvious threats to the community" incarcerated while awaiting trial, it "provid[ed] the FBI with a weapon far superior to the strategy of pretext arrests" in detaining political targets such as the Puerto Rican *independentistas*, Resistance Conspiracy defendants, and IRA asylum seekers.[281]

In the meantime, Congress had passed the Foreign Intelligence Surveillance Act (FISA) in 1978,[282] which established a secret

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276 *See supra* text accompanying notes 117-19.

277 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

278 Stone, *supra* note 82, at 279.

279 *Id.* at 281 (emphasis added). The Seventh Circuit Court of Appeals, in an opinion written by Judge Richard Posner, affirmed this interpretation, declaring in *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1015-17 (7th Cir. 1984), that *Brandenburg* applied only to criminal punishment and not to investigations. For a critique of this opinion, see Stone, *supra* note 82, at 283-86.

280 Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150, 3156.

281 Churchill & Vander Wall, Cointelpro, *supra* note 141, at il.

282 Foreign Intelligence Surveillance Act, Pub. L. No. 95-511; 92 Stat. 1783 (1978)

Foreign Intelligence Surveillance Court (FISC) composed of seven federal appellate court judges serving rotating terms whose purpose was to review warrants for surveillance in cases targeting a "foreign power" or the "agent of a foreign power." FISA significantly reduced the showing required for warrants, initially for surveillance and later for physical searches as well.[283] The safeguard was presumably that these warrants were to be issued only in cases primarily involving foreign intelligence, and subject to the limitation that no U.S. person, meaning a citizen or permanent resident, could be targeted "solely on the basis of activities protected by the First Amendment."[284] Despite the passage of this Act, the executive branch has consistently maintained that, as a constitutional matter, the President does not need congressional or judicial approval to engage in warrantless searches.[285]

Following the 1993 bombing of the World Trade Center, the Clinton administration considered a proposal to rewrite the Smith guidelines to permit the FBI to infiltrate domestic groups without any evidence that the targeted organization was planning to commit criminal acts.[286] Instead, in 1995 FBI Director Louis Freeh and Deputy Attorney General Jamie Gorelick told the House Judiciary Committee Subcommittee on Crime that the administration had decided to "reinterpret" the guidelines to allow wide-ranging investigations of "domestic terrorism" groups if they "advocated violence or force with respect to achieving any political or social objectives." Instead of requiring a finding of an "imminent violation" of law, an investigation would be authorized if the Bureau "detected any potential conduct" that "might violate federal law,"[287] clearly disregarding the Smith guidelines' requirement that the government at least take into consideration the magnitude of the threat, its likelihood and immediacy, and

(codified as amended at 50 U.S.C. §§ 1801-1811 (1994 & Supp. IV 1998)), *amended by* Act of Dec. 3, 1999, Pub. L. No. 106-120, 113 Stat. 1606 (1999).

[283] *See* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793 (1989) (describing history and early use of FISA); Daniel J. Malooly, *Physical Searches Under FISA: A Constitutional Analysis*, 35 AM. CRIM. L. REV. 411, 421-23 (1998) (suggesting changes which would help protect Fourth Amendment rights in FISA searches).

[284] 50 U.S.C. § 1805 (a)(3)(A).

[285] Banks & Bowman, *supra* note 267, at 19-31, 49-66, 90-92.

[286] *Id.* at 107.

[287] *Id.* at 107-08.

the danger to individual freedoms posed by the investigation.[288]

The past decade has seen a dramatic increase in the legalization of many of the tactics used by the FBI and other intelligence agencies during the COINTELPRO era. In 1994, Congress passed the Omnibus Crime Bill[289] which gave the FBI an additional $25 million per year for its "counterterrorism" budget and another $25 million per year for training state and local SWAT teams, created an Economic Terrorism Task Force and authorized the death penalty for numerous new categories of "terrorist activity."[290] Even though the FBI had reported only two incidents of international terrorism in the United States between 1984 and 1996, Congress nonetheless passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) whose "sweeping provisions served to license almost the full range of repressive techniques which had been quietly continued after COINTELPRO was supposedly terminated."[291] The Act defines "national security" as encompassing "the national defense, foreign relations, or economic interests of the United States" and gives the secretary of state broad authority to designate groups as "engaging in terrorist activity" if they threaten "the security of United States nationals or the national security of the United States."[292] Groups so designated can seek judicial review, but the government can prevent them from seeing the evidence by presenting it to the judge *in camera*, and the judge is to review the decision under the highly deferential "arbitrary and capricious" standard of the Administrative Procedure Act.[293]

Under the 1996 Act, it is a felony to provide any form of material support to designated organizations even if the support goes

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288 *Id.* at 108.

289 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994) (amending Omnibus Crime Control and Safe Streets Act of 1968).

290 CHURCHILL & VANDER WALL, COINTELPRO, *supra* note 141, at l (citing 18 U.S.C. § 2339B (1994)).

291 *Id.* at li. *See also* David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247 (1996) (noting the dangers of the anti-terrorism bills which were subsequently enacted as AEDPA); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825 (2001) (noting the discriminatory application of AEDPA).

292 DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 119 (2d ed. 2002).

293 Banks & Bowman, *supra* note 267, at 109.

directly to an entirely lawful activity of the group.[294] Noncitizens can be deported on the basis of secret evidence for belonging to organizations deemed "terrorist," without any showing of personal involvement in terrorist or criminal activity; in other words, for engaging in what would otherwise be associations protected by the First Amendment.[295] According to David Cole and James Dempsey, AEDPA was:

> [O]ne of the worst assaults on the Constitution in decades. It resurrected guilt by association as a principle of criminal and immigration law. It created a special court to use secret evidence to deport foreigners labeled as "terrorists." It made support for the peaceful humanitarian and political activities of selected foreign groups a crime. And it repealed a short-lived law forbidding the FBI from investigating First Amendment activities, opening the door once again to politically focused FBI investigations.[296]

Again, we see the national security being invoked to enact laws and permit executive actions which target individuals and organizations engaged in activities which may challenge the status quo, but are otherwise lawful and constitutionally protected. Although much of the congressional debate surrounding this bill focused on the 1993 World Trade Center bombing and the 1995 bombing of the federal building in Oklahoma City,[297] the measures requested by the Clinton administration were not a response to new developments in terrorism, but changes that had long been on the executive branch's "wish list."

