

Amendment if engaged in by United States citizens. In effect, the Court put immigrants on notice that if they engage in political activity of which the government disapproves, they are vulnerable to selective retaliatory enforcement of the immigration laws.

And now, in the stunned aftermath of the September 11, 2001 atrocities, the nation is in deeper crisis than it has been in many decades. Once again, we are faced with undocumented claims that surrendering liberty will purchase security. Weekly, we see new measures proposed that run counter to fundamental constitutional principles: military tribunals, alien detentions, invasions of the attorney-client relationship, increased secrecy. And in the PATRIOT legislation adopted in October 2001, Congress expanded government surveillance powers, changed the domestic posture of the Central Intelligence Agency, and broadened the discretion of the executive branch to detain aliens indefinitely based on their associations and beliefs, rather than their acts.

The purpose of this book is to examine the civil liberties issues raised by government responses to terrorism, and to identify what is necessary to ensure that counterterrorism activities (especially of the FBI) are reliably consistent with the Constitution. The book seeks to place the terrorism problem in historical context by reviewing the FBI's persistent infringements on the First Amendment and its avoidance of meaningful controls on its discretion. Part I recounts several recent instances where FBI "counterterrorism" investigations consisted largely of monitoring First Amendment activity. These cases all arose after the reforms of the Watergate era, which were supposed to have reined in the FBI in response to earlier abuses. Part II outlines the legal framework that has permitted such intrusive investigations. Informed by this background, Part III examines the Antiterrorism Act of 1996, the PATRIOT Act of 2001, and emerging evidence of recent abuses. Finally, the conclusion proposes an alternative approach to fighting terrorism that is likely to be both more effective and more consistent with the Constitution than the path the government has taken.

FOUR STORIES

To understand the recurring nature of the government's misguided response to political threats, we start with four stories:

The Fifties: McCarthyism

In August 1952, Frank Wilkinson was testifying on behalf of the Los Angeles Housing Authority as an expert witness in an eminent domain hearing against slum property in the Chavez Ravine area.⁶ The Housing Authority wanted to clear the slum to build public housing. Wilkinson had been on the Housing Authority staff for ten years, campaigning for the racial integration of public housing. His support for social justice had long since brought him to the attention of the FBI, which had secretly begun an investigation in an attempt to link him to the Communist Party. As Wilkinson finished his testimony at the condemnation hearing, he was asked on cross examination, "Mr. Wilkinson, will you now tell us of all the organizations, political or otherwise, with which you have associated?" In those times, the mere posing of the question carried an implied accusation that one was a Communist.

Wilkinson refused to answer the question, launching a public odyssey that included a trip to federal prison and a lifetime of defending the First Amendment. His insistence upon his constitutional rights made headlines the next day in the Los Angeles Times. The eminent domain court disqualified him as an expert and struck his testimony from the record. The Los Angeles City Council called upon the House Un-American Activities Committee to investigate the Housing Authority. The California Senate subpoenaed both Wilkinson and his wife, a high school teacher. When they refused to answer questions regarding their political affiliations, they were both fired from their jobs.

Wilkinson went on to organize community and legal efforts to defend the Constitution, helping to found what is today the National Committee Against Repressive Legislation (NCARL). The FBI continued to investigate, harass and disrupt his First Amendment activities. In July 1958, Congress subpoenaed Wilkinson and again asked about his political associations. He again refused to answer, invoking his First

Amendment rights. With Carl Braden, the civil rights activist, he was cited for contempt and convicted in federal court. He appealed all the way to the Supreme Court, where he lost by a vote of five to four.⁷ In 1961, he served nine months in prison. When he came out, the FBI stepped up its neutralization campaign, as field offices were invited to interfere with his speaking engagements through "disruptive tactics." In all, Wilkinson was under surveillance for thirty-eight years. The FBI generated 130,000 pages of detailed reports on him and his friends at a cost of several million dollars. At the end of it all, the FBI concluded that Wilkinson and the group he founded to fight for the First Amendment had engaged in no illegal activities.

