

HOW ABOUT A LITTLE PERSPECTIVE: THE USA PATRIOT ACT AND THE USES AND ABUSES OF HISTORY

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I. INTRODUCTION

Following the senseless killing of innocent Americans in politically-inspired attacks with the threat of more to come, U.S. prosecutors and agents are directed to use their skills to prevent terrorism before it occurs. The resulting disruption efforts—a product of creative thinking by government personnel of varied backgrounds and talents—are multi-faceted and are driven by such time-tested investigative techniques as electronic surveillance and the use of undercover informants. The efforts include the prosecution of non-terrorists, including the legal representatives of radical individuals and groups, who themselves cross the line into illegal activity, as well as the conscious prosecutorial decision to aggressively charge terrorists with non-terrorism crimes. Persons and groups targeted by these law-enforcement actions and their supporters cry foul and complain that the government's actions go too far, raising the specter of a police state infringing on the constitutional protections to freely express themselves and to associate with whomever they choose. They point to the police abuses of the past, arguing that American law-enforcement cannot be trusted to learn the lessons of history. Unless the body politic rises up in protest, they argue, Americans are doomed to repeat the mistakes of an earlier era.

Sound familiar? The aftermath of 9/11? Modern debates over the PATRIOT Act? In fact, the situation described above occurred some thirty-five years ago, when the FBI undertook an extensive plan to disrupt a number of 1960s-era radical groups whose self-proclaimed purpose was, in their own words, to cause a “holocaust.”¹ Looking back, there is no question that law-enforcement saved innocent lives, although its efforts were somewhat overshadowed by very real and demonstrable excesses.

Today, we are once again involved in public debates over where to draw the line between national security and personal

1. On *60 Minutes*, in what turned out to be his last interview, former Black Panther leader Eldridge Cleaver said, “If people had listened to Huey Newton and me in the 1960s, there would have been a holocaust in this country.” David Horowitz, *Eldridge Cleaver's Last Gift*, FRONTPAGEMAGAZINE.COM (May 3, 1998), at <http://www.frontpagemag.com/Articles/ReadArticles.asp?ID=1146>.

liberty. What is striking about the modern debates is not, as some have argued, that American law-enforcement, faced with an emerging security threat, is bound to repeat the mistakes of the past. Instead, what is amazing is that these arguments have been going on virtually non-stop for the last several decades, and can be reviewed by anyone with access to a law library.

Honestly examining the modern history of U.S. law-enforcement's response to political violence, one notices something that is rather surprising in light of the current rhetoric: it is today's critics of the Justice Department's counter-terrorism efforts who have it wrong. The critics, rather than American law-enforcement, are the ones who are ignoring history. They stress the police excesses of the 1960s and 1970s without following this history to its chronological next step—the series of massive reforms and the very real and meaningful limitations on law-enforcement operations that arose out of those excesses. These reforms, which remain with us to this day, were hammered out in a very open way over the last three decades by Congress, the courts, and the public, with a healthy dose of help from the news media. They include enforceable guidelines that guarantee that Americans are not arbitrarily targeted for investigation for constitutionally-protected conduct, as well as the complete elimination of warrantless entries and electronic surveillance. These reforms make a return to the abuses of the past all but impossible—a point that seems lost on many of today's commentators.

Looking at the record of American law-enforcement's approach to threatened political violence over the last forty years, one can appreciate the similarity between the threat that existed back then and what we face now. At the same time, if one looks at the court decisions of the last four decades, one realizes how the current U.S. counter-terrorism enforcement program differs in significant ways from what occurred during the Vietnam Era. Today's program, it seems, has adopted the good while stripping away the bad policies of the past. History shows something else that should be comforting for everyone: whenever there is a conscious redrawing of the line between liberty and security, American institutions remain an effective bulwark against severe abuse and lasting damage. The American people, through their elective power over Congress and the executive branch, can always effect change through the

legislation or reorganization that results from widespread legitimate outcry.

