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## U.S. And U.K. Approaches To The War On Terror: The Surveillance Of Religious Worship

Jodie A. Kirschner

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## U.S. and U.K. Approaches to the War on Terror: The Surveillance of Religious Worship

Jodie A. Kirshner\*

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### INTRODUCTION

In 1993, Steve Emerson, terrorism expert and author of the documentary film "Jihad in America," attended a conference of Islamic radicals held at the Detroit, Michigan Renaissance Center. Knowing that members of Hamas and Islamic Jihad would be present, Emerson approached the FBI, suggesting that an agent attend to collect intelligence. Without specific suspicion of criminal activity, however, FBI agents could not participate, under the existing Attorney General Guidelines. Emerson attended and heard known international representatives of terrorist organizations advocate violence. He also collected bomb-making manuals they distributed.<sup>1</sup>

In 1999, Sheikh Muhammed Hisham Kabbani, Head of the Islamic Supreme Council of America, testified before an open forum at

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\* The author acknowledges with gratitude the invaluable advice given to her by Professor Debra Livingston, Vice Dean and Paul J. Kellner Professor of Law, Columbia Law School.

<sup>1</sup> See *Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium Transcript*, 21 MICH. J. INT'L L. 527, 565-566 (1999).

the State Department that eighty percent of mosques and Islamic charities in the United States have been taken over by “extremists.”<sup>2</sup> During the making of his documentary, Steve Emerson witnessed this first-hand. Hamas posters and recruitment literature papered the vestibule of the Bridgeview Mosque Emerson visited in a suburb of Chicago. Terrorist videos and manuals formed the bulk of its library collection. In fact, when Israeli authorities charged Mohammad Jarad, a member of the Mosque, with transferring money to terrorist groups, he told them he had been sent on a “mission” by Jamal Said, the Bridgeview Mosque’s imam.<sup>3</sup> Emerson also listened to speaker Abdullah Azzam order his audience to “unsheathe his sword and fight to liberate Palestine” at the 1998 First Conference in Jihad at the Al-Farooq Mosque in Brooklyn.<sup>4</sup>

These anecdotes raise the question of whether the FBI should be authorized to attend mosque services and other religious events on the same terms as the public. While attendance of religious services falls within the core of activities protected by the First Amendment, former Attorney General John Ashcroft believed that the FBI should exercise this power to protect national security proactively. In 2002, he eased decades-old restrictions on the FBI’s authority to carry out surveillance, proclaiming that the old rules “barred FBI field agents from taking the initiative to detect and prevent future terrorist acts unless the FBI learns of possible criminal activity from external sources.”<sup>5</sup> The revised guidelines Ashcroft enacted allow agents to attend public gatherings at their individual discretion without requiring any preliminary criminal finding. “People who hijack a religion and make out of it an implement of war will not be free from our interest,” he told ABC’s “This Week.”<sup>6</sup>

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<sup>2</sup> See STEVEN EMERSON, *AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US* 160 (2002).

<sup>3</sup> See *id.* at 12.

<sup>4</sup> See *id.* at 130.

<sup>5</sup> John Ashcroft, Remarks of Attorney General, May 30, 2002, <http://www.usdoj.gov/archive/ag/speeches/2002/53002agpreparedremarks.htm>.

<sup>6</sup> *Religious Groups Could Be Monitored, Ashcroft Says*, ASSOCIATED PRESS, Dec. 3, 2001.

Meanwhile, critics counter that monitoring religious observance “chills” individual behavior.<sup>7</sup> The *Washington Post* reports that across New York, mosques have suffered declines in both attendance and charitable contributions as a direct result of Ashcroft’s changes.<sup>8</sup> The Muslim Community Association, an Ann Arbor group sponsoring daily prayers and educational programs, has sued Ashcroft, noting in its complaint that attendance at its activities has fallen “because the FBI has recorded conversations and services inside the mosque.”<sup>9</sup> Other mosques have expressed concern over the language used at services.<sup>10</sup>

Ashcroft’s new formulation of the FBI’s role brought it closer to the unfettered position long enjoyed by the U.K.’s MI5 security services. As a pure domestic intelligence agency, the MI5 enjoys freedom to monitor political and religious activities at will.<sup>11</sup>

In the past, the U.S. and U.K. have struck different balances with respect to the protection of civil liberties and the defense of national security. The U.K.’s approach to counterterrorism developed through its struggle to subdue violence perpetrated by the Irish Republican Army. The guidelines governing the FBI prior to Ashcroft’s revisions<sup>12</sup> were adopted in the 1970s, following the revelation of widespread intelligence abuses. The Senate Church Committee exposed an FBI where

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<sup>7</sup> See Floyd Abrams, *Address: The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 2 (2002-2003) (supporting a higher level of surveillance, even as Abrams concedes that this chills free speech).

<sup>8</sup> Lynne Duke, *At a Brooklyn Mosque, Muslims Pray in the Shadow of Terrorism*, WASH. POST, April 16, 2003, at C1.

<sup>9</sup> See Complaint of the Muslim Community Association of Ann Arbor, Muslim Cmty. Assoc. et al. v. Ashcroft, No. 03-72913 (E.D. Mich. July 30, 2003) [hereinafter “Complaint”].

<sup>10</sup> Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1233 (2004).

<sup>11</sup> *Id.* See *infra* pt. III (discussing the United Kingdom’s MI5 Security Service).

<sup>12</sup> Two sets of guidelines govern FBI terrorism investigations: guidelines for foreign intelligence and international terrorism and guidelines on general crimes, racketeering and domestic terrorism. The Foreign Guidelines apply to the investigation of foreign groups who carry out attacks in the United States. The Domestic Guidelines apply to groups who both originate and operate domestically. This Article discusses the revisions Ashcroft made to the Domestic Guidelines.

“opposition to government policy or the expression of controversial views was frequently considered sufficient for collecting data on Americans.”<sup>13</sup> The Committee concluded: “Where unsupported determinations as to ‘potential’ behavior are the basis for surveillance of groups and individuals, no one is safe from the inquisitive eye of the intelligence agency.”<sup>14</sup>

This Article argues that while broad surveillance powers may reflect the appropriate compromise between liberty and security in the U.K., unlimited surveillance of First Amendment-protected activity is improper in the context of U.S. history. Part I of this Article surveys the FBI’s historic misuse of its investigative authority. Part II details the protections put in place once the FBI’s abuses came to light. Part III explains the structure of intelligence operations in the U.K., tracing this legal framework to the history of Irish terrorist activity. Part IV contends that the government should reinstate the requirement that FBI agents allege suspicions of criminal activity before they conduct surveillance of religious groups in recognition of the events that spurred the original enactment of this requirement.