The Sixties and Seventies: COINTELPRO

On April 22, 1970, thousands of people gathered on Washington D.C.'s mall to celebrate the first Earth Day. Rallies in cities across the nation brought the total to twenty million Americans participating in what has been described as the "birth of the modern environmental movement."⁸ The FBI was there. Headquarters had ordered agents in at least forty cities to spy on Earth Day events. Their reports identified groups and individuals associated with planning the event. They attempted "to link the environmental activists with organizations the bureau [had] already targeted for surveillance, infiltration, and disruption."⁹ In Denver, the FBI's surveillance team recorded the remarks of Senator Gaylord Nelson. In Washington, D.C., agents carefully wrote down the slogans on signs carried by marchers and summarized each of the speeches, noting, for example, that Phil Ochs "made a few anti-war, anti-administration remarks."¹⁰

The Earth Day surveillance was part of a massive FBI program known as COINTELPRO, a set of secret investigations and disruptive actions against political activism across a wide range of issues. A special Senate committee chaired by Idaho Democrat Frank Church (the "Church Committee") in 1975 and 1976 found that the FBI had conducted a wide-ranging campaign of monitoring and disrupting political groups that were not engaged in illegal conduct.¹¹ At the peak of its

efforts, the FBI was investigating all major protest movements, from civil rights activists to Vietnam war protesters to women's liberation advocates. Standard FBI methodology included bugging of homes and offices, wiretapping, break-ins, and informants. In addition, the FBI sought to spread misinformation, foment internal dissension, and even provoke illegal activity. The effort consumed tremendous resources and sowed distrust and fear among many seeking peaceful change in government policies, but it produced little evidence of criminal conduct.¹²

The Eighties: Central American activists

"Please call me about Nicaragua. This will be a friendly chat." A New York law student returning home one day in 1985 found that message written on an FBI business card left at her door. The student had never been to Nicaragua, but had recently attended a meeting about the Nicaraguan conflict at City University. As public opposition to U.S. intervention in Central America mounted in the early 1980s, many others also received visits from the FBI. Daisy Cubias, who worked with the Ecumenical Refugee Council in Milwaukee, was visited once at her job and twice at home by FBI agents who asked her about members of a coalition to which she belonged that opposed U.S. policy in Central America. A Santa Cruz man was called by the FBI after returning from a trip to Nicaragua; when the man declined to meet for an interview, the agent commented that he "sounded guilty." One FBI agent seeking to interview a Detroit woman explained, "We try to interview everyone who makes a trip to Nicaragua. We do it for positive intelligence gathering."¹³

FBI agents tried three times to contact Jill Clark, a member of the New Orleans chapter of the Committee in Solidarity with the People of El Salvador (CISPES). Questioned about the visits at a 1985 hearing, FBI Director William Webster defended the visits and testified, "We are not keeping track of the membership of CISPES as such."¹⁴ Three years later, however, the Center for Constitutional Rights, a public interest legal organization in New York City, released thousands of pages of documents obtained under the Freedom of Information Act, showing that the

FBI had conducted a nationwide investigation of CISPES and other domestic groups whose only common feature was that they opposed American assistance to the military of El Salvador. The documents showed that, contrary to Webster's assurance, some FBI field offices in fact did undertake to identify CISPES members "as such." In the name of investigating "support for terrorism," agents monitored campus meetings, photographed peaceful rallies, checked license plate numbers in church parking lots, sent an informant into CISPES offices to copy or steal records, and questioned activists at home and at work. While the investigative efforts were nominally focused on CISPES, they ultimately collected information on the political activities of 1,330 groups opposed to U.S. policy in Central America.¹⁵ Throughout, the FBI gave little attention to uncovering criminal conduct, and never found any evidence of terrorism or support of terrorism.

The Nineties: Palestinians and Muslims

Khader Musa Hamide immigrated to the United States in 1971. He earned a bachelor's degree in psychology and an MBA. He also became active in the Palestinian community. He distributed copies of a newspaper published by the Popular Front for the Liberation of Palestine (PFLP). The PFLP, the second-largest faction within the umbrella Palestine Liberation Organization, had engaged in violent activities in the Middle East, but it was also engaged in a wide range of lawful activities, including the provision of education, day care, health care and social security, as well as cultural activities, publications and political organizing. Hamide participated in demonstrations advocating Palestinian self-determination and helped organize large public dinners which featured political speeches, cultural performances, and humanitarian aid fundraising attended by hundreds of Palestinians and Arab-Americans.

In 1984, Hamide's activities brought him to the attention of the FBI. He and others in the Los Angeles area suspected of being PFLP members became the subject of an intensive FBI investigation. An undercover FBI agent moved into the apartment next door to Hamide for nine months. With the assistance of local police officers, the FBI doc-

umented in detail Hamide's participation in political demonstrations, his distribution of literature, and his speeches at public events. It painstakingly (but not very accurately) translated hundreds of pages of Arabic language newsletters. Yet the FBI made no attempt to follow the trail of the money allegedly collected by Hamide and the others to determine whether it supported lawful or violent activities. Once the FBI had characterized the PFLP as a terrorist organization, it did not matter to its investigation that Hamide and his friends were engaged in entirely lawful and peaceful protest activity.

