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FBI Suveillance Past and Present

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FBI SURVEILLANCE: PAST AND PRESENT

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On January 29, 1979, police arrested seventy members of the Maoist Revolutionary Communist Party (RCP), formerly the Revolutionary Union (RU), in Washington, D.C., at a demonstration protesting the visit of the Vice Premier of the People's Republic of China, Teng Xiao Ping. The RCP members were charged with assaulting police officers; seventeen of those arrested were eventually indicted. Their case, however, never came to trial. Prosecutors dropped all charges against six of those indicted. On June 3, 1982, the remaining defendants and the prosecutors agreed to a plea bargain: ten of the defendants pled guilty to two misdemeanor charges and, in return, the government dropped the felony charges against them; in addition, the government dropped all charges against RCP leader Robert Avakian.[1]

The indictment of the eleven RCP leaders was not unprecedented. Since the 1940s the federal government has sought to convict radical activists on a variety of conspiracy charges.[2] Nonetheless, the RCP trial has broader significance. Its importance derives from the release of documents by the Federal Bureau of Investigation (FBI) to the RCP during discovery and in response to requests filed under the Freedom of Information Act.[3] These documents provide insights into past and current FBI surveillance practices. The more important revelations pertain to the scope of FBI break-ins during the 1970s,[4] the Reagan Administration guidelines governing FBI "domestic security/terrorism" investiga-

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1 United States v. Schiller, 424 A.2d 51 (D.C. 1980). The lengthy proceedings were episodically covered by the Washington Post. *See, e.g.,* Wash. Post, Jan. 31, 1979, at A1, col. 1; *id.* Oct. 22, 1980, at A17, col. 3; *id.* June 4, 1982, at A4, col. 4.

2 *See, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968); Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); United States v. Spock, 416 F.2d 165 (1st Cir. 1969). *See generally* M. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977); D. CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978).

The RCP indictments were distinctive in that the defendants were charged with violating a District of Columbia statute prohibiting rioting or inciting to riot and disorderly conduct, D.C. CODE ANN. §§ 22-1121, 22-1122 (1981), rather than a federal statute as in the cases cited above.

3 5 U.S.C. § 552 (1982).

4 *See* Marro, *FBI Break-in Policy,* in BEYOND THE HISS CASE: THE FBI, CONGRESS, AND THE COLD WAR 78-128 (A. Theoharis ed. 1982) (describing of FBI domestic security "break-ins" during 1970s to investigate Weather Underground).

tions,[5] and the targets of FBI "foreign intelligence" (formerly "domestic intelligence") electronic surveillance.[6] These documents demonstrate that although the FBI may have quantitatively reduced its surveillance activities during the late 1970s and early 1980s, the underlying criterion governing earlier investigations—the political beliefs of the individual or group—continues to shape the Bureau's current surveillance policy.[7] Although the FBI now rationalizes its surveillance activities under the rubrics of "terrorism" and "foreign intelligence," these activities do not seem substantively different from those it had justified in the 1940s, 1950s, and 1960s under the rubric of "subversive activities."[8]

FBI documents concerning investigation of the RCP suggest that during the 1970s the FBI conducted more warrantless break-ins than its officials had publicly admitted. Until April 1978, when the federal government indicted former Acting FBI Director L. Patrick Gray, former Acting FBI Associate Director W. Mark Felt, and former FBI Assistant Dircctor Edward Miller for authorizing illegal break-ins during investigations of the Weather Underground in the early 1970s,[9] FBI officials had consistently affirmed that the FBI had terminated "domestic security" break-ins in 1966 pursuant to a directive from then FBI Director J. Edgar Hoover.[10] The indictments of Gray, Felt, and Miller, however, confirmed that the FBI had employed break-ins in the FBI's post-1966

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5 The guidelines issued on March 7, 1983, by Attorney General Smith are reprinted in 32 CRIM. L. REP. (BNA) 3087 (1983).

6 See A. THEOHARIS, SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN 94-120 (1978) (examining FBI electronic surveillance policy and practice).