### I. THE FBI’S TROUBLED PAST

The FBI’s past excesses indicate that a lack of constraint on intelligence can devolve into retribution against those holding non-mainstream beliefs. In 1908, the FBI was formed under orders from Attorney General Charles Bonaparte for the purpose of criminal enforcement. Members of Congress debated whether to legislate checks on the FBI’s power but ultimately did not institute any protections against abuse.<sup>15</sup> Part I of this article details the FBI’s historic misuse of its freedom to conduct covert investigations.

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<sup>13</sup> See SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES REPORT, S. REP. NO. 94-755, Book II, at 169 (1976).

<sup>14</sup> *Id.*, Book II, at 177-78.

<sup>15</sup> *Id.*, Book III, at 379.

*A. War-time Intelligence*

The Attorney General holds derivative power to issue guidelines directing the FBI to investigate matters within the control of the Department of Justice and the Department of State.<sup>16</sup> Thus, while the FBI's original mandate was to investigate violations of federal criminal law, during World War I Attorney General George Wickersham and Attorney General James McReynolds directed the Bureau's increasing involvement in domestic intelligence.<sup>17</sup>

As the War drew to a close, the FBI transferred its focus from investigating war critics to the surveillance of radical groups. In 1919, terrorist bombings within the United States, including "an explosion" on Attorney General A. Mitchell Palmer's doorstep, triggered the creation of a General Intelligence Division.<sup>18</sup> The Division operated under a directive to investigate "anarchistic and similar classes, Bolshevism, and kindred agitations advocating change in the present form of government." The result was the "Palmer Raids," a night on which FBI agents detained more than 10,000 people in thirty-three cities, falsely alleging that they were Communists.<sup>19</sup> During this period, the FBI also began to compile dossiers detailing the political beliefs of suspected radicals.<sup>20</sup>

Upon taking office in 1924, Attorney General Harlan Fiske Stone labeled the FBI as "lawless . . . and tyrannical."<sup>21</sup> He placed J. Edgar Hoover in charge of restricting the Agency's activities to criminal investigations.<sup>22</sup>

In spite of this, President Roosevelt soon commanded the FBI to investigate Nazi activity and right-wing domestic threats.<sup>23</sup> Roosevelt requested intelligence on "subversive activities in the United States . . .

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<sup>16</sup> 28 U.S.C. § 533 (1976).

<sup>17</sup> S. REP. NO. 94-755, *supra* note 13, Book III, at 382.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 383-84.

<sup>20</sup> *Id.* at 386.

<sup>21</sup> *Id.* at 388.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 393.

as may affect the economic and political life of the country as a whole.”<sup>24</sup> The FBI fulfilled this directive by creating an index of more than 2,500 people suspected of Communist and Nazi activities. Roosevelt’s orders did not limit the FBI’s domestic intelligence collection to violations of the law.<sup>25</sup>

In 1940, Attorney General Robert Jackson informed state officials that the FBI was engaged in a program of “steady surveillance over individuals and groups within the United States who are so sympathetic with the systems or designs of foreign dictators.”<sup>26</sup> Utilizing its unbounded authority, the FBI monitored participants in lawful domestic political activities, including members of the League for Fair Play, a group that supplied the Rotary and Kiwanis Clubs with speakers, and members of the Independent Voters of Illinois.<sup>27</sup>

#### *B. Post-war “Subversive” Targeting*

By the close of the Second World War, the FBI was embroiled in “pure intelligence” programs directed against domestic “subversives.”<sup>28</sup> Under Director Hoover’s instructions, the agency expanded its efforts to investigate and create files on all Communist Party members. The FBI undertook surveillance of organized labor, alleged Communist front organizations, racial groups, nationality groups, youth organizations, political activists, the motion picture industry, and science and research professionals.<sup>29</sup>

By 1951, the FBI maintained records on 13,901 individuals in its Security Index and over 200,000 individuals in its Communist Indexes. The 1951 FBI Manual stated it was “not possible to formulate any hard-and-fast standards for measuring the dangerousness of individual members or affiliates of revolutionary organizations.” Thus, “Where there is doubt an individual may be a current threat . . . the questions

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<sup>24</sup> *Id.* at 394.

<sup>25</sup> *Id.* at 396.

<sup>26</sup> *Id.* at 411.

<sup>27</sup> *Id.* at 415.

<sup>28</sup> *Id.* at 449.

<sup>29</sup> S. REP. NO. 94-755, *supra* note 13, Book II, at 47 (1976).

should be resolved in the interest of security and investigation [sic] conducted.”<sup>30</sup>

The NAACP was a particular target of the FBI’s Communist-infiltration activities. In 1957, the FBI’s New York Field Office compiled a 137-page manuscript detailing its findings on the organization, even though an informant had reported the NAACP’s extension of a resolution barring membership to those with Communist ties.<sup>31</sup>

The FBI also began to investigate other racial groups, including Klan-like organizations and individuals associated with the Nation of Islam, the John Birch Society, and the Christian Nationalist Crusade. Despite the FBI’s acknowledgment that it lacked authority over general racial matters, the FBI’s Manual stated, “[a]n intelligence function the Bureau does have the responsibility of advising . . . on all pertinent information obtained concerning [these groups].”<sup>32</sup>

As concerns over civil rights demonstrations, urban violence, and Vietnam protests replaced the Communist fears of the 1950’s, the FBI continued to pursue a domestic intelligence, rather than law enforcement approach to these problems. FBI agents were charged with reporting on the political speech of the Klu Klux Klan and other “hate groups.”<sup>33</sup> Agents investigated the leaders and members of “black nationalist groups” because they were seen as a “threat to internal security.”<sup>34</sup> The FBI engaged in such substantial overreaching that Dr. Martin Luther King, Jr. and the Southern Christian Leadership Coalition were investigated as “radical and violence-prone” groups.<sup>35</sup> Agents took pictures at civil rights demonstrations, including one in celebration of the anniversary of the Emancipation Proclamation.<sup>36</sup>

Intelligence investigations also targeted antiwar demonstrators.<sup>37</sup> Informants attended antiwar teach-ins and conferences sponsored by the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, Book III, at 450.