For instance, the first Bush administration's proposals to allow secret evidence in deportation hearings had been twice rejected by Congress. The Immigration and Naturalization Service (INS), undeterred by lack of congressional approval and even by numerous federal court decisions rejecting the practice, continued to deport people on the basis of secret evidence.[298]

In 1984, the Reagan administration had tried unsuccessfully to get Congress to criminalize "support" for terrorism and the first Bush administration also made similar proposals. Ten years

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[294] COLE & DEMPSEY, *supra* note 292, at 121-23.

[295] Banks & Bowman, *supra* note 267, at 110. At the same time, Congress passed the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), which made it easier to deport immigrants for their political associations and for minor violations of criminal laws. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[296] COLE & DEMPSEY, *supra* note 292, at 2-3.

[297] *Id.* at 108.

[298] *Id.* at 109.

later, the Clinton administration succeeded by including a narrower version of the ban in the Omnibus Crime Bill, but it was accompanied by the Edwards amendment precluding investigations based solely on First Amendment-protected activities.[299]

Just as the Oklahoma City and 1993 World Trade Center bombings served as the catalyst to obtain changes in the law that the executive branch had long wanted, the September 11 attacks on the World Trade Center and the Pentagon were seized upon as the opportunity to pass even more restrictive legislation. As illustrated by the speed with which Attorney General John Ashcroft introduced the enormous package of far-reaching changes that constitute the USA PATRIOT Act, these were not carefully considered responses to a new political development but the utilization of a prime opportunity to roll out the next phase of the government's wish list of repressive measures. Some of the "highlights" of the 2001 Act are considered in the following Part VI.

VI
THE "USA PATRIOT" ACT OF 2001

> [W]e have witnessed the Bush administration amass enormous new powers in the months since September 11. And we have witnessed the administration, in an effort to maintain a free hand in the exercise of its new powers, employ strategies that are calculated to silence dissent. First, it has questioned the patriotism of those who oppose its policies, thereby fostering a climate of intolerance of dissent. Second, it has sought to discourage political activism by imposing guilt by association. Third, it has restricted access to government information, which has stymied the press, the public, and even Congress in their efforts to hold the executive accountable for its actions.
>
> —Nancy Chang, Silencing Political Dissent[300]

A. The Flurry of Post-September 11 Activity

The Bush administration has been extraordinarily busy since September 11. President Bush immediately declared war on terrorism,[301] sent enough bombs and troops to Afghanistan to force

[299] *Id.* at 108-09.

[300] CHANG, *supra* note 25, at 92-93.

[301] For alternative explanations of the attacks and subsequent U.S. actions see generally Ward Churchill, *Acts of Rebellion: Notes on the Interaction of History and Justice*, *in* ACTS OF REBELLION: A WARD CHURCHILL READER xi-xx (2003);

its government from power,[302] and is currently threatening an invasion of Iraq.[303] The U.S. military has brought several hundred captured "combatants" to Guantanamo Naval Base in Cuba, where they have been held in outdoor cages and interrogated, much to the consternation of international human rights organizations.[304]

President Bush has issued a Military Order authorizing the creation of military tribunals to prosecute a very broad range of noncitizens suspected of terrorism and sentence them to death.[305] U.S. citizens thought to be involved in terrorist plots have been removed from the criminal justice system and are being held by military authorities.[306] Attorney General John Ashcroft has re-

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EQBAL AHMAD, TERRORISM: THEIRS AND OURS (2001); NOAM CHOMSKY, 9-11 (2001); GORE VIDAL, PERPETUAL WAR FOR PERPETUAL PEACE (2002); HOWARD ZINN, TERRORISM AND WAR (2002).

302 *See* Babak Behnam, *Kabul Topples with Barely a Push: Marching into the Afghan Capital*, MSNBC NEWS (Nov. 13, 2001), *available at* http://www.msnbc.com/news/656949.asp. Although none of the hijackers were Afghanis, the U.S. government says it attacked Afghanistan because its fundamentalist Taliban government was "harboring" Osama bin Laden and al Qaeda training camps.

303 *See* Mike Allen & Juliet Eilperin, *Bush Aides: No Iraq War Vote Needed*, WASH. POST, Aug. 26, 2002, at A1; Kenneth T. Walsh et al., *Another Step Closer to War*, U.S. NEWS & WORLD REP., Oct. 21, 2002, at 30.

304 *See* Amnesty International, United States of America: Memorandum to the U.S. Government on the rights of people in U.S. custody in Afghanistan and Guantanamo Bay, Apr. 15, 2002, AI-index: AMR 51/053/2002, *available at* http://web.amnesty.org/ai.nsf/recent/AMR510532002; Human Rights Watch, U.S.: Growing Problem of Guantanamo Detainees, May 30, 2002, *available at* www.hwr.org/press/2002/05/guantanamo.htm; International Committee of the Red Cross, The ICRC in Guantanamo Bay, Nov. 20, 2002, *available at* http://www.icrc.org.

305 Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831-36 (2002). The Order applies to any noncitizen the president "has reason to believe" is or was a member of al Qaeda, someone involved in "acts of international terrorism," broadly defined, or someone who "knowingly harbored" someone in either of these categories. In addition to identifying those to be tried by the military tribunals, the president has the power to create the rules for the tribunals and change them at will, appoint judges, prosecutors and defense lawyers, decide the sentence and all appeals, and conduct the entire process in secret. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that the Order establishing military tribunals is "flatly unconstitutional"); *see generally* BARBARA OLSHANSKY, SECRET TRIALS AND EXECUTIONS; MILITARY TRIBUNALS AND THE THREAT TO DEMOCRACY (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

306 Laurence H. Tribe, Editorial, *Citizens, Combatants and the Constitution*, N.Y. TIMES, June 16, 2002, at D13 ("Secretary of Defense Donald Rumsfeld's assertion that the United States is holding Mr. Padilla because it is 'interested in finding out what he knows' is not legally persuasive"); *see also Military Tribunal Won't Try Padilla, Justice Dept. Says*, WASH. POST, June 14, 2002, at A10 (reporting Justice De-

cently stated that the government is considering plans to reinstitute "detention centers" for U.S. citizens deemed threats to the national security.[307]

Since September 11, 2001, the Department of Justice has arrested approximately 2000 immigrants and held them indefinitely without charge, often preventing them from contacting family, friends or lawyers, and refusing to release information about who or even how many people are being held.[308] In the fall of 2001, the Justice Department identified 5000 noncitizens based on their age, gender, and country of origin, and "invited" them to submit to interviews with the INS and the FBI, subsequently acknowledging its intent to expedite removal proceedings if the interviews revealed any immigration violations.[309] A new National Security Entry-Exit Registration System has been implemented for nationals of certain countries, requiring them to be registered and fingerprinted, and to periodically report where they are living, what they are doing and when they leave the country.[310] Ashcroft has also announced that the Department of Justice will monitor conversations between attorneys and clients in custody.[311]

The executive branch has simply assumed the authority to en-

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partment claim that the United States can hold Padilla until the war against terrorism is over); Jess Bravin, *White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens*, WALL. ST. J., Aug. 8, 2002, at A4.