It is perhaps more significant that the federal judiciary is always available to redress more immediate and individualized forms of law-enforcement abuse for which legislation is not a practical remedy. American judges have not been reluctant to interpose their judgment when U.S. security efforts go too far. Accepting this premise, particularly when it comes to the power of U.S. courts, one cannot blithely ignore the past, since it is history—the use of precedent and the principle of *stare decisis*—that is the currency of judicial decision-making. Precedent is important, not only in terms of the result of judicial actions, but also in understanding the process courts used to reach their decisions. As shown in this article, American law-enforcement should welcome this type of historical analysis, for it supports today's counter-terrorism program.

What does the past tell us about the fairness, constitutionality, and wisdom of current U.S. counter-terrorism efforts? In many ways, as shown in this article, it establishes the exact *opposite* of what the critics claim. Moreover, the specific manner in which U.S. courts resolved civil liberties complaints about U.S. national security efforts thirty years ago shows that today's U.S. counter-terrorism enforcement program is neither unprecedented nor unconstitutional. That is inconvenient to today's critics. To understand this, one need look no further than published judicial opinions. History is useful, and it should not be abused. Today's debates over the PATRIOT Act suggest such an abuse is taking place.

This article seeks to demonstrate that point. Part I reviews the security situation that gave rise to some of some of the 1960s-era law-enforcement excesses, and how American courts resolved complaints about aggressive government conduct. As will be shown, violent radicals of that era used some of the same extreme constitutional arguments advanced more recently by international terrorists, though without success. This, however, is not the real lesson of this historical comparison. The better insight comes from opinions resulting from some of the more mainstream judicial challenges of that era—cases that demonstrate that American courts have not been reluctant to review law-enforcement actions taken in response to security threats nor to judge the legality of those actions through an

exacting historical analysis of what was known or believed at the time. As will be shown, this historical process cannot be separated from the national security apparatus we have today, irrespective of the tendency of today's critics to ignore the obvious. Part II deals with the history that is being ignored: judicial opinions that resulted in reforms of our electronic surveillance and investigative guidelines. Part III discusses the historical precedent for many of the allegedly "unprecedented" aspects of today's counter-terrorism program. The Conclusion argues, through a modern case example involving a former 1960s radical, that judicial remedies—available to all who understand the power of the historical analysis and are patient enough to use it—are a consistent remedy available to people who fear law-enforcement abuses and the prospect of the government "going too far" in the war on terrorism.

II: THE CONTEXT OF THE TIMES

A. *The 1960s Terrorist Threat*

Were the FBI's efforts against the radical groups of the 1960s justified by legitimate concerns? Consider that American law-enforcement uncovered a plot by American radicals to destroy several Manhattan buildings;² that members of the Weather Underground were charged with a plot to use explosives to destroy power lines, a railroad junction, and property of Bethlehem Steel Works,³ with killing two police officers and a security guard during a robbery of an armored truck,⁴ and with executing an escape from San Quentin prison that resulted in the deaths of inmate George Jackson and five other persons;⁵ and that during the murder trial arising out of the latter incident, Jackson's brother entered the Marin County courthouse and took the trial judge hostage.⁶ The judge was killed in the parking lot during a gun battle between his abductors and the police.⁷ Around this same time, leaders of the

2. *United States v. McGrath*, 418 F.2d 243 (2d Cir. 1969).

3. *United States v. Heckman*, 479 F.2d 726, 727 (3d Cir. 1973).

4. *Boudin v. Thomas*, 543 F. Supp. 686, 687 (S.D.N.Y. 1982); *In re Dohrn*, 560 F. Supp. 179 (S.D.N.Y. 1983).

5. *Spain v. Rushen*, 543 F. Supp. 757 (N.D. Cal. 1982).

6. *Spain v. Rushen*, 883 F.2d 712, 720 (9th Cir. 1989).

7. *Id.* at 719.