<sup>32</sup> *Id.* at 456.

<sup>33</sup> *Id.* at 475-89.

<sup>34</sup> *Id.* at 477.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 489.

<sup>37</sup> *Id.* at 483.



Universities Committee on Problems of War and Peace and reported the text of all speeches.<sup>38</sup> The FBI also conducted name checks on those who signed petitions critical of U.S. policy in Vietnam and of those who wrote letters to Senator Wayne Morse supporting his critiques of the Vietnam War.<sup>39</sup>

From 1956 through 1971, the FBI's COINTELPRO operation aimed to "neutralize or disrupt" the groups it targeted.<sup>40</sup> The Bureau aimed to prevent the exercise of First Amendment speech and associational rights, asserting that protecting national security necessitated prevention of the growth of dangerous groups and the propagation of dangerous ideas.<sup>41</sup> Attorney General William Saxbe's 1974 report on COINTELPRO described its tactics as "abhorrent in a free society."<sup>42</sup>

Religious groups also caught the FBI's attentions. According to FBI documents, agents conducted surveillance on Holiness-Pentecostal, Baptist, African Methodist, Muslim, and Spiritualist congregations. The agency particularly scrutinized the Church of God in Christ, the Saints of Christ, and "Daddy Grace's" House of Prayer and maintained dossiers on Black churches with missions in Africa.<sup>43</sup>

### C. 1970s Backlash

In February 1971, the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, chaired by Senator Sam J. Ervin of North Carolina, began hearings to address citizens' "fear[s] about exercising their rights under the First Amendment to sign petitions, or to speak and write freely on current issues of Government policy."<sup>44</sup> While testifying before the Subcommittee, Robert Mardian, Assistant Attorney General and head of the Justice Department's Internal Security Unit, confessed that the Justice Department and FBI had no "specific

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<sup>38</sup> *Id.* at 487.

<sup>39</sup> *Id.* at 489.

<sup>40</sup> *Id.*, Book II, at 3.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 73.

<sup>43</sup> *Id.*

<sup>44</sup> S. REP. NO. 94-755, *supra* note 13, Book II, at 73-77 (1976).

published regulations” guiding intelligence collection related to civil disturbances.<sup>45</sup>

The scope of abuse did not surface until 1975, when the Church Committee in the Senate and the Pike Committee in the House convened to review the FBI’s activities.<sup>46</sup> The Church Committee’s inquiry lasted for fifteen months.<sup>47</sup> Its final report detailed a 25-year investigation of the NAACP,<sup>48</sup> surveillance on every Black Student Union in the country,<sup>49</sup> a 31-year infiltration of the Socialist Workers Party,<sup>50</sup> harassment of the Women’s Liberation Movement,<sup>51</sup> and 17,528 domestic investigations of individual citizens.<sup>52</sup> The Church Committee’s final report makes clear that groups and individuals were investigated because of their political stance, not because of any proclivity towards criminal activity.<sup>53</sup> The report states:

Virtually every element of our society has been subjected to excessive government-ordered intelligence inquiries. Opposition to government policy or the expression of controversial views was frequently considered sufficient for collecting data on Americans. The committee finds that this extreme breadth of intelligence activity is inconsistent with the principles of our Constitution which protect the rights of speech, political activity, and privacy against unjustified governmental intrusion.<sup>54</sup>

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<sup>45</sup> *Id.* at 548-58.

<sup>46</sup> *See id.*; *see also* CIA, THE PIKE REPORT (Spokesman Books 1977).

<sup>47</sup> *See* William C. Banks & M.E. Bowman, *Executive Authority For National Security Surveillance*, 50 AM. U. L. REV. 33 (2000).

<sup>48</sup> S. REP. NO. 94-755, *supra* note 13, Book II, at 8.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.* at 19.

<sup>53</sup> *See* Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 621 (2004).

<sup>54</sup> S. REP. NO. 94-755, *supra* note 13, Book II, at 169 (1976).

## II. ATTORNEY GENERAL GUIDELINES

The Church Committee's final report generated several results. Both the House and the Senate established permanent intelligence oversight committees.<sup>55</sup> President Ford issued an executive order placing limits on the FBI's investigative activities.<sup>56</sup> In addition, President Ford's Attorney General Edward Levi issued internal guidelines curtailing the FBI's ability to conduct political surveillance.<sup>57</sup>

Attorney Generals may issue guidelines defining the FBI's investigatory powers.<sup>58</sup> Such guidelines, though not explicitly enforceable in court, both regulate FBI activity and form a template against which judges may review the propriety of investigations.<sup>59</sup> These guidelines thus shape the degree to which governmental investigations respect civil liberties, and the FBI's compliance with them has influenced recent litigation settlements.<sup>60</sup>

The Levi Guidelines created a framework that ensured against intrusions into First Amendment-protected activities, without an adequate evidentiary predicate. The Smith Guidelines retained this basic framework, while recognizing the need for government, in certain circumstances, to undertake the long-term surveillance of dangerous enterprises. The Ashcroft Guidelines, by contrast, reinstated a dangerous authority to initiate surveillance without predication.

### A. *Levi Guidelines*

The guidelines Attorney General Levi enacted following the Church Committee hearings restricted FBI investigations according to their type. The Levi Guidelines permitted the FBI to commence a

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<sup>55</sup> H.R. Res. 658, 95th Cong.(1977); S. Res. 400, 94th Cong. (1976).

<sup>56</sup> Exec. Order No. 11,905, 41 C.F.R. (1976).

<sup>57</sup> ATTORNEY GENERAL'S GUIDELINES ON DOMESTIC SECURITY INVESTIGATION, reprinted in JOHN T. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS 196-202 (1979) [hereinafter "LEVI GUIDELINES"].

<sup>58</sup> 28 U.S.C. § 533 (1976).

<sup>59</sup> John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69. CORNELL L. REV. 785, 786 (1984).

<sup>60</sup> See *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 575, 583 (D.C. Ill., 1983).