7 The Bureau of Investigation in the Department of Justice, the earliest predecessor agency of the Federal Bureau of Investigation, was created administratively in 1908. 28 U.S.C. § 531 note (1976). The FBI first assumed its domestic security role during the First World War. *See generally* F. DONNER, THE AGE OF SURVEILLANCE 30-51 (1980); W. PRESTON, ALIENS AND DISSENTERS 88-117 (1963). Although funding for the FBI was ostensibly limited to prosecutions of federal crimes, *see* 28 U.S.C. § 531 note (1976), the FBI soon began to investigate lawful political activities of citizens and resident aliens. These investigations culminated in the "Palmer Raids of 1920." *See* F. Donner, *supra*, at 35-39; W. PRESTON, *supra* 208-37; Williams, *The Bureau of Investigation and its Critics, 1919-1921: The Origins of Federal Political Surveillance,* 68 J. AM. HIST. 560 (1981). The FBI has continued domestic political surveillance to the present time. *See generally* F. Donner, *supra*; A. Theoharis, *supra* note 6; Williams, *They Never Stopped Watching Us: FBI Political Surveillance 1924-1936,* 2 U.C.L.A. HIST. J. 5 (1981).

8 *See, e.g.,* Donner, *Intelligence on the Attack: The Terrorist as Scapegoat,* 226 NATION 590, 591 (1978).

9 United States v. Gray, 502 F. Supp. 150, 150-51 (D.D.C. 1980).

10 *See* SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess. 365 (1976) [hereinafter cited as SELECT COMMITTEE REPORT]; A. THEOHARIS, *supra* note 6, at 126-28. The Hoover directive referred only to "blackbag jobs"—the FBI term for warrantless surreptitious entries for purposes other than the installation of electronic listening equipment. SELECT COMMITTEE REPORT, *supra,* at 355 n.1. Hoover's directive did not ban break-ins for the purpose of installing such equipment. *Id.* at 365.

investigation of the Weather Underground. One extant FBI document, a December 1, 1972, airtel from Acting FBI Associate Director W. Mark Felt to several FBI field office heads, known as Special Agents in Charge (SAC),[11] moreover, records that the New York City agents conducting the illegal Weather Underground break-ins had been acting under official orders. In the airtel, Felt noted: "I am certain that you have taken a personal interest in Weatherman fugitive cases in your office with the result that the intensification required is being achieved and with the further result that *innovative techniques* are being considered and implemented."[12] The government conceded during Felt's trial that the term "innovative techniques" was an FBI euphemism for an order to conduct break-ins.[13]

The documentation of the authorization of break-ins involving the Weather Underground compelled FBI officials to revise earlier statements in which they had claimed that break-ins ended in 1966. After the indictments of Gray, Felt, and Miller, FBI officials conceded that "domestic security" break-ins had continued beyond July 1966, but maintained that the Weather Underground break-ins were atypical. They asserted that they had employed these break-ins in response to the Nixon Administration's obsessive concern with apprehending the Weather Underground fugitives.[14]

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11 Airtel from Acting FBI Associate Director W. Mark Felt to FBI field office heads, known as Special Agents-in-Charge (SAC) in Chicago, Cleveland, Detroit, Milwaukee, New York, San Francisco, and Scattle (Dec. 1, 1972, FBI 176-1594-3014) (on file at *Cornell Law Review*).

12 *Id.* (emphasis added).

13 *Cf.* Marro, *supra* note 4, at 101-02 ("The reporting of break-ins, such as it was, was virtually in code, with such terms as 'special techniques' or 'sensitive investigative techniques' used in place of a clear description of what had been done.").

14 A. THEOHARIS, *supra* note 7, at 128-29; Marro, *supra* note 4. The Nixon administration's obsession with antiwar radicals is underscored by the development of the so-called Huston Plan, which, had it been implemented, would have authorized the White House to control and closely supervise intelligence investigations of leftist political activities. Nixon and his senior advisers believed that, because of a lack of coordination and cooperation, the intelligence agencies (the FBI, the Central Intelligence Agency (CIA), the National Security Agency (NSA), and the Defense Intelligence Agency (DIA)) were not dealing effectively with the antiwar movement. Nor, in the administration's opinion, were the intelligence agencies aggressive enough. The "Huston Plan" called for NSA interception of the communieations of U.S. citizens through the use of international facilities, expanded electronic surveillance of individuals and groups within the United States, removal of restrictions on mail coverage, modifieations of restrictions on surreptitious entries, and the use of military intelligence agents to gather information on student-related dissident activities. SELECT COMMITTEE REPORT, SUPRA note 10, at 945-54. The author of the plan, Tom Charles Huston, a presidential assistant and former army intelligence officer, advised that some of the proposals were "clearly illegal," but concluded that "the advantages to be derived from [their] use outweigh the risks." *Id.* at 954. In testimony before the Senate Select Committee investigating the intelligence agencies (the "Church Committee"), Huston conceded that no objections were ever raised by anyone within the administration or the intelligence agencies. 2 HEARINGS BEFORE THE SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94th Cong., 1st Sess. 21 (1975). For analyses of the