307 *See* Jonathan Turley, *Camps for Citizens: Ashcroft's Hellish Vision; Attorney General Shows Himself as a Menace to Liberty*, L.A. TIMES, Aug. 14, 2002, at B11.

308 *See* CHANG, *supra* note 25, at 67-87; Amnesty International, Amnesty International's Concerns Regarding Post September 11 Detentions in the USA (Mar. 14, 2002), *available at* http://web.amnesty.org/ai.nsf/Index/AMR510442002?OpenDocument&of=COUNTRIES\USA; *see generally* Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1 (2002).

309 *See* OLSHANSKY, *supra* note 305, at 8 (citing Statement of John Bell, Special Agent in Charge of the Detroit FBI office, *in* Associated Press, *Federal Plans Concern Arab Leaders*, Nov. 16, 2001).

310 Press Release, Department of Justice, Attorney General Ashcroft Announced Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm.

311 *See* Special Administrative Measure for the Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062 (Oct. 31, 2001) (amending 28 C.F.R. s501.3(d)); CHANG, *supra* note 25, at 90-91. *See also* Avidan Y. Cover, Note, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233 (2002) (analyzing criticisms of the government's interception of attorney-client communications).

gage in these actions.[312] In addition, it has convinced Congress to fund these activities and to expand the scope of its law enforcement and intelligence capabilities. As a result, Congress has appropriated billions of dollars for the above-mentioned actions and passed dozens of bills in the wake of September 11.[313] The most significant, by far, is the so-called "USA PATRIOT" or 2001 Act.[314] According to David Cole and James Dempsey:

> The bill was never the subject of a Committee debate or mark-up in the Senate . . . . [A]fter three weeks of behind-the-scenes discussions between a few Senators and the Administration, a bill was introduced in the Senate on October 5 that included essentially all of the Administration's proposals. That bill passed . . . on October 11, following a brief debate that made it clear that even supporters of the legislation had not read it and did not understand its provisions. The next day, a slightly different bill was introduced in the House . . . and passed the same day under a procedure barring the offering of any amendments. It is virtually certain that not a single member of the House read the bill for which he or she voted.[315]

After the attorney general "exerted extraordinary pressure, essentially threatening Congress that the blood of the victims of future terrorist attacks would be on its hands if it did not swiftly enact the Administration's proposals,"[316] the final version was introduced on October 23, passed by the House on October 24 and by the Senate on October 25, and signed into law by President George W. Bush on October 26, 2001.[317]

The Act dramatically extends the government's law enforce-

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[312] The executive seems to presume that such powers can be exercised on the basis of its Constitutional responsibility for foreign affairs and military matters. U.S. CONST. art. II. *See* Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL'Y 455 (2002) (criticizing President Bush's actions as violating constitutionally mandated separation of powers); Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441 (2002) (focusing on powers available to law enforcement and intelligence agencies, rather than the new statutory powers conferred by the 2001 Act).

[313] *See* THOMAS: Legislative Information on the Internet, *Legislation Related to the Attack of September 11, 2001*, *at* http://thomas.loc.gov/home/terrorleg.htm (on file with author).

[314] *See supra* note 21. *See generally* Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002); Michael T. McCarthy, *USA PATRIOT Act*, 39 HARV. J. ON LEGIS. 435 (2002).

[315] COLE & DEMPSEY, *supra* note 292, at 151.

[316] *Id.*

[317] The history of this bill can be found at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@L&summ2&.

ment and intelligence gathering powers. Although some of the provisions of the act are subject to a four-year sunset provision, acts begun or investigations initiated before the sunset date are not affected, and these provisions can always be extended by Congress.[318] If one substitutes "counterintelligence" for its many references to "counterterrorism," and reads the Act in light of the history of the FBI, it becomes clear that the 2001 Act is attempting to legalize many of the repressive practices that the FBI and other intelligence agencies have been engaging in for decades. This Part VI will highlight provisions of the 2001 Act that are most disturbing in light of the history of the systematic abuse of power and law engaged in by the very agencies now being given more authority and more funding.

B. Enhanced Surveillance Powers

According to Nancy Chang of the Center for Constitutional Rights, in passing the 2001 Act, "Congress granted the Bush administration its longstanding wish list of enhanced surveillance tools, coupled with the right to use these tools with only minimal judicial and congressional oversight."[319] Title II, "Enhanced Surveillance Procedures," defines "foreign intelligence information" very broadly to include not only information relating to attacks or sabotage by foreign powers or their agents, but "information, whether or not concerning a United States person [i.e., a U.S. citizen or permanent resident], with respect to a foreign power or foreign territory that relates to (i) the national defense or the security of the United States; or (ii) the conduct of the foreign affairs of the United States." Under this definition, it appears that any U.S. citizen's opinion on any matter of U.S. foreign policy, regardless of how abstract or even inane, is "foreign intelligence information." Any foreign intelligence information obtained in a criminal investigation, as well as any obtained by a grand jury may be disclosed "to any Federal law enforcement, intelligence, protective, immigration, national defense, or na-

[318] CHANG, *supra* note 25, at 47-48.