After three years of investigation, the FBI found no evidence of criminal activity by Hamide or other alleged PFLP members in Los Angeles. But rather than close its investigation and move on, the FBI asked the Immigration and Naturalization Service (INS) to deport Hamide and several others in order to "disrupt" their political activities and hamper the PFLP. In 1987, shortly after Hamide applied for U.S. citizenship, FBI and INS agents arrested him and his Kenyan-born wife and six others and sought to deport them immediately. The government, invoking long-unused provisions of the McCarran-Walter Act, charged them with being deportable for being associated with a group that advocated "world communism." In a chilling preview of what was to come in other cases, the INS sought to detain the "Los Angeles Eight" on the basis of secret evidence, but an immigration judge refused to go along, and released them. Federal courts blocked the deportations, characterizing the government's case as based on "guilt by association," but the Justice Department appealed to the Supreme Court, which ruled that aliens can be singled out for deportation based on their legal, political activities.¹⁶

THE LIMITS OF POST-WATERGATE REFORMS.

These stories span nearly five decades, revealing a troubling pattern of FBI surveillance and "disruption" of legitimate political activity. After the Church Committee in 1975 and 1976 documented the FBI's illegal and harassing tactics, public and Congressional outrage spawned

a series of reforms intended to prevent political spying and harassment. The reforms were significant, but, as the CISPES and LA 8 cases illustrate, the changes were by no means as deep or as permanent as many had believed. While FBI officials tried to dismiss the CISPES case as an aberration, they refused to admit any overreaching in the LA 8 case, and the Supreme Court effectively endorsed the government's tactics. It is clear that a focus on political activity and reliance on guilt by association have been enduring elements of the FBI's approach to its national security and counterterrorism missions.

The FBI, the Justice Department to which it reports, and the government as a whole still have not accepted or implemented a concept of "intelligence" that fully respects political freedoms. Consequently, through the 1980s and 1990s, the FBI continued to undertake investigations that, while lacking the extreme tactics of COINTELPRO, shared the philosophy and approach of the counterintelligence investigations condemned by the Church Committee. Arab-American community leaders, Palestinian students, Amnesty International members, and environmental activists were among the subjects of FBI counterintelligence or antiterrorism investigations in the last two decades whose focus on political activity recalled the abuses of the past.

The adoption of the Antiterrorism Act of 1996 showed how little had been learned from the abuses of the past and how alluring remained the concept of unrestrained intelligence investigations focused on political ideology. The Act's explicit criminalization of support for peaceful activity effectively authorized FBI surveillance and infiltration of political, religious and ethnic groups engaged in peaceful humanitarian and political work. Its repeal of a prohibition against using First Amendment activities as the sole basis for an investigation further encouraged politically motivated investigations. Its reintroduction of guilt by association into the immigration laws allowed the exclusion and deportation of immigrants and foreign visitors not for what they have done but for the causes and groups with which they have associated. And the endorsement of secret evidence in immigration proceedings against alleged "terrorists" denied the

most fundamental of rights — the right to defend oneself by confronting one's accusers.

The 1996 Act's provisions, it must be concluded, have had little direct impact, either positive or negative, on the fight against terrorism. The support for terrorism provisions have thus far resulted in only three prosecutions. The "Alien Terrorist Removal Court" was never used — in part because the Justice Department claimed authority outside the Act for using secret evidence in deportation proceedings with even fewer due process protections. The government carried out a number of successful prosecutions of terrorists, including of members of the al Qaeda network, but did so without relying on the 1996 Act authorities. And the FBI continued to resist outside checks on its discretion, instead adopting a "new" strategy that emphasized intelligence gathering and sought ever increasing mountains of data about legal activity.

CHILLING EFFECT ON THE FIRST AMENDMENT

In the past, the Bureau intentionally used investigations to intimidate. An FBI memorandum in September 1970 urged questioning members of one group in order to "enhance the paranoia in these circles and ... further serve to get the point across that there is an FBI agent behind every mailbox."¹⁷ When confronted with charges of political harassment today, the FBI responds that its *intent* is not to intimidate. Viewed objectively, however, widespread FBI monitoring and questioning of people regarding their political activities has an inescapable chilling effect. For protest groups already at odds with the government, or for minority ethnic or religious groups, such attention inevitably inhibits and reduces the level of political activities in which the group's members feel free to engage. Word travels fast that the FBI has been to visit somebody and has asked about the group's activities, membership, or funding.