FBI documents pertaining to the RCP suggest that the Weather Underground break-ins of the 1970s were not atypical. During the Felt-Miller trial, Gray had successfully maintained that he neither authorized, nor even knew about, the Weather Underground break-ins.[15] Nevertheless, the RCP documents indicate that authorization for these break-ins had not come solely from Acting FBI Associate Director Felt, but that Acting FBI Director Gray had authorized break-ins as well. For example, on the bottom of a June 15, 1972, memorandum characterizing the RU as a violent organization, Gray wrote: "[T]his is the kind of extremist I want to go after *HARD and with innovation.*"[16] Gray repeated this wording in a July 3, 1972, airtel, marked "personal attention," and sent to SACs in fourteen cities.[17] The Acting FBI Director continued:

> There has been good informant penetration of the RU, but coverage is not by any means sufficient in either quality or quantity. In a number of instances, investigations relating to the RU and its membership have been delayed and reporting has been delinquent. Some offices have not afforded investigation of the RU *sufficient imaginative attention.* Special Agents in Charge . . . must insure sufficient manpower is afforded to the investigation of this organization, its membership and activities as well as to developing well-placed informant coverage. Insufficient investigation and delays in reporting will not be tolerated.[18]

"Huston Plan," see F. DONNER, *supra* note 7, at 263-68 and A. THEOHARIS, *supra* note 6, at 13-39. The FBI's obsession with the "New Left" is evidenced by its use of aggressive and illegal intelligence methods, known as "Cointelpro—New Left" (counterintelligence program), to disrupt "New Left" political activities. *See* F. DONNER *supra* note 7, at 232-37; A. THEOHARIS, *supra* note 6, at 147-50; Mackenzie, *Sabotaging the Dissident Press,* in THE CAMPAIGN AGAINST THE UNDERGROUND PRESS 159-70 (G. Rips. ed. 1981).

15 In December 1980, citing the apparent weakness of its evidence that Gray had approved unconstitutional break-ins against friends and relatives of Weatherman fugitives, the Justice Department dropped criminal charges against the former Acting FBI Director. N.Y. Times, Dec. 12, 1980, at A1, col. 5. A month earlier, a jury found defendants Felt and Miller guilty of authorizing the illegal break-ins and fined them $5,000 and $3,500 respectively. *Id.,* Dec. 16, 1980, at A1, col. 5. In April 1981, however, President Ronald Reagan unconditionally pardoned Felt and Miller, asserting that "the record demonstrates that they acted not with criminal intent, but in the belief that they had grants of authority reaching to the highest levels of government." *Id.,* April 16, 1981, at H22, col. 1. In response, John W. Nield, Jr., the chief proseeutor in the case, commented that "whoever is responsible for the pardons did not read the record of the trial and did not know the facts of the case." *Id.,* at A1, col. 1, A22, col. 1.

16 Handwritten notation on memorandum from FBI Assistant Director A.J. Decker to FBI Assistant Director Edward S. Miller (June 15, 1972) (emphasis added) (on file at *Cornell Law Review).*

17 Airtel, from Acting FBI Director L. Patrick Gray to SACs in Boston, Chicago, Cincinnati, Detroit, Los Angeles, Milwaukee, Newark, New York, Philadelphia, Portland, Sacramento, San Diego, San Francisco, and Seattle (July 3, 1972) (on file at *Cornell Law Review).*

18 *Id.* (emphasis added).