“preliminary investigation” 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.”<sup>61</sup> The Levi Guidelines limited such investigations to confirmation or negation of the charge and restricted their duration to ninety days.<sup>62</sup>

A “full investigation” was only “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.”<sup>63</sup> A “full investigation” also required permission from FBI headquarters<sup>64</sup> and annual review by the Department of Justice to “determine in writing whether continued investigation was warranted.”<sup>65</sup> In essence, investigations conforming to the Levi Guidelines had to be “designed and conducted so as not to limit the full exercise of rights protected by the Constitution and U.S. Laws.”<sup>66</sup>

By the end of the 1970s, the number of domestic security investigations occurring under the Levi Guidelines had decreased substantially.<sup>67</sup> In 1983, when President Reagan’s Attorney General William French Smith decided to update the Levi Guidelines, his reforms overall cemented the shift away from the FBI’s pre-Levi orientation towards internal security to a focus on criminal intelligence and law enforcement.<sup>68</sup>

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<sup>61</sup> LEVI GUIDELINES, *supra* note 57, at 197.

<sup>62</sup> *Id.* at 197-98.

<sup>63</sup> *Id.* at 198.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 200.

<sup>66</sup> *Id.* at 196-197.

<sup>67</sup> Gregory R. Stone, *The Reagan Administration, the First Amendment and F.B.I. Domestic Security Investigations*, in FREEDOM AT RISK 272, 276-77 (Richard O. Curry ed., 1988).

<sup>68</sup> Elliff, *supra* note 59, at 796.

### *B. Smith Guidelines*

Attorney General Smith articulated his purpose as ensuring “protection of the public from the greater sophistication and changing nature of domestic groups that are prone to violence.”<sup>69</sup> He updated and made explicit the FBI’s ability to launch investigations based on suspicious statements, its authorization to conduct “preliminary inquiries,” and the terms upon which it could launch “full investigations.”

Although the Levi Guidelines did not address investigations based solely on statements, the Smith Guidelines made clear:

In its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct. It is important that such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States. When, however, statements advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence, an investigation under these guidelines may be warranted unless it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm.<sup>70</sup>

The Smith Guidelines abolished separate “preliminary inquiries” for domestic security purposes. Smith authorized only “preliminary inquiries” related to general crimes.<sup>71</sup> This change reflected the

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<sup>69</sup> Press Release, Department of Justice (Mar. 7, 1983), *reprinted in Attorney General’s Guidelines for Domestic Security Investigations (Smith Guidelines): Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98<sup>th</sup> Cong. 47 (1983).

<sup>70</sup> ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS § I, *reprinted in FBI Domestic Security Guidelines: Oversight Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98<sup>th</sup> Cong. 67, 69 (1983) [hereinafter SMITH GUIDELINES].

<sup>71</sup> *Id.* § II.B.

recognition that prior to 1976, the FBI had undertaken “preliminary inquiries” for domestic security purposes, based upon an individual’s political association or political expression. While such investigations had generated copious individual files, they had not contributed meaningfully to law enforcement.<sup>72</sup> Furthermore, history had demonstrated the FBI’s frequent initiation of “preliminary inquiries” to monitor members of mistrusted groups. In 1971, the FBI had screened all Black student leaders across the country, for the purpose of identifying members of militant groups such as the Black Panthers.<sup>73</sup> Under the Smith Guidelines, “undisclosed participation in the activities of an organization by an undercover employee or cooperating private individual in a manner that may influence the exercise of rights protected by the First Amendment” necessitated approval from FBI headquarters, with notification to the Department of Justice.<sup>74</sup> The FBI would also be “required to use the least intrusive means of surveillance possible.”<sup>75</sup>

Whereas the Levi Guidelines permitted investigations of groups as well as of individuals engaged in activities that “involve or will involve the use of force or violence in violation of federal law,”<sup>76</sup> the Smith Guidelines stated that investigations should be “concerned with . . . entire enterprises, rather than individual participants and specific criminal acts.”<sup>77</sup> The Smith Guidelines also lowered the probable cause standard found in the Levi Guidelines, enabling investigations “when 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.”<sup>78</sup>

The standards included in the Smith Guidelines struck a workable balance. The “reasonable indication of violence” requirement and the obligation to adhere to the defined scope of an investigation addressed many of the abuses seen under FBI Director Hoover without

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<sup>72</sup> S. REP. NO. 94-755, *supra* note 13, at 138-47 (1976).

<sup>73</sup> *Id.* at 527.

<sup>74</sup> *Id.* § IV.B.3.

<sup>75</sup> SMITH GUIDELINES, *supra* note 70, § II.B.4.

<sup>76</sup> LEVI GUIDELINES, *supra* note 57, § I.A.4.

<sup>77</sup> SMITH GUIDELINES, *supra* note 70, § III.B.

<sup>78</sup> *Id.* § III.B.1a.

sacrificing results. Under the Smith Guidelines, the FBI successfully investigated mosques, after documenting suspicious activity.<sup>79</sup>

In the 1980s, the INS lawfully infiltrated Arizona churches under similar standards. After Presbyterian minister John Fife proclaimed to the media that his church was smuggling illegal aliens from Central America, and therefore violating federal immigration law, INS agents initiated an undercover operation.<sup>80</sup> Informants attended religious services over the course of nine months,<sup>81</sup> and the government successfully convicted eight of eleven defendants with the evidence it had gathered.<sup>82</sup> Though some of the monitored churches brought suit against the government for “chilling” their religious liberty, the court did not rule to prohibit undercover infiltration of churches.<sup>83</sup>

Following the Oklahoma City bombing, the FBI investigated right-wing religious groups, including the Christian Identity Movement.<sup>84</sup> Though some members of Congress proposed amending the Smith Guidelines to permit broader surveillance,<sup>85</sup> FBI Director Louis Freeh, Attorney General Janet Reno, and Deputy Attorney General Jamie Gorelick agreed that the Smith guidelines afforded the FBI sufficient power to investigate terrorist threats.<sup>86</sup>

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<sup>79</sup> U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL TERRORISM -F.B.I. INVESTIGATES DOMESTIC ACTIVITIES TO IDENTIFY TERRORISTS 22-23, 38 (1990).

<sup>80</sup> *United States v. Aguilar*, 883 F.2d 662, 668 (9th Cir. 1989).