[319] CHANG, *supra* note 25, at 48. *See also* Evans, *supra* note 314 (noting the potential for increased surveillance powers to undermine the Fourth Amendment); Sharon H. Rackow, Comment, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651 (2002) (noting that the new powers given to the executive are unnecessary, violate civil liberties, and go beyond the stated goal of fighting terrorism).

tional security official[s]" to assist in the performance of their official duties.[320]

The Act extends the scope and duration of FISA-authorized surveillance and physical searches, allowing for warrants that cover multiple individuals and locations that extend beyond the reach of the issuing court's jurisdiction.[321] It is now much easier to obtain records from third parties such as telephone or utility companies, banks and credit card companies,[322] and even public libraries.[323] Although the Act makes it easier to get court orders for access to such information, many companies report being pressured to "turn over customer records voluntarily, in the absence of either a court order or a subpoena, 'with the idea that it is unpatriotic if the companies insist too much on legal subpoenas first.' "[324]

Section 215 allows an FBI agent to apply for a court order requiring the production of "any tangible things" simply by certifying that they are wanted for an investigation "to protect against international terrorism or clandestine intelligence activities."[325] Evidence need not be presented, and the judge has no discretion; if the application is sufficient on its face, he or she must issue the order.[326] This section removes the former FISA requirements that the government specify that "there are specific and articulable facts" for believing that the material sought pertains to a "foreign power or an agent of a foreign power,"[327] and the government does not need even reasonable suspicion that the person subject to the warrant be involved in any criminal activity.[328]

Section 216 provides that upon certification by a government

[320] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, sec. 203(a)(1) (2001) (amending Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure).

[321] *Id.* sec. 207; *see also* CHANG, *supra* note 25, at 49. While other federal judges are also authorized to issue such warrants, the Act expands the FISA Court from seven to eleven judges. *Id.* sec. 208.

[322] *See generally* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), Title II ("Enhanced Surveillance Procedures") and Title III ("International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001").

[323] *See* Mark Sommer, *Big Brother at the Library: FBI's Right to Data Raises Privacy Issues*, BUFF. NEWS, Nov. 11, 2002, at A1; *see also* CHANG, *supra* note 25, at 50.

[324] CHANG, *supra* note 25, at 49-50 (quoting Ohio State University law professor Peter Swire).

[325] USA PATRIOT Act, sec. 215.

[326] *Id.*

[327] 50 U.S.C. § 1862(b)(2)(B) (2000) (prior to amendment).

[328] CHANG, *supra* note 25, at 53.

attorney that the information sought is "relevant" to any criminal investigation, courts must order the installation of a pen register and a trap-and-trace device which will allow the government to obtain "dialing, routing, addressing and signaling" information on telephone and internet lines.[329] While interception of the content of the communications is not authorized, there are no safeguards to this effect. In short, we must rely on the good faith of the government in this regard. Chang notes that this section:

> [A]uthorizes the government to install its new Carnivore, or DCS1000, system, a formidable tracking device that is capable of intercepting all forms of Internet activity, including e-mail messages, Web page activity, and Internet telephone communications. Once installed on an Internet service provider (ISP), Carnivore devours *all* of the communications flowing through the ISP's network—not just those of the target of the surveillance but those of all users—tracking not just information but content as well.[330]

FISA previously allowed orders for wiretaps and physical searches to be issued without a showing of probable cause where the government asserted that the gathering of "foreign intelligence information" was "the purpose" of the investigation.[331] In addition to expanding the definition of "foreign intelligence information,"[332] the 2001 Act now allows such warrants to be issued in criminal investigations as long as the gathering of "foreign intelligence information" is also a "significant" purpose of the surveillance.[333]

Section 213, which is not limited to terrorism investigations but extends to all criminal investigations, authorizes "sneak-and-peak searches," known in COINTELPRO days as "black bag jobs," i.e., searches conducted without notice of the warrant until

329 USA PATRIOT Act, sec. 216(b).

330 CHANG, *supra* note 25, at 54-55.

331 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2000) (prior to amendment).

332 *See supra* text accompanying note 317.

333 USA PATRIOT Act, sec. 218. As Chang notes, FISA was passed after the Supreme Court held in *United States v. United States Dist. Court for the Eastern Dist. of Mich.*, 407 U.S. 297 (1972), that the executive was not exempt from the Fourth Amendment's probable cause and warrant requirements in cases of domestic surveillance (in this case, District Judge Damon J. Keith was among the respondents, and the case is commonly referred to by his last name). In light of *Keith*, the presumed constitutional validity of FISA rests on the fact that its relaxed warrant requirements apply to foreign intelligence. CHANG, *supra* note 25, at 57-58. *See also* United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980); United States v. Johnson, 952 F.2d 565 (1st Cir. 1991) (both holding that FISA could not be used to circumvent Fourth Amendment requirements in criminal cases).

after the search has been completed. This means, among other things, that the target of the warrant cannot point out deficiencies in it or monitor whether the search is being conducted in accordance with the warrant.[334] After-the-fact notification may be delayed "for a reasonable [and undefined] period" in searches where notification "may have an adverse result,"[335] and in the case of seizures if "reasonably necessary." This could mean that a person or organization subjected to a covert search or seizure may never be informed about it, or may learn about it only when evidence obtained is used against them in court.

C. The Blurring of Criminal and Intelligence Investigations

A major concern with the 2001 Act is not simply that the government can obtain more information on individuals and organizations, but the expanded uses to which it can put this information. It has generally been presumed that the relaxed standards for warrants available under FISA are constitutionally acceptable because the purpose of the authorized surveillance was foreign intelligence information, not information intended for use in criminal prosecutions.[336] Now, however, U.S. persons can be targeted on the basis—although not *solely* on the basis—of First Amendment-protected activities and subjected to extensive, and perhaps secret, surveillance and searches because they are involved in activities that, under the broadened definition of "foreign intelligence information," relate to U.S. foreign policy or national security. Although the courts may yet find this to be unconstitutional, the Act appears to allow the use of the information thus obtained in criminal prosecutions.

The line between criminal and intelligence investigations is further blurred by provisions that allow for the extensive sharing of information. Section 203 of the Act authorizes the FBI, CIA, INS, and a number of other federal agencies to share information that "involves" foreign intelligence or counterintelligence. Tele-

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334 CHANG, *supra* note 25, at 51-52. As Chang points out, such searches violate the common law "knock and announce" requirement and Rule 41(d) of the Federal Rules of Criminal Procedure which requires officers conducting searches to give subjects a copy of the warrant and a receipt for property taken. *Id.* at 51.

335 "Adverse result" is broadly defined to include "endangering the life or physical safety of an individual; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 2705(a)(2) (2003).