In a follow-up memorandum appraising the resultant FBI investigations of the RU, Gray repeated this admonition:

> All recipients [of this memorandum] insure investigation of the RU and its members is being afforded sufficient manpower. *Intensified, imaginative* investigative effort must be applied to obtain member informant coverage. *Recommendations for any imaginative or unique approaches* to this challenge, or to the over all investigation of the RU, will be afforded careful consideration by the Bureau.[19]

FBI Supervisor David Ryan, Acting FBI Director Gray's principal aide, and the author of the July 8, 1972, airtel written over Gray's signature, later confirmed that Gray was contemplating the use of illegal break-ins in the investigation of the RU. In 1980, during pretrial discovery in *ACLU v. City of Chicago,*[20] a suit brought to enjoin political surveillance in the Chicago area by federal and local law enforcement agencies, Ryan was deposed by ACLU attorney Douglas Cassel. Cassel asked Ryan whether Gray's order to go after the RU "[h]ard and with innovation" constituted "implicit authorization" to conduct break-ins given the similarity between this language and the langnage of Felt's December 1, 1972, directive, which concededly authorized break-ins.[21] Ryan responded: "I think [Gray] was suggesting that all appropriate intelligence and counter-intelligence techniques be used. This would include

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19 Airtel from Acting FBI Director L. Patrick Gray to SACs in Baltimore, Boston, Chicago, Cincinnati, Detroit, Los Angeles, Milwaukee, Newark, New York, Philadelphia, Portland, Sacramento, San Diego, San Francisco, and Seattle (Oct. 24, 1972) (emphasis added) (on file at *Cornell Law Review*).

20 No. 75 C 3295 (N.D. Ill. filed Oct. 3, 1975). This case, together with another class action suit, Alliance to End Repression v. City of Chicago, No. 74 C 3268 (N.D. Ill. filed Nov. 13, 1974), was settled when the parties entered into an agreement that barred the FBI and the CIA from investigating and disrupting lawful political activity. In August 1981, the court approved the proposed settlement and entered its order banning such investigations. Alliance to End Represion v. City of Chicago, 91 F.R.D. 182, 204-05 (N.D. Ill. 1981). In April 1983, a month after Attorney General William French Smith issued new guidelines governing FBI domestic intelligence investigations, *see supra* note 5, Federal District Judge Susan Getzendanner permanently enjoined implementation in Chicago of the guideline that provided: "When, however, statements advocate criminal activity . . . an investigation under these Guidelines may be warranted unless it is apparent, from the circumstances or in the context in which the statements are made, that there is no prospect of harm." Alliance to End Repression v. City of Chicago, 561 F. Supp. 575, 583 (N.D. Ill. 1983). The court found that the new guidelines violated rights conferred by the settlement agreement because it would have allowed the FBI to investigate persons solely because they *advocated* violence or other illegal acts. *Id.* at 577. The right to advocate illegal acts is guaranteed by the first amendment, " 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " *Id.* at 578 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)). The court found that the settlement agreement embraced the principles of *Brandenburg* as the test for initiating investigations, 561 F. Supp. at 580, and that the Smith guidelines "encourage violations [of the settlement agreement] by permitting investigations to commence solely on the basis of a target's exercise of protected First Amendment rights." *Id.* at 577. For an examination of the Chieago settlement agreement, see Cassel, *Chicago FBI Settlement,* FIRST PRINCIPLES, June 1981, at 1.

21 *See supra* text accompanying notes 12-13.

certainly surreptitious entries."[22] Cassel then pressed Ryan as to what he had intended to convey when reiterating the "innovation" phrase in the July 3, 1972, airtel he had written under the Acting FBI Director's signature.[23] Ryan evasively responded: "I intended to convey the interests of the Acting Director."[24]

The FBI's interest in the RCP-RU did not abate after 1972. The FBI conducted later investigations more circumspectly because of the changed political climate brought on by the Watergate scandal. Thus, when approving a request from the head of the FBI's Chicago field office for an additional $1,000 payment to an informer targeted to infiltrate the RCP, Gray's successor as FBI Director, Clarence Kelley added: "Insure this informant is not maintaining duplicate copies or any type of record of information informant is furnishing you."[25]