Black Afro Militant Movement (BAMM) organization gave instructions to a gathered group in Miami on how to assemble explosive and incendiary devices, to—in their words—prepare the members of BAMM for “the coming revolution.”⁸ Individual members of African-American revolutionary groups were prosecuted for murdering police officers and government informants in Philadelphia, New York, New Haven, and Cleveland.⁹ White radicals, in a show of solidarity with their black peers, placed dynamite at the Central Intelligence Agency offices in Ann Arbor, Michigan.¹⁰ Politically-motivated individuals in several cities—New Orleans, New York, Milwaukee, San Diego, Albuquerque, Miami, and Salt Lake City—hijacked commercial airliners, in one case ordering the pilot to fly the plane into a Tennessee nuclear reactor when it appeared their demands would not be met.¹¹ Was the political violence of this era real or imagined? According to figures contained in a 1972 Supreme Court brief submitted by the Attorney General, there were 1,562 bombing incidents—most of which involved government-related facilities—in the United States *in the first six months* of 1971.¹²

Putting aside the issue of how U.S. counter-terrorism enforcement efforts in the 1960s and 1970s were implemented, it cannot be said that the radical groups of this era should have been left to their own devices and allowed to operate happily unencumbered by any law-enforcement scrutiny. Their violent activities, particularly when considered in the aftermath of September 11, 2001, speak for themselves.

8. United States v. Featherstone, 461 F.2d 1119, 1121 (5th Cir. 1972).

9. Abu-Jamal v. Horn, 1997 WL 527349, *1 (D.D.C. 1997); Bell v. Coughlin, 820 F. Supp. 780 (S.D.N.Y. 1993); Williams v. FBI, 730 F.2d 882 (2d Cir. 1984); Jones v. FBI, 41 F.3d 238, 241 (6th Cir. 1994).

10. United States v. Sinclair, 916 F.2d 1109, 1110 (6th Cir. 1990).

11. Fenton Wheeler, *Life Worse in Cuba, Unhappy Black Panthers Wail*, MIAMI HERALD, June 26, 1969, at 17D; *Ex-SU Student Ends Cuba Exile*, BATON ROUGE ST. TIMES, Sept. 12, 1986, at 1A; Mary Voboril, *Hijacker Is Glad He's Back in US, Rails Against Reds*, MIAMI HERALD, Oct. 29, 1980; *'71 Hijacker Gets Term of 15 Years*, MILWAUKEE J., Sept. 6, 1978, at 1; *Man Pleads Guilty to 1971 Hijacking of Airliner to Cuba*, L.A. TIMES, Oct. 25, 1975; Philip Bennett, *From Cuba, An Exile Looks Homeward*, BOSTON GLOBE, Feb. 27, 1989, at 1; Andy Rosenblatt and Michael H. Cottman, *Miami Hijacking Suspect Arrested*, MIAMI HERALD, Dec. 5, 1983; Duncan Mansfield, *Tennessee Narrowly Dodged Bullet in Tense '72 Hijack Episode*, L.A. TIMES, Sept. 23, 2001, at A30; Barry Bearak, *Hijackers - They're Still Flying High*, L.A. TIMES, Aug. 4, 1983.

12. United States v. United States District Court (Keith), 407 U.S. 297, 311 n.12 (1972).

B. *Hyperbolic Arguments*

To be fair, few modern critics suggest that the United States should ignore the threat of international terrorism. They instead focus on the means with which U.S. prosecutors and agents are trying to achieve their new public safety mandate. Like their predecessors of the earlier era, the critics sometimes rely on odd constitutional arguments that courts have no trouble rejecting. These arguments represent the easy lessons of history, in terms of how American courts view political violence. The American judiciary has never accepted the argument that the act of killing innocent people is protected by the U.S. Constitution.

Hyperbolic arguments about the constitutionality of the U.S. government's counter-terrorism efforts are nothing new. They were voiced several decades ago, and are eerily similar in substance to complaints voiced more recently by international terrorists and their attorneys.