The government's case against the LA 8, for example, had a devastating chilling effect on the activities of Palestinians throughout the United States. And when the FBI began interviewing Arab-Americans

during the Gulf War in 1991, many were afraid to speak out, both because of concern that neighbors and co-workers would assume that there was a reason for the FBI visit and for fear of being subjected to racial harassment. In Orange County, California, after two interviews in 1991, the homes of Arab-Americans were hit with bottles, possibly as an outgrowth of the FBI's questioning of neighbors.¹⁸ And the Gulf War interviews of Arabs were mild compared to the targeting of Arabs and Muslims in the wake of the terrorist attacks of September 11. These tactics simultaneously silence the community targeted and build suspicion of law enforcement. As Casey Casem, a Los Angeles radio host and prominent Arab-American said, "When Arab-Americans become suspect, then Arab-Americans tend to want to carry a low profile and not speak out on issues they believe strongly in. The interviews are thus impeding our First Amendment rights."¹⁹

Such feelings, of course, are not unique to Arab-Americans. They are an inevitable consequence of law enforcement questioning that follows lines of politics, ethnicity or religion. Yale Law School professor and First Amendment scholar Thomas Emerson described the impact of government surveillance on what he called "the dynamics of the system of freedom of expression:"

Suspicious that government infiltrators are reporting the discussions at meetings dampen the spontaneity or destroy the harmony of a political gathering. Thus many people will hesitate to attend a meeting where the police are taking down license numbers or engage in a demonstration where they are being photographed.²⁰

This chilling effect, amplified by agents' attempts to neutralize or disrupt those loosely defined as national security threats, has a corroding effect on the political and social integration necessary to the maintenance of security in a democratic society. To promote security, we need to avoid engendering the sense that dissenters are excluded from society. This alone is a powerful reason to adopt a model of intelligence that does not define threats in terms of politics and to develop counterterrorism strategies that do not devolve into the monitoring of suspect groups or communities.

POLITICAL MONITORING VERSUS CRIMINAL LAW ENFORCEMENT

For much of its modern history, our nation has grappled, often unsuccessfully, with the question of how to separate the few who resort to violence from the many who criticize the government and work peacefully to change the dominant political culture. In the 1950s, this challenge was posed by the threat of Communism. Today's challenge is terrorism.

What are the means to prevent attacks like those of September 11, and to promptly identify, arrest and convict the perpetrators of such acts, without casting a net that sweeps in peaceful dissent? If a fundamentalist religious group or a militia group is preaching the propriety of violence or advocating support for terrorism, when should the FBI be permitted to investigate, and how long and intensively should it continue investigating? If a person or group is involved in violent activity, should the FBI identify and monitor others who share the same ideology? If a group is raising money and sending it to a politically active foreign group, should the FBI be permitted to investigate? Should the government be able to prohibit all support for a group that engages in both violent and peaceful activities? These questions are central to the fight against terrorism.

The FBI's predominant approach, followed throughout its history, has been to designate certain ideologies or groups as suspect, to attempt to identify their adherents, members, supporters or associates, and then to monitor the activities of all those identified. This "guilt by association" intelligence model presumes that all those who share a particular ideology or political position must be monitored on the chance that they will slip into criminal activity in order to achieve their political objectives. It blurs the distinction between "support" for a cause and participation in violence. Thus, even if an investigation begins with an allegation of violent conduct, it often expands to include many who share the same ideology, without any evidence linking them to the crime. At its worst, this approach has led to investigations aimed mainly at disrupting, discrediting and neu-

tralizing "targets" instead of developing evidence of criminal conduct that can be presented in a court of law.

A better approach recognizes the critical distinction between criminal conduct and political activity. This approach accepts angry criticism of government as healthy to a democratic society and constitutionally protected. It requires the government to have suspicion of personal involvement in past, ongoing or planned criminal conduct before it investigates a group or an individual; if there is no evidence of criminal conduct, persons and groups should be left alone, regardless of their beliefs or the actions of those with whom they associate. The goal of this criminal model is not to draw the widest possible picture of an enterprise, but to narrow the scope of inquiry. Rather than viewing advocacy and violence as part of a continuum, the approach tries to draw a distinction between the two.