<sup>81</sup> Wayne King, *Churches Sue U.S., Alleging Illegal Acts in Inquiry on Aliens*, N.Y. TIMES, Jan 14, 1986, at A1.

<sup>82</sup> Lininger, *supra* note 10, at 1220.

<sup>83</sup> *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521-23 (9th Cir. 1989); *Presbyterian Church v. United States*, 752 F. Supp. 1505 (D. Ariz. 1990).

<sup>84</sup> See FBI, PROJECT MEGIDDO, available at <http://permanent.access.gpo.gov/lps3578/www.fbi.gov/library/megiddo/megiddo.pdf>. (last visited February 27, 2006).

<sup>85</sup> See David M. Park, *Re-examining the Attorney General's Guidelines for F.B.I. Investigations of Domestic Groups*, 39 ARIZ. L. REV. 769, 769 (1997) (explaining that several politicians in Congress suggested broadening the guidelines to help prevent future attacks).

<sup>86</sup> *Id.* at 770.

*C. New Ashcroft Guidelines*

Attorney General John Ashcroft's 2002 revisions significantly rolled back Levi and Smith's limitations. Ashcroft's Guidelines state that "for the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally."<sup>87</sup> The new guidelines authorize FBI agents to initiate "preliminary investigations" with permission from a Special Agent in Charge, rather than from FBI Headquarters, and they also lengthen the time period in which FBI agents may conduct these inquiries.<sup>88</sup>

The FBI has made use of this new power to conduct surveillance of First Amendment activities by targeting mosques and other political meetings for undercover investigation.<sup>89</sup> The FBI has confirmed its surveillance of mosques in several U.S. cities.<sup>90</sup> The Department of Justice has endorsed FBI instructions to local police directing them to convey reports of irregular behavior at antiwar rallies.<sup>91</sup> Previously, FBI

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<sup>87</sup> U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERALS GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (2002), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last visited February 27, 2006) [hereinafter "2002 GUIDELINES"].

<sup>88</sup> *See id.* at 17-18.

<sup>89</sup> *But see id.* at 23 ("The law enforcement activities authorized by this Part do not include maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States.").

<sup>90</sup> *See* House Comm. on the Judiciary, *Sensenbrenner/Conyers Release Justice Department Oversight Answers Regarding USA PATRIOT Act and War on Terrorism*, May 20, 2003, available at <http://www.house.gov/judiciary/partiotlet051303.pdf> (citing U.S. DEP'T OF JUSTICE, ANSWERS FROM THE DEPARTMENT OF JUSTICE ON THE USA PATRIOT ACT 39-40 (May 13, 2003), available at <http://judiciary.house.gov/media/pdfs/patriotlet051303.pdf>).

<sup>91</sup> Eric Lichtblau, *F.B.I. Goes Knocking for Political Troublemakers*, N.Y. TIMES, Aug. 16, 2004, at A1.



attendance at a religious service or political event would have required suspicion of specific criminal activity.<sup>92</sup>

Appearing on ABC's news program "This Week" shortly after announcing the revised guidelines, Attorney General Ashcroft stated that, "[f]or so-called terrorists to gather over themselves some robe of clericism . . . and claim immunity from being observed, people who hijack a religion and make out of it an implement of war will not be free from our interest."<sup>93</sup> Ashcroft did not acknowledge that this immunity grew from the FBI's historic abuse of its power.

### III. THE BRITISH MODEL

Attorney General Ashcroft's revisions brought the F.B.I. closer to the British intelligence model. No law limits the MI5 from attending or monitoring political or religious events.<sup>94</sup> In fact, the MI5 has frequently directed local Special Branch officers to attend such gatherings.<sup>95</sup> Subsection A of Part III of this Article sets out the structure of MI5 and the legal framework in which it operates. Subsection B contends that this scheme derives from the U.K.'s past dealings with terrorism in Ireland.

#### *A. The MI5's Power*

Unlike the FBI, which combines domestic intelligence with law enforcement, MI5 functions solely as a domestic intelligence agency.<sup>96</sup>

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<sup>92</sup> See LEVI GUIDELINES, *supra* note 57; § II.A-B; see SMITH GUIDELINES, *supra* note 70, § IIA-B.

<sup>93</sup> John Solomon, *Religious Groups Could Be Monitored, Ashcroft Says*, Dec. 2, 2001.

<sup>94</sup> TOM PARKER, APPENDIX A: COUNTERTERRORISM POLICIES IN THE UNITED KINGDOM, IN PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 129, 250 (Philip B. Heymann & Juliette N. Kayyem eds., 2005) [hereinafter PARKER].

<sup>95</sup> *Id.* (describing how the Special Branch comprises local detective officers).

<sup>96</sup> See ABOUT MI5, at <http://www.MI5.gov.uk/output/page7.html> (last visited February 27, 2006); see also Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1419 (2003).

MI5 is explicitly prohibited from developing into a “secret police.”<sup>97</sup> To underscore its separation from law enforcement, MI5 cannot make arrests or detentions.<sup>98</sup>

Under a 1952 directive from Home Secretary Sir David Maxwell-Fyfe, a Director General heads MI5.<sup>99</sup> The Director General reports MI5’s activities to the Home Secretary, who is a member of the British Cabinet. Parliament, however, has never approved this arrangement.<sup>100</sup> As one of three intelligence agencies in the U.K., MI5 is supplemented by MI6, roughly the equivalent of the CIA, as well as the Governmental Communications Headquarters, which functions similarly to the National Security Agency (“NSA”).<sup>101</sup>

MI5 enjoys a very broad charter. Its activities are governed principally by the Security Service Act of 1989 and its 1996 amendments, the Intelligence Services Act of 1994, and the Regulations of Investigatory Powers Act of 2000.<sup>102</sup> The Security Service Act of 1989 articulates MI5’s role as ensuring “the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.”<sup>103</sup> The Security Service Act of 1996 describes MI5 as supporting law enforcement agencies in the prevention and detection of serious crime.<sup>104</sup>

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<sup>97</sup> See MI5 | Myths & FAQs, at <http://www.mi5.gov.uk/output/Page119.html> (last visited February 27, 2006).

<sup>98</sup> See *Security Service Act*, 1996, c. 35 (Eng.).

<sup>99</sup> See TRIB. OF INQUIRY, THE PROFUMO-CHRISTINE KEELER AFFAIR, 1963, Cmnd. 2152, para. 230.