Consider the case of Laura Whitehorn, Timothy Blunk, Alan Berkman, Susan Rosenberg, Marilyn Buck, Linda Evans, and Elizabeth Duke—members of the so-called Armed Resistance Unit.¹³ Twenty years ago, they were charged with a plot to bomb several federal buildings and military installations within the United States.¹⁴ In their motion to dismiss, they advanced some strange arguments. They claimed that the indictment should be dismissed because it was brought to harass and punish them for the exercise of their First Amendment rights, and because the United States was guilty of “war crimes” in Nicaragua, Grenada, Puerto Rico, South Africa, Israel, Lebanon, and several other countries, as well as against American Indians. They claimed the word “violent” within the indictment should be stricken because it was unduly prejudicial. They objected to references in the judicial proceedings to “terrorism,” including the FBI agents’ statements that they are members of the “Joint Terrorist Task Force,” claiming that the terms were unduly provocative. They argued that the courtroom security measures, if maintained during the trial, would deny them their constitutional right to a fair trial. They maintained that they could not be convicted because no one was killed or injured in the bombings they

13. *United States v. Whitehorn*, 710 F. Supp. 803 (D.D.C. 1989), *rev'd*, *United States v. Rosenberg*, 888 F.2d 1406 (D.C. Cir. 1989).

14. *See id.* at 807–26 (discussing the facts of the case).

planned, and that the object of the alleged conspiracy was largely legal and protected associational activity.

The trial court had little trouble disposing of these arguments. In his most pointed language, Judge Harold H. Greene wrote:

This claim—that they are being prosecuted and punished for their political beliefs and activities—runs like a bright thread through almost all of the defendants’ motions and supporting papers. None of those assertions, no matter how often repeated, can obscure the fact, however, that the defendants are being prosecuted for bombing the United States Capitol, the National War College Building at Fort McNair, the Computer Center at the Washington Navy Yard, and the Officer’s Club at the Washington Navy Yard, or that the conspiracy count further alleges that they also bombed the Federal Building on Staten Island, the South African Consulate, the Israeli Aircraft Industries Building, and the Patrolmen’s Benevolent Association Building, all in New York. None of these acts falls into the category of “beliefs” or “political activities.”

Bombings are violent acts, and defendants have no immunity from prosecution for such acts merely because they also hold protected beliefs or, for that matter, because they hold beliefs that may be abhorrent to the government and to many citizens. This proposition can easily be tested. Suppose that one of these particular defendants had been arrested in the act of selling illegal drugs or of robbing a liquor store. Could it reasonably be maintained that he could not legally be prosecuted by the government for these offenses on the basis that he is not popular with that government? Of course not. Prosecutorial vindictiveness cannot be inferred from the fact that the prosecutors are determined to bring to justice those who, they have reasonable cause to believe, have engaged in a series of bombings. Prosecutors are presumably equally determined—and properly so—to bring to justice other individuals who commit other serious crimes. Prosecutors are expected to be unsympathetic to lawbreakers, as are most law-abiding citizens.¹⁵

Years later, when the United States faced a more modern brand of terrorist, some of these same arguments were revived. A blind Egyptian cleric, Sheik Abdul Rahman, was the leader of a group of persons who were ultimately convicted in October

15. *Id.* at 811 (citation omitted).

1995 in New York of seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism in the United States.¹⁶ Included in the charges were plots to kill Egyptian President Hosni Mubarak, to provide assistance to the February 1993 World Trade Center attack, and to orchestrate a series of simultaneous attacks on such New York-area landmarks as the United Nations' Building, the Federal Building, and the Lincoln and Holland Tunnels.¹⁷

Rahman's lawyers unsuccessfully argued that the indictment should be dismissed on the grounds that it was based on nothing more than his expression of political views and his performance of pastoral functions, and that it charged him with conduct protected by the First Amendment. Judge Mukasey's response to this argument, like Judge Greene's from years earlier, was brief:

The motion seems based on misapprehension of three things: what crimes the indictment charges, what acts may constitute commission of such crimes, and what evidence may show that such acts occurred. The indictment charges in Count One that Rahman conspired to levy a war of urban terrorism against the United States, in Count Two that he conspired to murder a foreign official, in Count Three that he conspired to bomb buildings and other structures, and in Count Seven that he used or carried destructive devices during and in relation to violent crimes or aided and abetted (including counseled or commanded) others in doing so. To be sure, those crimes, like most others, may have a component of speech in the course of their commission. Indeed, it is the rare offense, particularly the rare conspiracy or aiding and abetting offense, that is committed entirely in pantomime. However, that speech—even speech that includes reference to religion—may play a part in the commission of a crime does not insulate such crime from prosecution. . . .