This concern with safeguarding information concerning FBI investigations had previously led FBI officials to devise a series of filing procedures designed to preclude the public discovery of the FBI's most sensitive operations.[26] These separate filing procedures included the "Do Not File" procedure for memoranda authorizing break-ins, and the "JUNE mail" procedure for reports containing information obtained from "sources illegal in nature" or other "highly sensitive sources," "such as Governors, secretaries to prominent officials discussing the officials and their attitudes."[27] "Do Not File" memoranda were not to be serialized and were to be maintained in "office files" of FBI assistant directors; "JUNE mail" documents also were not to be maintained in the FBI's "central records system" but in the "Special File Room."[28] Thus, when responding to a court-ordered search for all electronic surveillance records involving the RCP defendants, FBI Assistant Director Robert Finzel stated that the required search had been conducted "to the extent that such records have been indexed."[29]

The FBI's attempt to minimize public awareness of its interest in

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22 Deposition of FBI Supervisor David Ryan at 28, ACLU v. City of Chicago, No. 75 C 3295 (N.D. Ill. filed Oct. 3, 1975) [hereinafter cited as Ryan Deposition]. Other FBI documents suggest that the RCP had been the target of FBI break-ins during the early 1970s; see, in particular, Six FBI Photographs of the RCP's Chicago Hcadquarters Pinpointing the Location in the Building and the Means of Access (on file at *Cornell Law Review).*

23 *See supra* notes 16-17 and accompanying text.

24 Ryan Deposition, *supra* note 22, at 28.

25 Memorandum from FBI Director Clarence Kelley to SAC, Chicago (May 26, 1977) (on file at *Cornell Law Review).*

26 For fuller discussion of these and other FBI filing and record destruction procedures, see Theoharis, *In-House Cover-up: Researching FBI Files,* in BEYOND THE HISS CASE: THE FBI, CONGRESS, AND THE COLD WAR 20 (A. Theoharis ed. 1982).

27 *Id.* at 27-28.

28 *Id.* at 21-22. Apparently, the FBI continues to maintain a separate filing system, not part of the "central records system," for highly sensitive documents. *Id.* at 34-35.

29 Memorandum from FBI Assistant Director Robert P. Finzel to Assistant United States Attorney General D. Lowell Jensen (Nov. 2, 1981) (on file at *Cornell Law Review).*

the RCP was motivated in part by the institution of Attorney General Edward Levi's restrictive guidelines governing FBI "domestic security" investigations.[30] The guidelines granted the FBI limited latitude to conduct "domestic security" investigations. The FBI could initiate "preliminary" investigations on the basis of "allegations or other information that an individual or a group may be engaged in activities which involve or will involve the use of force or violence and which involve or will involve the violation of federal law."[31] The guidelines required the FBI to conclude "preliminary" investigations within ninety days, and confined the inquiry to verifying or refuting the allegation.[32] The FBI could not initiate a "full" investigation unless it obtained hard information either at the outset or during "preliminary investigations." The standards that Levi established for "full" investigations approximated a probable violation of criminal law: full investigations "may only be authorized on the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence and which involve or will involve the violation of federal law."[33]

Attorney General Levi accorded the Justice Department a greater supervisory role over these investigations than had any previous attorney general, requiring the Department's participation in determining whether FBI investigations complied with these standards. He required the Department of Justice to review "the results of full domestic intelligence investigations at least annually, and . . . determine in writing whether continued investigation [was] warranted."[34]

The Levi guidelines applied only to "domestic security" investigations. Levi issued other, secret guidelines to govern FBI "foreign counterintelligence" investigations.[35] Initiation of foreign counterintelligence investigations required some proof that the targeted individual or group was an agent or was knowingly acting on behalf of an agent of a foreign power, a less stringent standard than that required for "domestic security" investigations. Even under this less stringent standard, however, the FBI probably could conduct a full investigation of a United States citizen or resident alien only "if there were reasonable suspicion that he was a conscious member of a hostile foreign intelligence network, and [the FBI] could seek approval for electronic surveillance if there were probable cause that the [individual's] activities involved clandestine transmission of information to a hostile intelligence

30 *Attorney General's Guidelines for FBI Domestic Security Investigation, reprinted in* J. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS 196-202 (1979).