336 *See* Banks & Bowman, *supra* note 267, at 5-10, 90-92.

phone or internet conversations that have been intercepted by one agency can be disclosed to others, as can foreign intelligence information obtained in the course of a criminal investigation.[337]

A dramatic extension of the law comes in Section 203(a) which allows information obtained by federal grand juries to be shared with these agencies, without judicial oversight and without any requirement that the information relate to terrorist activities.[338] Courts exercise no supervision over the issuance of grand jury subpoenas. Grand juries have an almost unlimited ability to subpoena witnesses and records, and are "generally 'unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.'"[339] Witnesses can exercise their Fifth Amendment right not to incriminate themselves through their own testimony, but neither the Fourth nor the Fifth Amendment prevents the compelled disclosure of records.[340] Thus, witnesses who have no right to a lawyer can be compelled—under threat of going to jail for civil or criminal contempt—to produce any records and to testify about highly personal matters or about the criminal conduct of others.[341]

D. The Criminalization of Protest

The 2001 Act has also made some very significant substantive changes in the criminal law. As noted above, in the late 1940s the Justice Department created a list of "subversive" organizations and considered not only membership but "sympathetic association" with such organizations as evidence of disloyalty.[342] The 1996 Antiterrorism and Effective Death Penalty Act authorized the secretary of state to create a list of "foreign terrorist organizations" and made it a felony to provide material aid to such organizations.[343] The 2001 Act expands on the 1996 Act by authorizing the creation of a separate "terrorist exclusion list" and by defining as "terrorist" a broad range of organizations not

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337 USA PATRIOT Act, sec. 203(b)(i), (d)(1).

338 *See* Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699 (2002) (analyzing the threat posed by these changes to the integrity of the grand jury system).

339 CHANG, *supra* note 25, at 60 (quoting *In re Schofield*, 486 F.2d 85, 90 (3rd Cir. 1973)).

340 COLE & DEMPSEY, *supra* note 292, at 164.

341 *See*, *e.g.*, United States v. Dionisio, 410 U.S. 1 (1973).

342 *See supra* text accompanying notes 121-25.

343 *See supra* text accompanying note 291-93.

on any official list.[344] The penalty for providing material support to designated organizations has been increased to fifteen years imprisonment.[345]

The provision of the 2001 Act that may, in the long run, prove most effective in suppressing political dissent is its creation of a new crime of "domestic terrorism." As codified in Section 802, this new and very broadly defined crime encompasses activities which (1) "involve acts dangerous to human life that are [(2)] a violation of the criminal laws of the United States or of any State;" and which (3) appear intended to (a) "intimidate or coerce a civilian population," (b) "influence the policy of a government by intimidation or coercion;" or (c) "affect the conduct of a government by mass destruction, assassination, or kidnapping;" and which (4) "occur primarily within the territorial jurisdiction of the United States."[346]

Many forms of social and political protest in the United States can now be classified as "domestic terrorism." Any serious social protest—such as demonstrations against the World Trade Organization, police brutality, or the war in Iraq—is, by definition, intended to influence government policy and could easily be interpreted as involving "coercion." Such protests could qualify as acts of domestic terrorism if a law is broken (say, failure to obey a police officer's order) and life is endangered (perhaps by blocking an intersection).

Many unjust laws—such as the South's segregation laws–-have historically been challenged by civil disobedience, and those who engage in such actions have been prepared to pay the price of a possible conviction under the law being challenged. Many protesters who fully intend to comply with the law know they run the risk of being charged with "disorderly conduct" or other misdemeanors which carry relatively minor criminal penalties. Now, those who protest, and those who provide them with "material support"[347] (say, food or a place to stay), must at least be cognizant that they could face felony charges and long prison terms. As Nancy Chang notes: "Because this crime is couched in such vague and expansive terms, it is likely to be read by federal law enforcement agencies as licensing the investigation and surveil-

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[344] USA PATRIOT Act, sec. 805; *see also infra* text accompanying notes 355-59.
[345] USA PATRIOT Act, sec. 810(d).
[346] USA PATRIOT Act, sec. 802(a).
[347] *See* USA PATRIOT Act, sec. 805.

lance of political activists and organizations that protest government policies, and by prosecutors as licensing the criminalization of legitimate political dissent."[348]

E. Further Restrictions on Immigrants

As we have seen from the early application of the Alien Act[349] to the provisions of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[350] immigrants often bear the brunt of laws and law enforcement policies designed to quash political dissent. The 2001 Act both broadens the definition of who is deportable under the Immigration and Nationality Act (INA) and gives the attorney general expanded powers to indefinitely detain noncitizens.

Section 411 of the 2001 Act makes "terrorist activity" a deportable offense. Although the government has generally defined "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience,"[351] under the INA as now amended it can include any crime involving a weapon or other dangerous device "other than for mere personal monetary gain."[352] Thus, participation in a street fight could make a permanent resident, quite possibly someone who has lived in the United States since childhood, deportable as a terrorist. While this may seem far-fetched, there have been numerous deportations and attempted deportations under the 1996 laws, IIRIRA and AEDPA, on the basis of comparably minor incidents.[353]

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348 CHANG, *supra* note 25, at 44. She goes on to note:

> Experience has taught us that when prosecutors are entrusted with the discretion to file trumped-up charges for minor crimes, politically motivated prosecutions and the exertion of undue pressure on activists who have been arrested to turn state's witness against their associates, or to serve as confidential informants for the government, are not far behind.

Id. at 113.

349 *See supra* text accompanying notes 57-59, 92-93.

350 *See supra* text accompanying notes 94, 298.

351 U.S. STATE DEPARTMENT, PATTERNS OF GLOBAL TERRORISM 2001, May 2002, *available at* http://www.state.gov.s/ct/rls/pgtrpt/2001/html/10220.htm.

352 8 U.S.C. § 1182(a)(3)(B)(lil)(V)(b) (2003).

353 *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGISL. 477 (2001) (illustrating some of the hardships caused by the deportation laws).