. . . [I]t is both possible and permissible to charge that criminal statutes were violated entirely by means of speech. Further, that speech may sound constitutionally protected does not mean that it is, if that speech was intended and likely to generate imminent criminal action by others. Finally, even speech protected by the First Amendment may be received as

16. *United States v. Rahman*, 1994 WL 388927 (S.D.N.Y. Jul. 22, 1994). *See id.* at *1-*4 for a discussion of the facts of the case that follow.

17. *Id.* at *2-*4.

evidence that conduct not so protected is afoot. For the above reasons, Rahman's motion to dismiss must be denied.¹⁸

Thankfully, most reasonable people agree that plots to destroy critical U.S. infrastructure and to kill innocent people in the name of some twisted political agenda cannot be defended on the basis of one's First Amendment rights, and the mere fact that the violent 1960s radicals unsuccessfully advanced arguments similar to those made more recently by the international terrorists does not place them in the same category. Nor does the similarity of these arguments reflect on the constitutionality or advisability of U.S. counter-terrorism efforts from either era. The historical happenstance of two different groups of violent people, decades apart, advancing the same type of arguments in an attempt to exonerate themselves from serious criminal charges hardly means that these people were connected, nor that they shared the same goals or the same level of criminal culpability. At most, it shows that desperate people try desperate arguments. It also may reflect merely that the defendants in each of these cases were represented by the same type of American defense lawyer.¹⁹

As noted, these odd constitutional arguments make for easy decisions by the courts, and the lessons from these cases are not significant, other than those rare situations when someone claims that murder is constitutionally protected. The greater insight comes from the opinions that reflect more mainstream and historically sound arguments. It is these cases—particularly where the courts ruled against the government—that illustrate how judges over the past several decades have resolved arguments similar to those being advanced today, and whether modern federal law-enforcement is ignoring or absorbing these rulings as they plan their counter-terrorism operations. Today's counter-terrorism warriors should welcome this examination.

C. The U.S. Courts and 1960s Terrorism

Did American law-enforcement in the 1960s and 1970s go too far? There is no question that they did. The real issue is whether

18. *Id.* at *1-2.

19. The late William Kunstler, who represented one of Sheik Rahman's co-defendants, argued that Judge Mukasey should be recused from the Sheik Rahman case because he was Jewish and therefore a Zionist and thus was unable to be objective. *United States v. El-Gabrowny*, 844 F. Supp. 955, 957 (S.D.N.Y. 1994).

the specific instances of “going too far” involved those activities currently being undertaken by today’s federal agents and prosecutors, a type of conscientious parsing rarely attempted by critics today. Fortunately, this is exactly the type of analysis courts undertake when faced with challenges to governmental conduct. Case law is important.

Published judicial opinions concerning law-enforcement activities in the 1960s and 1970s are a rich source of insight and fascinating reading when one considers the more recent debates over security and personal privacy. Although the Department of Justice and the FBI were able to effectively disrupt a number of lethal Vietnam-era terrorist plots—a point frequently overlooked by commentators—their overall efforts against radical groups were closely scrutinized, heavily criticized, intensely challenged by investigative targets, and, in many cases, publicly censured by federal judges. The result was a series of legal reforms that are firmly institutionalized and are now a permanent part of our legal landscape. They make a return to the bad-old-days virtually impossible. This should be reassuring to all but those who are inclined to believe the worst about federal law-enforcement.