31 *Id.* at 197.

32 *Id.* at 197-98.

33 *Id.* at 198.

34 *Id.* at 200.

35 J. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS 133 (1979).

service."[36]

Neither the "domestic security" nor the "foreign counterintelligence" standards of the Levi guidelines would have authorized an investigation of the RCP; it was not involved in concerted illegal or overtly revolutionary activity, and was not associated with any foreign country.[37] A March 14, 1979, FBI memorandum from the SAC of the FBI's Pittsburgh field office conceded as much, reporting that investigation of the RCP had uncovered no evidence of the resort to "force or violence . . . or the violation of Federal Law . . . for the purpose of overthrowing the Government."[38] Despite this finding, the Pittsburgh SAC argued that "newly surfaced" RCP activities, such as demonstrations against the Iranian government, underscored the need to modify the Levi guidelines to permit full domestic security investigations of the RCP. The Pittsburgh SAC suggested that the RCP's recent abstention from the use of violence would be only a temporary phenomenon:

> It is felt that such periods of quiescence followed by acts of violence or other activities which violate U.S. Law or the U.S. Constitution are not uncommon for the Communist Party organizations, and *that provisions for such activity should be made in the Attorney General's guidelines to cover such situations prior to violent and/or detrimental reactivations of such organizations.*[39]

The Reagan Administration recently made provisions to rectify this problem. On June 24, 1982, FBI Director William Webster announced before the Senate Subcommittee on Security and Terrorism that the Justice Department was in the process of reviewing the Levi guidelines.[40] Webster asserted that the proposed revisions were necessary to enable the FBI to investigate "terrorist groups" that are "no different from other criminal enterprises."[41] The setting of Webster's announcement was fitting; since 1981 the chairperson of the Senate Subcommittee, Jeremiah Denton, had been lobbying for revisions of the Levi guidelines. Not surprisingly, then, Denton praised the proposed revisions as permitting needed FBI investigations of radical organizations,

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36 *Id.* at 145.

37 A Maoist organization espousing revolutionary change, the RCP has not been convicted under any federal statute and was not targeted for a foreign counterintelligence investigation under the Levi guidelines. The RCP has denounced both the Soviet and the current Chinese Communist governments for their failure to espouse revolutionary change and for repudiation of the tenets of Marxism-Leninism-Maoism.

38 Memorandum from SAC, Pittsburgh, to FBI Director William Webster (Mar. 14, 1979, FBI 100-56839-293) [hereinafter cited as SAC Pittsburgh Memo] (citing an Apr. 5, 1978 FBI airtel) (on file at *Cornell Law Review*). The investigation revealed that "the RCP encouraged its members at one time to acquire weapons and engage in firearms training, but discontinued this practice." *Id.*

39 *Id.*

40 N.Y. Times, June 25, 1982, at B14, col. 5.

41 *Id.*

citing in particular the National Lawyers Guild, the Socialist Workers Party, the Weather Underground, and the Progressive Labor Party.[42]

On March 7, 1983, Attorney General William French Smith issued new, more permissive guidelines governing "domestic security/terrorism investigations."[43] Abandoning a probable cause standard, the Smith guidelines authorized such investigations "when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise [to further] political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States."[44] The FBI should "anticipate or prevent crime" by investigating statements that "advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence."[45] Under the Smith guidelines, the FBI Director or desiguated FBI Assistant Director can authorize "domestic security/terrorism" investigations for a 180-day period,[46] as compared to the 90-day period for preliminary investigations under the Levi guidelines.[47] The Smith guidelines also enable these officials to reauthorize investigations beyond this period.[48] Furthermore, the Smith guidelines abandon the Levi requirement that the Department of Justice review full investigations at least annually and "determine in writing whether continued investigation is warranted."[49] Instead, the FBI need only "notify" the Justice Department's Office of Intelligence Policy and Review whenever initiating a "domestic security/terrorism" investigation.[50] The guidelines did not specify whether this notification must be in writing. The attorney general's oversight role became discretionary: the attorney general "may, as he deems necessary, request the FBI to prepare a report on the status of the investigation."[51] In addition, the Smith guidelines authorize the Office of Intelligence Policy and Review to review at least annually only the results of FBI investigations, and do not empower it to determine in writing whether continued investigation is warranted.[52] The abandonment of any written authorization requirement under the Smith guidelines for domestic security investigation is even more striking in view of the provisions governing "sensitive criminal" and "racketeering enterprise" investigations, which do require written

42 *Id.*

43 *Attorney General's Guidelines on Domestic Security/Terrorism Investigations,* 32 CRIM. L. REP. (BNA) 3087 [hereinafter cited as *Smith Guidelines].*

44 *Id.* at 3091.