"Engaging in terrorist activity" now encompasses soliciting members or funds, or providing material support to a "terrorist" organization, even if the activity is undertaken solely to support lawful, humanitarian activities of the organization, and even if the associational activities would otherwise be protected by the First Amendment.[354] As David Cole and James Dempsey note:

> Under the immigration law that existed before September 11, aliens were deportable for engaging in or supporting terrorist *activity*. The PATRIOT Act makes aliens deportable for wholly innocent associational activity with a "terrorist organization," irrespective of any nexus between the alien's associational conduct and any act of violence, much less terrorism.[355]

The noncitizen subject to deportation bears the nearly impossible burden of showing "that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity."[356]

"Terrorist organizations" now include not only those that have been designated as "foreign terrorist organizations" by the State Department pursuant to AEDPA,[357] and groups on the secretary of state's new "terrorist exclusion list,"[358] but also groups which have never been officially identified as terrorist, but are comprised of "two or more individuals, whether organized or not" who engage in certain activities, including the use or threat of violence.[359] This definition "potentially encompasses every organization that has ever been involved in a civil war or a crime of violence, from a pro-life group that once threatened workers at an abortion clinic, to the African National Congress, the Irish Republican Army, or the Northern Alliance in Afghanistan."[360]

Upon the attorney general's certification that he or she has "reasonable grounds to believe" that an immigrant is engaged in

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354 USA PATRIOT Act, sec. 411(a).

355 COLE & DEMPSEY, *supra* note 292, at 153.

356 USA PATRIOT Act, sec. 411(a).

357 *See supra* text accompanying notes 290-92. The criteria for such designation are found at 8 U.S.C. § 1189(a)(1)(A)-(C) (2003), and the list is published periodically in the *Federal Register*. *See*, *e.g.*, Designation of Foreign Terrorist Organizations, 67 Fed. Reg. 14761 (Mar. 27, 2002).

358 *See* Designation of 39 "Terrorist Organizations" Under the "USA PATRIOT Act," 66 Fed. Reg. 63620 (Dec. 7, 2001). The criteria for this list are much broader than for the list created under AEDPA. See 8 U.S.C. § 1189(a)(3)(B)(iv)(I)-(III) (2003).

359 USA PATRIOT Act, sec. 411(a). The activities are listed at 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2003).

360 COLE & DEMPSEY, *supra* note 292, at 153.

terrorist activities, as broadly defined above, or in other activities threatening to the national security, Section 412 provides that the INS can detain that person for up to seven days without charge.[361] If someone so certified is charged with any immigration violation, no matter how minor, Section 412 mandates that he or she be held indefinitely, without the possibility of release on bond, until deportation.[362] Although the attorney general is to review the certification every six months, there is no requirement that the immigrant be shown the evidence on which it is based, or be given a hearing to contest the evidence. The immigrant's only remedy is to seek a writ of habeas corpus in federal district court.[363]

Even when such a person is eligible for political asylum or other relief from removal—i.e., has a statutory right to remain in the country—Section 412 makes no provision for release. As Cole and Dempsey point out, the INS already had the authority to detain someone in deportation proceedings who presented a risk of flight or a threat to national security. "Thus, what the new legislation adds is the authority to detain aliens who do *not* pose a current danger or flight risk, and who are *not* removable because they are entitled to asylum or some other form of relief."[364]

F. Enhanced Funding and Inter-Agency Communication

Title I, "Enhancing Domestic Security Against Terrorism," creates a separate "counterterrorism fund" which, among other things, will "reimburse any Department of Justice component for any costs incurred in connection with . . . providing support to counter, investigate, or prosecute domestic or international terrorism."[365] The Technical Support Center established by the 1996 AEDPA "to help meet the demands for activities to combat terrorism and support and enhance the technical support and tac-

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361 USA PATRIOT Act, sec. 412. Of course, the seven day limit seems rather meaningless at this point since the Justice Department has been indefinitely detaining hundreds of immigrants without charge for many months. *See supra* text accompanying note 308.

362 USA PATRIOT Act, sec. 412.

363 USA PATRIOT Act, sec. 412(a).

364 COLE & DEMPSEY, *supra* note 292, at 156; *see also* Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002) (noting the likely effect of the 2001 Act on political asylum adjudications).

365 USA PATRIOT Act, sec. 101(a)(1).

tical operations of the FBI" is given an additional $200 million for each of the next three years,[366] and the director of the Secret Service is instructed to develop a national network of electronic crime task forces to prevent, detect, and investigate various forms of electronic crimes.[367]

In addition, Section 701 provides an additional $50 million in 2002 and $100 million in 2003 for expanding the Regional Information Sharing System (RISS)that was created by the Omnibus Crime Control and Safe Streets Act of 1968,[368] an intranet system which can be accessed by 5600 federal, state, and local law enforcement agencies.[369] Nancy Chang spells out some of the potential problems:

> By allowing information about individuals suspected of the new crime of domestic terrorism to be shared with thousands of law enforcement agencies, RISS places at risk of harm political activists who engage in, associate with those who engage in, or are suspected of engaging in civil disobedience. Information concerning activists that is personally sensitive or simply irrelevant to any legitimate law enforcement purpose, as well as erroneous or outdated information, can easily find its way into an RISS database. Once posted, this information can quickly be circulated to thousands of law enforcement offices, some of which may share the information with governmental and private organizations. The potential for arrest based on false charges, invasion of one's privacy, damage to reputation, loss of employment, or other injuries resulting from the misuse of posted information is extremely high.[370]

G. Are We More Secure?

According to the Bush administration, all of the measures described in this Part VI have been taken "for our security." However, as of August 2002, the government had brought only one criminal indictment on charges related to terrorism, and that was against Zacarious Moussaoui, who is alleged to have been the "twentieth hijacker" and was already in custody on September 11.[371] According to the Justice Department's six-month report to

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[366] USA PATRIOT Act, sec. 103.
[367] USA PATRIOT Act, sec. 105.
[368] 42 U.S.C. § 3796h (2003).
[369] CHANG, *supra* note 25, at 112. *See also* Jim McGee, *Fighting Terror with Databases: Domestic Intelligence Plans Stir Concern*, WASH. POST, Feb. 16, 2002, at A27.
[370] CHANG, *supra* note 25, at 114-15.
[371] Cole, *supra* note 305, at 960.

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Congress on the implementation of Section 412 of the 2001 Act which mandates the detention of alien terrorists, not a single noncitizen had been certified as a terrorist.[372] Thousands of people have been secretly detained without charge, and thousands more deported on technical immigration violations. This has had a devastating effect on Arab American and South Asian communities in the United States, but has not had any demonstrable effect on reducing criminal activity in the country.[373]

What is demonstrable is that the scenario described above by Nancy Chang is taking place.[374] The government's ability to gather information on the constitutionally protected activities of law-abiding Americans has surged dramatically. The very minimal restraints put on the FBI and other law enforcement and intelligence agencies in the wake of the exposure of COINTELPRO-type activities have disappeared altogether.[375] In addition to the changes wrought by the 2001 Act itself, the lack of minimal restraints can be seen in Attorney General Ashcroft's recent revisions of the Smith guidelines for domestic intelligence gathering described in Part V.[376]

The new Ashcroft guidelines, issued on May 30, 2002, authorize a full investigation when facts or circumstances "reasonably indicate that a federal crime has been, is being, or will be committed."[377] "Terrorism enterprise investigations" are authorized

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372 CHANG, *supra* note 25, at 71-72.