By reading the actual cases, one quickly sees the fallacy of today’s critics’ “historical” arguments. One should start with *Socialist Workers Party v. Attorney General*—a case that set the standard for what constitutes excessive governmental scrutiny of organized political activity, in which private citizens succeeded in collecting damages from the United States for overaggressive investigative techniques and excessive surveillance.²⁰

The lawsuit started on July 18, 1973, when the Socialist Workers Party (SWP), its youth arm, the Young Socialist Alliance (YSA), and several individual members brought an action against the United States and certain individual U.S. officials.²¹ The plaintiffs, followers of the Trotskyist branch of Marxism, contended that they had been improperly viewed by various government agencies as threats to national security. They objected to the infiltration, disruption, and harassment that they had allegedly suffered over the past forty years, seeking declaratory and injunctive relief and damages. The original complaint was a class action, and included the Attorney General

20. *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357 (S.D.N.Y. 1986).

21. *See id.* at 1362–75 (further discussing the facts of the case).

as a defendant. An amended complaint, filed in May 1976, included a claim against the United States under the Federal Tort Claims Act (FTCA).²²

The bench trial lasted approximately seven weeks, from April 2 to June 25, 1981. The bulk of the evidence at the trial and the discussion in the briefs related to the plaintiffs' allegations of wrongdoing by the FBI and the Department of Justice. The plaintiffs complained about four types of FBI activity—disruption, surreptitious entries or burglaries, use of informants, and electronic surveillance (telephone wiretaps and “bugs” in offices and dwellings). They also complained about two programs implemented by the Department of Justice and the FBI: the Security Index/Administrative Index (ADEX) program and the loyalty-security program for federal employees. In connection with the second program, the SWP was included on the Attorney General's list (now terminated) as a so-called subversive organization.

In the end, the trial court found that the plaintiffs were entitled to an award of damages under the FTCA from the United States for the FBI's disruption activities, surreptitious entries, and use of informants.²³ The SWP was awarded damages in the amount of \$42,500 relating to disruption activities, \$96,500 for the surreptitious entries, and \$125,000 for the use of informants, or a total of \$264,000. The SWP's damage claim for electronic surveillance was dismissed for failure to comply with the procedural requirements of the FTCA. The requests for declaratory and injunctive relief were denied because there was no present or threatened activity that warranted such a remedy.

A major factor in the court's decision was whether the FBI and certain other agencies of the federal government could reasonably have believed at the time that the SWP presented a threat of revolutionary or subversive activity against the United States, thereby justifying certain investigative techniques and other measures.²⁴ This required the court to undertake an analysis of SWP's ideology and chosen means.

The court found that it would have been reasonable for the U.S. government to take the view that Lenin and Trotsky

22. 28 U.S.C. §§ 1346(b), 2671–2680 (1949) (current version at 28 U.S.C. §§ 1346(b), 2671–2680 (2004)).

23. See *Socialist Workers Party*, 642 F. Supp. at 1364 (detailing the ruling that followed).

24. *Id.* at 1364.

believed in the denial of democracy, and that they advocated totalitarian rule imposed by military force and terror.²⁵ At trial, the SWP acknowledged that it was in favor of revolution, but simply as a means for transforming society, and that the revolution would come about through a historical process only after the capitalist system had exhausted itself. According to the SWP, the revolution cannot be brought about by a putsch or coup, or the action of a minority, but only through broad mass action. The court found that the SWP believed in using the electoral process in this country to have the workers gain control of the government, and then amending the Constitution to carry out the nationalization of property required by their economic program. SWP claimed they were not interested in initiating violence, but that since the capitalist class would use violence to prevent the democratic process from running its course, the workers would then resort to armed force to defend themselves. This, according to the court, demonstrated that SWP has not deserted the theory and example of Lenin and Trotsky favoring ultimate violent revolution.

The SWP leaders testified that terrorism was totally contrary to the doctrine of their party, and that it distracted attention and efforts from the development of a mass movement. In 1972, for example, the SWP criticized the attack on Israeli athletes in Munich by “Black September,” a Palestinian terrorist group. The SWP, while sympathizing with the Palestinians, issued a statement that such terrorist tactics are “ineffective and in fact harmful to the Palestinian struggle.”²⁶ In 1974, SWP leader Mary Alice Waters wrote a report denouncing the assassination of Spanish Prime Minister Carrero Blanco by terrorists. These factors led the court to conclude that, while the SWP embraced violent revolution as an ultimate goal, it realized it had no power under current circumstances to carry it out; the fact that it ultimately desired a revolution did not mean that its ideology was antithetical to the political system of democratic processes of the United States. On the question of whether SWP practiced violence, the court concluded that it did not, citing the fact that the FBI had conducted an intensive investigation of the group for over thirty years and had not prosecuted a single SWP or YSA member for any terrorist act. Notably, the court contrasted this

25. *See id.* at 1364–75 (discussing the court’s findings about the SWP).