<sup>100</sup> Ian Leigh, *The Security Service, the Press and the Courts*, PUB. L. 12, 13(1987).

<sup>101</sup> TODD MASSE, DOMESTIC INTELLIGENCE IN THE UNITED KINGDOM: APPLICABILITY OF THE MI5 MODEL TO THE UNITED STATES 4 (May 19, 2003), available at <http://www.fas.org/irp/crs/RL31920.pdf> (last visited February 27, 2006).

<sup>102</sup> *Id.*

<sup>103</sup> *Security Service Act*, 1989, c. 5, § 1(2) (Eng.).

<sup>104</sup> *Security Service Act*, 1996, c. 35, § 1(1)(4).

Though nominally under the direction of the Home Secretary, MIS is largely “self-tasking.”<sup>105</sup> Its statutory limitations are few: Section 2(2)(b) of the Security Service Act of 1996 bars the service from “tak[ing] any action to further the interests of any political party.”<sup>106</sup> The Intelligence Services Act of 1994 sets out guidelines establishing a Parliamentary committee on Intelligence and Security, which reports MIS’s activities to the Prime Minister.<sup>107</sup>

The Regulation of Investigatory Powers Act (“RIPA”), passed in 2000, was intended to scale back the degree of discretion allowed for surveillance.<sup>108</sup> Prior to RIPA, no redress existed for violations of privacy.<sup>109</sup> The European Convention (“Convention”), signed by the U.K. in 1950,<sup>110</sup> however, required its signatories to enforce the liberties detailed therein, which include<sup>111</sup> the right of privacy<sup>112</sup> and the right of redress.<sup>113</sup> Decisions of the European Court have decreed, moreover, that legal guidelines regulate the use of covert surveillance.<sup>114</sup> The

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<sup>105</sup> PARKER, *supra* note 94, at 250.

<sup>106</sup> Intelligence Services Act, 1994, c. 13., § 2(2)(b) (Eng.).

<sup>107</sup> *Id.* § 2(4) (Eng.).

<sup>108</sup> See Regulation of Investigatory Powers Act, 2000, Explanatory Notes, c. 23, para. 5.

<sup>109</sup> See Cara Hirsch, *Policing Undercover Agents in the United Kingdom: Whether the Regulation of Investigatory Powers Act Complies With Regional Human Rights Obligations*, 25 *FORDHAM INT'L L.J.* 1282, 1307 (2002).

<sup>110</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, CETS No.:005 (entered into force Mar. 9, 1953), available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited February 27, 2006).

<sup>111</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Nov. 4, 1950, E.T.S. no. 5, 213 U.N.T.S. 221, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).

<sup>112</sup> *Id.* art. 8. (“Everyone has the right to respect for his private and family life”).

<sup>113</sup> *Id.* art. 13. (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy”).

<sup>114</sup> See *Kopp v. Switzerland*, 27 Eur. Ct. H.R. 91, para. 4 (1999); see also *Klass v. Germany*, 2 Eur. Ct. H.R. 214, para. 3 (1979-80).

Convention and the European Court's decisions combined to pressure the U.K. to govern its agents' actions more formally.<sup>115</sup>

RIPA instituted a regulatory framework consisting of three broad categories of activity: "directed surveillance,"<sup>116</sup> "intrusive surveillance,"<sup>117</sup> and the "conduct and use of covert human intelligence sources."<sup>118</sup> "Directed surveillance" refers to covert surveillance undertaken pursuant to a specific investigation that is likely to unearth private information.<sup>119</sup> "Intrusive surveillance" means covert surveillance of a private residence or vehicle.<sup>120</sup> A "covert human intelligence source" is someone who enters a relationship in order to gain information covertly.<sup>121</sup>

Covert surveillance that does not fit any of RIPA's three categories continues to require no prior authorization.<sup>122</sup> The right to attend or record a public meeting remains unchanged. MIS, moreover, continues to enjoy a broad mandate to pursue behavior falling within the RIPA categories, since the requirements RIPA establishes are minimal. Authorization for both "directed surveillance" and "covert human intelligence" is subject to purely internal oversight. Permission is granted if a "designated" person<sup>123</sup> deems the surveillance both "proportionate to what is sought to be achieved"<sup>124</sup> and "necessary."<sup>125</sup> Anything in the interests of national security; for the purpose of protecting public health; for the purpose of assessing or collecting any tax, duty or levy payable to a government department; or for any purpose specified by an order of the Secretary of State qualifies as "necessary."<sup>126</sup> Persons "designated" to make this determination may include police,

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<sup>115</sup> See Hirsch, *supra* note 109, at 1314-15.

<sup>116</sup> Regulation of Investigatory Powers Act, 2000, c. 23, pt. II, § 26(1)(a).

<sup>117</sup> *Id.* § 26(1)(b).

<sup>118</sup> *Id.* § 26(1)(c).

<sup>119</sup> *Id.* § 26(2).

<sup>120</sup> *Id.* § 26(3).

<sup>121</sup> *Id.* § 26(8).

<sup>122</sup> *Id.* § 26.

<sup>123</sup> *Id.* §§ 28(1), 29(1).

<sup>124</sup> *Id.* §§ 28(2)(b), 29(2)(b).

<sup>125</sup> *Id.* §§ 28(2)(a), 29(2)(a).

<sup>126</sup> *Id.* §§ 28(3), 29(3).

intelligence and security services personnel, Customs and Excise officers, members of the armed forces, and any other authority designated by the Secretary of State.<sup>127</sup> Similarly, a broad list of authorities may authorize “intrusive surveillance” so long as it is “necessary” and “proportionate.”<sup>128</sup>

### *B. The Irish Template for UK Counter Terrorism*

In February 2004, British Home Secretary David Blunkett, in his discussion paper “Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society,” wrote that “[t]he UK has some of the most developed and sophisticated anti-terrorist legislation in the world. This is principally because of our longstanding experience concerning terrorism relating to the affairs of Northern Ireland.”<sup>129</sup> The scheme of antiterrorist policy in the U.K. derives from that country’s efforts to control the struggle in Northern Ireland.