373 While this is portrayed as making significant inroads against "illegal immigration," in fact it is estimated that there are about 300,000 people currently in the country who are similarly in violation of the terms of their visas. Cole, *supra* note 305, at 975. Thus, this is more accurately described as a program selectively targeting a very small sector of that group based on national origin, race or ethnicity, age and gender, not as a move against illegal immigration in general.

374 *See* Ann Davis, *Far Afield: FBI's Post-Sept. 11 "Watch List" Mutates, Acquires Life of Its Own*, WALL ST. J., Nov. 19, 2002, at A1 (noting the widespread dissemination and misuse of a list circulated by the FBI to corporations of persons it wished to question).

375 According to Nat Hentoff:

> A new addition to John Ashcroft's war on both terrorism and our Constitution is his plan—under the expanded surveillance powers in the USA Patriot Act—to reintroduce a current version of COINTELPRO. . . . On a Dec. 2 episode of ABC's "This Week," Attorney General John Ashcroft not only did not deny the advent of a new COINTELPRO, but stoutly maintained that he will pursue whatever has to be done in the war against terrorism. He doesn't need congressional approval for this assault on the First and Fourth Amendments.

Opinion-Editorial: *Sweet Land of Liberty*, WASH. TIMES, Dec. 17, 2001, at A21.

376 *See supra* text accompanying notes 274-79.

377 U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, THE ATTORNEY GEN-

when the FBI has a reasonable indication that "two or more persons are engaged in an enterprise for the purpose of . . . furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law" or for the purpose of engaging in terrorism, including the newly created crime of "domestic terrorism."[378] Full investigations may also be initiated where facts or circumstances reasonably indicate that a group has engaged in or intends to engage in acts involving force or violence or covered criminal conduct, including "domestic terrorism," in a political demonstration.[379] Once an investigation begins, the guidelines specifically authorize agents to collect information on the group's membership, funding, geographic reach, and "past and future activities and goals. . . ."[380]

Where there is no reasonable indication of criminal activity, a preliminary investigation may now be undertaken if there is information or an allegation which indicates the "possibility of criminal activity" and an FBI supervisor believes it warrants further scrutiny.[381] All of the techniques of a full investigation, including confidential informants, undercover operations, and searches and seizures,[382] may be utilized except for the opening of mail and nonconsensual electronic surveillance.[383]

Even when there is no basis for any kind of investigation, the Ashcroft guidelines instruct Bureau agents to "proactively draw on available sources of information to identify terrorist threats and activities," including nonprofit and commercial data search services, information volunteered by private entities, regardless of whether it was legally obtained, and the surveillance of publicly accessible places and events.[384] As Nancy Chang notes, these guidelines are

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ERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (2002), *available at* http://www.usdoj.gov/olp/generalcrimes2.pdf [hereinafter ATTORNEY GENERAL'S GUIDELINES]. *See also* CHANG, *supra* note 25, at 115-19.

[378] ATTORNEY GENERAL'S GUIDELINES, *supra* note 377, at 15. These investigations can be authorized for up to a year by the special agent in charge of a field office. *Id.* at 17. *See supra* text accompanying notes 346-48.

[379] ATTORNEY GENERAL'S GUIDELINES, *supra* note 377, at 16.

[380] *Id.* at 17.

[381] *Id.* at 1.

[382] *Id.* at 18-20.

[383] *Id.* at 9.

[384] *Id.* at 21-22.

> likely to lead to intrusive intelligence gathering on those who engage in non-violent civil disobedience or in lawful but confrontational political activities, as well as those who attract the attention of the FBI as it trolls through private databases, attends churches and mosques, and surfs the Web. With the advent of electronic record-keeping, the FBI is likely to maintain far more dossiers on law-abiding individuals and to disseminate the dossiers far more widely than during the COINTELPRO era.[385]

Does placing this information in the hands of law enforcement make us more secure? Four medical students traveling to Florida to begin their internships were turned in by a woman who thought she overheard a "suspicious" conversation. The interstate highway was shut down, the students stopped, searched and held in custody for several days and their car torn apart. No evidence of criminal or terrorist activity was found and the only tangible result appears to be that the students may have lost their internships and, quite possibly, their careers as doctors. Nonetheless, law enforcement officials' response was that "no harm was done" and the woman's actions were roundly praised by the media.[386]

Although only a small portion of the "spy files" kept by the Denver Police Department have been released, they contain no evidence of any criminal activity engaged in by those identified as "criminal extremists," or prevented as a result of the compilation of vast amounts of personal data. On the contrary, some of the files state that the Denver police had been notified by the FBI of a very specific plan to assassinate two leaders of the Colorado chapter of the American Indian Movement, but apparently nothing was done to prevent the attack.[387] Those planning the attack were not arrested or prosecuted, and the targets were not

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385 CHANG, *supra* note 25, at 119.

386 Associated Press, *Florida Terror Suspects Paid Toll* (Sept. 20, 2002), *available at* 2002 WL 100407327 (noting that videotape showed the medical students who were allegedly detained for failure to pay a toll had paid it); *3 Medical Students Get New Posts for Training; E-Mail Threats Behind Change*, S. FLA. SUN-SENTINEL (Fort Lauderdale), Sept. 18, 2002, at 3B, *available at* 2002 WL 100400628 (noting that Gov. Jeb Bush called the woman to thank her for the tip); *Big Mouths Result in Big Trouble/3 Held, Released in Threat Probe*, HOUSTON CHRON., Sept. 14, 2002, at 1, *available at* 2002 WL 23223309 (noting that of the three students stopped, one was a U.S.-born citizen and another a naturalized U.S. citizen); *Florida Hospital May Still Host 3 Held in False Alarm*, L.A. TIMES, Sept. 23, 2002, at A12, *available at* 2002 WL 2505671 (noting that the hospital the students were to train at turned them away after the incident).