45 *Id.* at 3088.

46 *Id.* at 3092.

47 *See supra* note 32 and accompanying text.

48 *Smith Guidelines, supra* note 43, at 3092.

49 J. ELLIFF, *supra* note 30, at 200.

50 *Smith Guidelines, supra* note 43, at 3092.

51 *Id.*

52 *Id.*

authorization.[53]

Notwithstanding the absence of a written authorization requirement for domestic security investigation, the Reagan Administration's relaxation of FBI investigative guidelines did not reinstitute FBI political surveillance. The FBI's electronic surveillance practices suggest that radical organizations were already under FBI investigation. During pretrial hearings in the aborted Washington trial, attorneys for the RCP defendants filed motions requesting all records of government electronic surveillance. The presiding Superior Court Judge granted these motions and directed government attorneys to produce affidavits responsive to this inquiry.[54] Government attorneys conceded the fact of electronic surveillance, but claimed that it was legal and that the resultant records need not be turned over to the defendants.[55] The government admitted that the FBI overheard four of the eleven RCP defendants "on various occasions during the course of foreign intelligence national security electronic surveillance. . . . [S]uch surveillance was authorized by the . . . Attorney General prior to May 18, 1979 . . . ."[56] The government further admitted that the FBI had overheard one of the defendants, Robert Avakian, "on numerous occasions during 1969 and 1970 on surveillances authorized by the Attorney General for domestic intelligence pur-

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53 *Id.* at 3088-91. Thus, during "preliminary inquiries" involving "sensitive criminal matters" (i.e., "any alleged criminal conduct involving corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious organization or a primarily political organization or the related activities of any individual prominent in such an organization, or the activities of the news media", *id.* at 3088), "the United States Attorney or an appropriate Department of Justice official shall be notified of the basis for an inquiry as soon as practicable after the opening of the inquiry, and the fact of notification shall be recorded in writing." *Id.* at 3089.

The authorization and review standards for "racketeering enterprise" investigations are even more stringent, reflecting an unwillingness to aceord broad discretionary investigative authority to the FBI:

> A racketeering enterprise investigation may be authorized by the [FBI] Director or designated Assistant Director upon a written recommendation setting forth the facts and circumstances reasonably indicating the existence of a racketeering enterprise whose activities involve violence, extortion, narcotics, or systematic public corruption. In such cases the FBI shall notify the Attorney General or his designee of the opening of the investigation. An investigation of a racketeering enterprise not involved in these activities may be authorized only by the Director upon his written determination, concurred in by the Attorney General, that such investigation is warranted by exceptional circumstances.

Id. at 3091.

54 United States v. Avakian, No. F-563-79 (D.C. Super. Ct. Oct. 17, 1979) (order granting disclosure of electronic surveillance).

55 *See* Memorandum of Law in Support of the Government's Petition for Judicial Determination of the Legality of Certain Electronic Surveillance at 6-7, United States v. Avakian, Misc. No. 82-0018 (D.D.C. filed) [hereinafter cited as *Avakian* Memorandum] (on file at *Cornell Law Review).*

56 Declaration of Donald B. Nicholson, Dep't of Justice Attorney, at 1-2, United States v. Avakian, No. F-563-79 (D.C. Super. Ct. Jan. 19, 1982) (on file at *Cornell Law Review).*

poses"[57] and that another defendant, Joseph Moore, was "monitored on April 19, 1979, during a surveillance authorized by United States District Judge James B. Parsons . . . on January 29, 1979, for thirty days and extended by the same judge for thirty-day periods on March 1, 1979 and March 30, 1979."[58] The government argued that disclosure of the electronic surveillance records "would be harmful to the national security of the United States."[59] Judge John Lewis Smith upheld the government's motion to suppress release of the electronic surveillance records on February 23, 1982.[60]