26. *Id.* at 1373.

to the “numerous acts of violence and destruction in recent times in the United States, particularly during the late 1960s and early 1970s.”²⁷

It is important to put the *SWP* ruling into perspective: an ostensibly non-violent group had been subject to government surveillance for some thirty-five years and, except for one early exception, the FBI had failed to turn up anything against them to suggest criminal activity.²⁸ The court’s review of that long history of FBI surveillance showed that no FBI informant ever reported an instance of planned or actual espionage, violence, or terrorism by *SWP* or efforts to subvert the U.S. governmental structure.²⁹ Over the course of approximately thirty years, there was no indication that any informant ever observed any violation of federal law or gave information leading to a single arrest for any federal law violation.³⁰

Could this be said of Al Qaida, Hamas, Hizballah, or any of the other modern terrorist organizations whose U.S.-based representatives have been captured and charged by federal law-enforcement over the last few years alone?³¹ If *SWP* is the benchmark, these more modern groups and their American sympathizers have a long way to go and much to demonstrate about their non-violent nature before they can successfully claim that the current scrutiny is unfair or unwarranted. Moreover, unlike the situation giving rise to *SWP*, today’s counter-terrorism efforts are more transparent, in that they are focused on targets who are defined more clearly than people who believe violent revolution is inevitable and a good thing. The American counter-terrorism law enforcement program currently focuses on specific groups whose names have been published for all of

27. *Id.* at 1375.

28. According to the court, the FBI’s investigation of the *SWP* started with a series of directives issued by President Roosevelt to J. Edgar Hoover in 1936. *Id.* at 1375. In 1941, eighteen *SWP* leaders were prosecuted under the Smith Act, 18 U.S.C. § 2385 (1948) (current version at 18 U.S.C. § 2385 (2004)), for advocating the overthrow of the United States. *Dunne v. United States*, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1944).

29. *Socialist Workers Party*, 642 F. Supp. at 1380.

30. *Id.*

31. The true difference between *SWP* and these groups is shown by the fact that, since 9/11, the Department of Justice has charged over 100 individuals (in over 20 different judicial districts) with crimes directly related to assistance they provided to a number of terrorist groups, including al Qaida, Hamas, and Hizballah. Robert M. Chesney, *Terrorism Prosecution Statistics*, available at <http://www.wfu.edu/~chesner/NationalSecurityLaw/Prosecution%20Charts/TerrorismProsecutionStatistics.htm> (last visited Dec. 3, 2004).

the world to see. This is the Department of State list of “designated foreign terrorist organizations.”³²

What is remarkable about *SWP* is the exacting analysis undertaken by the court regarding the nature of the aggrieved organization and the reasonableness of the government’s actions, in light of what it knew at the time. That type of analysis is not something many of today’s critics would likely welcome, if applied to those entities on which most of the Justice Department’s efforts are currently focused. This is partly because, unlike the early days of the *SWP* investigation, the focus of today’s counter-terrorism efforts is clearly defined: it is those groups that have been designated by the Secretary of State—a list that is public.

There are additional lessons from other 1960s-era judicial opinions, falling into three categories that are hotly debated in the post-9/11 climate: electronic surveillance, investigative discretion, and the various tools of law-enforcement that fall within the category of “disruption.” There is also the broader lesson which should give comfort to people on both sides of the current debates: U.S. courts remain available to correct any true transgression by federal law-enforcement.