As early as the late 1800s, U.K. legislators, determined to address the Northern Irish threat through ordinary criminal law, created many new ordinances.<sup>130</sup> The Explosive Substances Act of 1883, for example, made it a criminal offense to “make, possess, or control an explosive substance with intent to cause an explosion likely to endanger life.”<sup>131</sup> The perpetrator of a bombing would thus be charged with murder and with violation of the Explosive Substances Act.

Much of the criminal law the U.K. developed to manage violence in Ireland remains integral to its contemporary security efforts.<sup>132</sup> The proscription on “unlawful associations” found in the

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<sup>127</sup> *Id.* § 30.

<sup>128</sup> *Id.* § 32.

<sup>129</sup> HOME DEP’T, COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY: A DISCUSSION PAPER, 2004, Cm. 6147, *quoted in* Ben Brandon, *Terrorism, Human Rights and the Rule of Law: 120 Years of the UK’s Legal Response to Terrorism*, CRIM. L. REV. 981, 981 (2004) [hereinafter “Brandon”].

<sup>130</sup> *Id.* at 982.

<sup>131</sup> Explosive Substances Act, 1883, 12 & 13 Geo. c. 3, § (4)(1) (Eng.).

<sup>132</sup> *See* Brandon, *supra* note 129, at 982.

Criminal Law and Procedure (Ireland) Act of 1887 remains today.<sup>133</sup> While the Civil Authorities (Special Powers) Act of 1922 applied only to Northern Ireland, granting the Irish Minister of Home Affairs and the police in his charge extraordinary powers, many of these special powers, such as the authority to ban assemblies of proscribed groups and any public display of their symbols, now apply to the U.K. as a whole.<sup>134</sup>

In the mid-1970s, the spread of violence to the mainland spurred a series of Prevention of Terrorism Acts (“PTAs”), giving British authorities emergency powers. After the bombing of two Birmingham pubs in the mid-1970s, Parliament enacted its first PTA in just forty-eight hours.<sup>135</sup> The PTA conferred on Parliament the power to outlaw terrorist groups first seen in the Irish SPA and granted the Secretary of State authority to exclude terrorist suspects from the U.K. Since then, the PTA has been modified and reenacted several times, but it has remained in continuous use.<sup>136</sup>

Because each iteration of the PTA was enacted on a semi-permanent basis, U.K. lawyers regularly reviewed the effectiveness of the legislation.<sup>137</sup> In December of 1995, Lord Lloyd of Berwick undertook an analysis “to consider the future need for specific counter-terrorism legislation in the United Kingdom if the cessation of terrorism connected with the affairs of Northern Ireland leads to a lasting peace.” He recognized that as the threat from Northern Ireland ebbed, global terrorism would rise to take its place.<sup>138</sup> In 1998 the government agreed that “the threat from international terrorist groups . . . means that

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<sup>133</sup> Compare Criminal Law and Procedure (Ireland) Act, 1887, 50 & 51 Vict., c. 20, § 7 (Ir.), with Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56 (Eng.).

<sup>134</sup> See Brandon, *supra* note 129, at 982-83. Compare Civil Authorities (Special Powers) Act (Northern Ireland), 1922, sched. 3, § 1(a), with Terrorism Act, 2000, c. 11, § 11 (Eng.).

<sup>135</sup> See Brandon, *supra* note 129, at 986.

<sup>136</sup> Clive Walker, *Terrorism and Criminal Justice: Past, Present and Future*, CRIM. L. REV. 311, 312 (2004).

<sup>137</sup> See Brandon, *supra* note 129, at 986.

<sup>138</sup> HOME DEP’T, INQUIRY INTO LEGISLATION AGAINST TERRORISM BY THE RIGHT HONOURABLE LORD LLOYD OF BERWICK, 1996, Cm. 3420, *quoted in* Brandon, *supra* note 126, at 986.

permanent U.K.-wide counter-terrorist legislation will be necessary even when there is a lasting peace in Northern Ireland."<sup>139</sup> The ensuing reform process resulted in the Terrorism Act 2000.

Consisting of 131 sections and 16 schedules, the Terrorism Act 2000 takes previous legislation designed for Northern Ireland and revamps it to counter global terrorism.<sup>140</sup> Its principal change is to the definition of terrorism; it updates the PTA's language to be more international in scope.<sup>141</sup> The Terrorism Act retains the Secretary of State's power to outlaw organizations. This power originated in the Irish Special Powers Act of 1922.<sup>142</sup> Since 2000, when Parliament enacted the Terrorism Act, the Secretary has added twenty-five Islamic organizations to a formerly exclusively Irish list of proscribed groups.<sup>143</sup> Once an organization is banned, it becomes a criminal offense to belong to it, invite support for it, arrange a meeting supporting it, address a meeting to encourage support for it, or display any insignia of membership in it.<sup>144</sup>

Just three months after September 11, 2001, the U.K. addressed the attacks by enacting the Anti-Terrorism, Crime and Security Act 2001.<sup>145</sup> The bill is long and complicated, containing 129 sections, but its provisions have little bearing on surveillance.<sup>146</sup> The Prevention of Terrorism Act 2005, which received royal assent on March 11, 2005, amended Part IV of the Anti-Terrorism, Crime and Security Act 2001, to bring its detention provisions in line with the European Convention on Human Rights.<sup>147</sup> The decision not to broaden clause 38 of the Anti-Terrorism, Crime and Security Act 2001, penalizing incitement of racial hatred, to comprise incitement of religious hatred<sup>148</sup> suggests that the

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<sup>139</sup> See HOME DEP'T, LEGISLATION AGAINST TERRORISM, 1998, para. 6, available at <http://www.archive.official-documents.co.uk/document/cm41/4178/4178.htm>.

<sup>140</sup> MI5 | ANTI-TERRORIST LEGISLATION, at <http://www.mi5.gov.uk/output/Page70.html>.

<sup>141</sup> See Terrorism Act, 2000, c. 11, pt. I, § 1.(1) (Eng.).

<sup>142</sup> See *id.*, pt. II, § 3.

<sup>143</sup> See Brandon, *supra* note 129, at 988-89.

<sup>144</sup> Terrorism Act, 2000, c. 11, pt. II, §§ 11-13 (Eng.).

<sup>145</sup> MI5 | ANTI-TERRORIST LEGISLATION, *supra* note 140.