Judge Smith's February 1982 ruling and Judge Parsons's January 1979 authorization of electronic surveillance suggest that the courts are unduly deferential to the government's national security claims.[61] RCP members were targets of the government's 1969-1970 "domestic intelligence" investigations and "foreign intelligence national security" electronic surveillance in 1979. In view of the RCP's bitter opposition to the political leadership of both the Soviet Union and the People's Republic of China, electronic surveillance of RCP members is not reasonably likely to yield useful foreigu intelligence information. It appears that the courts failed to ask the threshold question of whether an investigation of this small and isolated radical organization might produce intelligence or foreign counterintelligence information.

Apparently, RCP members have been, and under the Smith guidelines will be again, investigated because of their radical political activities. The released FBI documents reflecting the nature of FBI electronic surveillance practices, the suggestions of the scope of FBI break-ins during the 1970's, and the rationale for modifying the Levi guidelines in the light of the permissive standards of the Smith gnidelines, demonstrate the need for a tightly worded FBI legislative charter.[62] This charter

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57 Declaration of Michael E. Davitt, Dep't of Justice Paralegal, at 2, United States v. Avakian, No. F-563-79 (D.C. Super. Ct. Jan. 13, 1982) (on file at *Cornell Law Review).*

58 *Id.*

59 *Avakian* Memorandum, *supra* note 55, at 5.

60 United States v. Avakian, No. 82-0018 (D.D.C. Feb. 23, 1982) (order declaring surveillance legal).

61 Although Congress has revised foreign intelligence electronic surveillance procedures since Judge Parsons' January, 1979, order, judicial deference to claims of national security persists. On October 24, 1978, President Carter signed the Foreign Intelligence Surveillance Act (FISA) into law. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-11 (Supp. V 1982). FISA established a Foreign Intelligence Surveillance Court to review requests by the National Security Agency and the FBI, the only two agencies affected by the law, for permission to conduct foreign intelligence electronic surveillance. Through August 1981, the court had approved all but one request submitted by the Attorney General. J. BAMFORD, THE PUZZLE PALACE: A REPORT ON AMERICA'S MOST SECRET AGENCY 367-74 (1982).

62 Although Congress has not begnn serious consideration of an FBI charter bill, some of its members have expressed concern over the breadth of the Smith gnidelines. The House Subcommittee on Civil and Constitutional Rights, chaired by Congressman Don Edwards, held hearings on these guidelines. Edwards argned that the Levi guidelines were "instrumen-

must not only detail the parameters of FBI investigative authority but must also prohibit the FBI's creation of separate filing procedures, and require that the attorney general review and authorize in writing FBI investigative techniques and procedures.[63]

tal in curtailing intelligence abuse by the FBI," and should not be changed "without careful Congressional and public scrutiny to assure that [the Smith guidelines are] not a retreat." N.Y. Times, May 14, 1983, at 8, col. 6.

On May 11, 1983, the House Committee on the Judicary reported to the House a $3.4 billion Justice Department authorization bill permitting the FBI to use the Smith guidelines until September 30, 1983, but requiring readoption of the Levi guidelines from October 1, 1983, through January 1, 1984. This restriction was not adopted where the House approved the Department's appropriations for 1984. N.Y. Times, May 12, 1983, at B10, col. 1.

63 The American Civil Liberties Union, The Committee for Public Justice, and the Center for National Security Studies have proposed an FBI charter that incorporates many of these proposals. Members of the drafting committee included Morton Halperin, Professors Thomas I. Emerson, Paul Chevigny, and Charles Nesson. *See also* The Committee on Federal Legislation, *A Charter for the Federal Bureau of Investigation,* 35 REC. A.B. CITY N.Y. 302 (1980), for an analysis of one of the proposed charter bills, S. 1612, 96th Cong., 1st Sess., 125 CONG. REC. 21,506-12 (1979), in the Senate and H.R. 5030, 96th Cong., 1st Sess., *reprinted in Legislative Charter for the FBI: Hearings on the H.R. 5030 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 96th Cong., 1st & 2d Sess. (1979-80), in the House, which was introduced on July 31, 1979.