387 Files about American Indian Movement and Ward Churchill produced by

even notified so that they could take appropriate security precautions.[388]

Given the lack of tangible evidence of criminal activity produced by the post-September 11 governmental measures, the long and well-documented history of the use of comparable measures to suppress movements for social change, and the chilling effect on First Amendment activities already evident as a result of recently heightened surveillance programs, it seems reasonable to conclude that people who live in America are not more secure but, in fact, more vulnerable to violations of their constitutionally protected rights. If anything is more secure as a result of these measures it is the status quo. Those who currently exercise political, economic, and military power will be more firmly entrenched and the nation's resources will continue to be used to further their interests.

VII

Using "Law" to Subvert the Rule of Law

> As long as we continue to go to work or pay our taxes or otherwise conduct business as usual, we contribute to the continued functioning of the various social systems to which we belong. . . . Perhaps, however, our sense of that complicity will awaken us from the everydayness in which we routinely slumber away our lives. Perhaps it will stir us to recognize that something extraordinary is afoot, demanding that we behave in ways beyond the ordinary.
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> —Douglas V. Porpora, How Holocausts Happen[389]

Since September 11, 2001 the administration has consistently told the American public that the government needs expanded powers in order to ensure our security, and Congress has willingly complied by passing legislation that dramatically restricts rights guaranteed to the people under the Constitution. Al-

Denver Police Department (on file with author). *See supra* text accompanying notes 25-29.

388 *Id.* Those identified as planning the attack have been linked to federal activity, *see* Faith Attaguile, *"Why Do You Think We Call It Struggle?" An Essay on the Subversion of the American Indian Movement* (on file with author), bringing to mind the inter-organizational conflict promoted by the FBI in its COINTELPRO operations with the hope of causing activists to kill each other. *See*, *e.g.*, *supra* text accompanying notes 149-52 (describing confrontations between the United Slaves (US) organization and the Black Panther Party).

389 Porpora, *supra* note 19, at 185-86.

though many of the executive's actions, such as the "disappearing" and indefinite detention of over 1200 immigrants and the Executive Order authorizing military tribunals, as well as the new legislation, have been criticized by advocates of civil rights and civil liberties, the debate has remained within the framework presented by the government, i.e., how much "liberty" are we willing to sacrifice for the sake of "security"?

In this Essay I have presented a cursory sketch of the history of the United States government's use of its law enforcement powers in the hope that it will prompt us to look more critically at our assumptions about the government's use of power to make us more secure. In addition to whatever else the federal government may or may not have been doing, it has consistently used its powers, legally and illegally, to suppress social and political movements which it deems threatening to the status quo. It is in this context that we must examine the expanded powers currently being exercised by the executive branch and legitimized by Congress.

Chief Justice Rehnquist, in his recent book, *All the Laws but One: Civil Liberties in Wartime*, examines President Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War and briefly discusses the internment of Japanese Americans during World War II.[390] He concludes that it is not likely or desirable for civil liberties to be "as favored" in wartime, as the laws will necessarily "speak with a somewhat different voice."[391] In essence, his message seems to be that while the government occasionally makes mistakes during times of national emergency, we need not worry about losing our civil liberties because, when the emergency is over, things will return to "normal."

This is a message often repeated in discussions about curtailing civil liberties today. Chief Justice Rehnquist may well be right that things will return to normal. However, the question remains whether the norm is acceptable. As I have tried to point out, the current expansion of executive powers and the concomitant restrictions on civil rights are not simply a response to a national emergency sparked by recent acts of terrorism, but a move toward legitimating powers that have a long history of being used consciously and deliberately to suppress political dissent.

In the name of "national security," governmental agencies

[390] *See generally* REHNQUIST, *supra* note 36.
[391] *Id.* at 224-25.

have a consistent history of knowingly violating fundamental rights guaranteed by the Constitution. As on-going revelations about the Denver "spy files" illustrate, these are not practices that can be safely relegated to the past. Nor are they limited to a "chilling effect" on freedom of expression. The federal government has subjected the American people, those it is charged with protecting, to false and deliberately misleading propaganda, wrongful arrests and arbitrary detentions, physical assaults and assassinations, and the crushing of law-abiding organizations. What has been "disrupted and destroyed" in the process are not only the targeted individuals, organizations and movements, but the core values the government claims to be protecting: freedom, democracy and the rule of law.

As I indicated in the Preface, there is much about the status quo that desperately needs to be changed. There is nothing acceptable about the fact that the planet's ecology is in rapid disintegration[392] or that the conditions of life are so bleak that in some indigenous communities seventy percent of all children deliberately obliterate their consciousness by inhaling gasoline fumes.[393] Every day the news brings us evidence of widespread violations of human rights, both at home and around the world. The United States, as the world's only political, economic, and military superpower, bears much of the responsibility for these conditions, and the American people have the right—and obligation—to influence governmental policies and make the structural changes necessary to realize fundamental human rights.

Bringing about such changes requires the ability to express political opinions, criticize policies, and organize movements for social change. For that very reason, these are rights built into the Constitution and firmly established in international law. To the extent that governmental practices violate the Constitution and basic principles of international law, the fact that they are being "legalized" by Congress cannot give us comfort. Again, this was one of the basic principles articulated by Supreme Court Justice Robert Jackson at the Nuremberg Tribunals, that the existence of national laws legitimizing particular practices does not render those practices lawful in the larger sense of the term.[394] The abil-

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392 *See supra* Preface.

393 *See* GEOFFREY YORK, THE DISPOSSESSED: LIFE AND DEATH IN NATIVE CANADA 10 (Little, Brown & Co. Ltd. 1992) (1989).

394 *See supra* Preface. As international legal scholar Richard Falk says:

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ity to influence the policies and practices of the government that is acting in our name is the essence of democracy. It is our responsibility, particularly the responsibility of lawyers and legal scholars, to ensure that this is, in fact, a democracy.

> In post-Nuremberg settings, a government that flagrantly violates international law is engaged in criminal behavior even on a domestic plane, and as far as internal law is concerned, its policies are not entitled to respect. To disobey is no longer . . . to engage in "civil disobedience." . . . To resist reasonably a violation of international law is a matter of legal right, possibly even of legal duty if knowledge and a capacity for action exists.

Richard Falk, *Introduction* to FRANCIS ANTHONY BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW xxi (1988).