<sup>146</sup> See Anti-terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

<sup>147</sup> See Prevention of Terrorism Act, 2005, c. 2 (Eng.), available at <http://www.opsi.gov.uk/ACTS/acts2005/20050002.htm>.

<sup>148</sup> See Adam Tomkins, *Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001*, PUB. L. 205, 207 (2002).

U.K. would be unlikely to extend special safeguards from surveillance to religious groups.

#### IV. ANALYSIS OF U.S. IMPORTATION OF U.K. LAW

Part IV of this Article argues that it is inappropriate to expand American intelligence authority to mimic the U.K. model. Removing limitations on the surveillance of First Amendment activity is improper in the context of U.S. history. It is also unnecessary to the effective defense of national security.

Using Ashcroft's revisions, the FBI has targeted mosques for undercover investigation. FBI Director Robert Mueller has ordered a count of all domestic mosques.<sup>149</sup> Others have charged that the FBI has sent agents to mosque services and deployed surveillance cameras to record membership.<sup>150</sup>

Although the Constitution places no limits on this exercise of authority, lessons from the period that triggered the establishment of Church Committee clearly demonstrate the need for restrictions. The Supreme Court, in *Laird v. Tatum*, declined to rule against the constitutionality of the surveillance of political dissidents.<sup>151</sup> Instead, the Court held that the plaintiff class that had alleged "chilling" of its First Amendment rights lacked standing to plead a cause of action.<sup>152</sup> The Court said that a plaintiff must demonstrate a direct injury; "subjective chill" was insufficient.<sup>153</sup> Thus, the "mere existence of a governmental investigative and data-gathering activity" did not constitute a constitutional injury.<sup>154</sup> The Church Committee, however, determined that "intelligence activities have a tendency to expand beyond their initial scope as intelligence collection programs naturally generate ever-increasing demands for new data<sup>155</sup> . . . investigations sweep in vast

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<sup>149</sup> Curt Anderson, *F.B.I. Calls Its Mosque Survey Part of Broad Security Plan*, L.A. TIMES, Jan. 29, 2003, at A16.

<sup>150</sup> Lininger, *supra* note 10, at 1205-06.

<sup>151</sup> *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

<sup>152</sup> *Id.* at 3, 11.

<sup>153</sup> *Id.* at 13-14.

<sup>154</sup> *Id.* at 10.

<sup>155</sup> S. REP. NO. 94-755, *supra* note 13, Book II, at 4-5 (1976).



amounts of information about the personal lives, views, and association of American citizens."<sup>156</sup> Moreover, the collection of large amounts of personal data threatens politicization and the possibility of retaliatory uses.

Recent history also shows that tailored limits to surveillance do not inhibit effective law enforcement. True, many terrorists involved in the September 11 plot attended U.S. mosques,<sup>157</sup> and fourteen members of Brooklyn's Al-Farooq Mosque joined the 1993 conspiracy to bomb the World Trade Center.<sup>158</sup> The Levi and Smith frameworks, however, did not create a legal loophole for mosques, as evidenced by the successful investigations of Arizona churches and right wing groups related to the Oklahoma City bombing.<sup>159</sup>

Moreover, the infringement of religious freedoms carries significant costs. In its suit against the government, the Muslim Community Association reported decreased attendance at services and reduced levels in the charitable donations Islamic faith mandates.<sup>160</sup> The lawsuit shows that religious surveillance can alienate the communities whose cooperation is most essential in fighting terrorism. In addition, religious expression has long enjoyed special protection within the American legal system. A place of worship is a place of refuge and introspection; an individual's experience there is deeply personal. Christian and Jewish leaders have jointly condemned the practice of monitoring mosques, absent a suspicion of criminal activity.<sup>161</sup>

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<sup>156</sup> *See id.*

<sup>157</sup> Toni Locey, *Al-Qaeda Records Solve Many 9/11 Puzzles, But Others Linger; Arrest In Pakistan Gives Terror Probe New Focus*, U.S.A. TODAY, Aug. 29, 2002, at 2A.

<sup>158</sup> Lynne Duke, *Worship and Worry: At a Brooklyn Mosque, Muslims Pray in the Shadow of Terrorism*, WASH. POST, Apr. 16, 2003, at C11.

<sup>159</sup> *See supra* notes 78-85 and accompanying text; *see also* STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11* at 61-63 (2002) (arguing that the FBI's problems are much less about legal authority than about language skills and manpower).

<sup>160</sup> *See* Complaint, *supra* note 9, at 11.

<sup>161</sup> Jessica Reaves, *Will Potential Surveillance Chill Churches? Attorney General Ashcroft Indicates He May Be Prepared to End a 1970s-Era Ban on Watching Religious Groups Suspected of Illegal Activities*, TIME, Dec. 3, 2001.

The government should reinstate the requirement that undercover investigations of religious activities be predicated on law enforcement rather than on profiling of an individual's beliefs. Religious expression has not correlated with criminality in the past. Although 700 Muslim men from New York and New Jersey were detained following September 11, their questioning revealed scant links to terrorism.<sup>162</sup> Surveillance based on evidence of criminal activity, originally recommended by the Church Committee in 1976,<sup>163</sup> strikes a more fair balance between national security interests and rights of association. In fact, the "reasonable suspicion" requirement of the Smith Guidelines<sup>164</sup> was recently introduced in Denver, Colorado as part of a consent decree in a police spying case.<sup>165</sup>

### CONCLUSION

Reinstating the ability of the FBI to surveil First Amendment activity without criminal evidence may mimic the U.K. model, but it is improper in the context of U.S. history and unnecessary for the effective defense of national security. The FBI's past excesses indicate that a lack of constraint on intelligence can devolve into retribution against those holding non-mainstream beliefs.

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<sup>162</sup> U.S. DEPT. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf>.

<sup>163</sup> See Fisher, *supra* note 53; S. REP. NO. 94-755, *supra* note 13, Book II, at 169 (1976); ATTORNEY GENERAL LEVI'S GUIDELINES, *supra* note 55, at 197.

<sup>164</sup> See ATTORNEY GENERAL SMITH'S GUIDELINES, *supra* note 70, § III.B.1a

<sup>165</sup> Kevin Vaughan, *Police Will Still Gather Intelligence; But 'Spy Filed' Settlement Places Restrictions on How It Can Be Done*, ROCKY MTN. NEWS, Apr. 18, 2003, at 12A.