Professor Emerson described the choice as follows:

The problem is not the government's power to investigate a crime that has been or is about to be committed, ... since, in such cases, any impact upon the right of an individual to freedom of expression has never been considered to be of constitutional dimensions. ... Rather, the issue arises where the collection of data is not related, or only remotely related, to law enforcement and is principally designed to inform the government about the political beliefs, attitudes or activities of individuals or organizations in the community. It must be conceded that the distinction involved is often difficult to draw; it is, however, fundamental to the constitutional issue.²¹

Adherence to a criminal standard does not mean that the FBI must remain deaf to statements calling for violent activity, nor, as some have irresponsibly said, does it require the FBI to wait until a bomb goes off before it can act.²² While a person cannot be prosecuted under the Constitution for saying that federal buildings should be blown up, law enforcement agencies may constitutionally investigate to determine if a person making such statements plans to act on them, for conspiracy to blow up federal buildings is a crime. What the First Amendment demands — and what the FBI has too often forgotten — is that an inves-

tigation must be narrowly limited to determining whether violent activity is in fact being planned. The government should not extend its attention to an individual without reason to suspect — apart from ideology — that he shares in the criminal plans or activity. And if evidence is not soon developed that a suspected group is in fact engaging in or planning violent activity, the government should withdraw its attention, until and unless new evidence provides reason to suspect that the group or individual is planning acts of violence.

THE CONSTITUTION AND AN EFFECTIVE COUNTERTERRORISM STRATEGY

This focus on criminal conduct, critics claim, is too narrow. In order to maintain security, government officials and terrorism experts tell us, we must surrender some of our liberty.²³ But in the past, we have sacrificed liberty without benefit to security. There is no necessary contradiction between a robust application of constitutional rights and an effective counterterrorism strategy. To the contrary, an antiterrorism policy that cuts corners constitutionally is likely to be ineffective.

Terrorist acts are criminal regardless of ideology and are best handled by strategies that are as divorced from ideology as possible. Much of the FBI's efforts, however, and much of the 1996 Antiterrorism Act and the immigration provisions of the 2001 PATRIOT Act focus not on acts of violence but on the political or religious ideology that motivates them. This approach is inevitably imprecise and inefficient. First, for practical reasons alone, the FBI cannot monitor all adherents of certain religions or ideologies on the chance that they may engage in terrorism sometime in the future. Our nation harbors too many diverse religions, ideologies and nationalities for the government to monitor effectively. Second, the ideological approach encourages stereotyping that not only stigmatizes the innocent but may lull security services into ignoring genuine threats that do not fit an ideological or ethnic pattern. The ideological approach is bound to be static, while the "face of terrorism" can change rapidly: Muslim fundamentalist one day, white separatist

the next, anti-technology loner the next. The Oklahoma City bombing demonstrated the frightful destructiveness of a person of little ideology and no apparent affiliation.

Third, politically focused investigations are likely to be counter-productive and may actually contribute to violence. Political freedom is a society's safety valve, allowing the passionately critical a nonviolent way to express their dissatisfaction with the status quo. Dissent is the mechanism for initiating social change. Shutting off this safety valve only encourages those who have no desire to see the process of peaceful change work. Further, if entire groups are identified as enemies, the cohesiveness of the group may harden against society, substantially diminishing the likelihood that law enforcement agencies will find cooperative witnesses. If the FBI treats an entire nationality or group as suspect, members of that nationality or group will in turn treat the FBI as suspect, making even legitimate investigation much more difficult.

In 1991, Frank Wilkinson and the National Committee Against Repressive Legislation launched a campaign calling for legislation to complete the process of reforming the FBI. At the heart of the campaign was a petition calling for legislation —

limiting FBI investigations to situations where there are specific and articulable facts giving reason to believe that the person has committed, is committing, or is about to commit a specific act that violates federal criminal law, and also limiting such investigations to obtaining evidence of criminal activity ...

Despite the support of over 500 legal scholars across the country, the proposal has never been adopted. As a result, there is no such statutory limitation on the FBI. The principle that the FBI should confine itself to collecting evidence of crimes and potential crimes should be a central premise of our national antiterrorism strategy, yet it is nowhere reflected in our statute books. If it had been, we might have avoided some of the abuses we detail here. In the wake of the events of September 11, the need for reform is more, not less, urgent than ever.