II. THE LEGAL REFORMS

A. *Electronic Surveillance*

Today’s critics occasionally argue that the PATRIOT Act represents an unprecedented increase in the government’s power to monitor private communications. They frequently point to the announcement that certain attorney-client communications in prison may be monitored (which is nowhere mentioned in the PATRIOT Act) and the changes to investigative authority designed to catch up with technological advances in communications services.³³ On occasion, they

32. See 8 U.S.C. § 1189 (1952) (current version at 8 U.S.C. 1189 (2004)). The full list and description of designated foreign terrorist organizations is contained in the annual State Department publication. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM (2003), available at www.state.gov/s/ct/rls/pgtrpt/2003/c12108.htm (last visited Dec. 3, 2004).

33. Section 216 of the PATRIOT Act, for example, establishes the legal authority to trace computer communications through the application of investigative tools that were previously limited to telephone communications. Uniting and Strengthening America by

suggest that the government now has the right to eavesdrop on telephone or Internet communications at will, without any form of judicial approval.³⁴ This claim ignores history, particularly the well-documented legal battles over what the executive branch can do in the name of national security. Much of this history is contained in the casebooks.

1. Wiretaps and *SWP*

The *SWP* opinion, published in 1986, contains perhaps the best judicial description of the FBI counterintelligence function, including the history of government-initiated electronic surveillance. The *SWP* Court's findings, after all, were based on weeks of testimony.

In modern history, FBI investigations were classified as either criminal investigations or national security investigations. According to the court in *SWP*, when a country is conducting "intelligence" activities—gathering information—regarding a foreign power, the latter will frequently attempt to disrupt these activities with "counter-intelligence": operations designed to disrupt the intelligence gathering conducted by other countries. Counter-intelligence and disruption activities have at times been directed by the FBI against domestic organizations. With these groups, the government's concerns were two-fold: the threat that a domestic organization might assist a hostile foreign nation in gathering intelligence on the U.S. government, and that such organizations might subvert or sabotage military and other governmental activities or engage in acts of violence or terrorism.

The FBI policy concerning the use of electronic surveillance changed over the years, as did Fourth Amendment law affecting the legality of certain practices.³⁵ At the *SWP* trial, Associate

Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

34. A current ACLU paper, for example, asserts, "Under the Patriot Act, the FBI can secretly conduct a physical search or wiretap on American citizens to obtain evidence of crime without proving probable cause, as the Fourth Amendment explicitly requires." AMERICAN CIVIL LIBERTIES UNION, SURVEILLANCE UNDER THE "USA PATRIOT ACT" (2001), at www.aclu.org/Privacy/Privacy.cfm?ID=13593&c=130 (last visited Dec. 3, 2004).

35. *Socialist Workers Party*, 642 F. Supp. at 1390. The discussion that follows regarding the FBI's policy concerning the use of electronic surveillance and the Fourth Amendment law affecting the legality of those practices has been extracted from the court's opinion.

Deputy Attorney General Robert Keuch testified about the history of the FBI's policy concerning the use of electronic surveillance in national security investigations. When the FBI was created in 1920, the policies of both the FBI and the Department of Justice prohibited any use of wiretapping. Ten years later the Bureau of Prohibition, an agency of the Treasury Department that had been using wiretaps, was merged into the FBI. The Bureau of Prohibition continued to use wiretaps after the merger. The policies of the FBI and the Department were then changed by the Attorney General to allow wiretapping by the FBI upon approval of the Director of the FBI and an Assistant Attorney General.

In the 1930s two events impacted this policy. First, Congress passed the Federal Communications Act of 1934, which provided that: "No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."³⁶ The Justice Department interpreted the statute as requiring both interception and disclosure before there was a violation of the statute. Moreover, the Department of Justice took the view that the statute would be violated only by a disclosure to some person outside of the executive branch. Under this view, interception and disclosure within the executive branch would not violate the statute.

The second event was the Supreme Court's decision in *Nardone v. United States*, which held that, under the Federal Communications Act, evidence or information obtained by use of a wiretap was not admissible in a criminal trial.³⁷ The Supreme Court extended the scope of this ruling in the second *Nardone* opinion, which held that evidence procured through the use of knowledge gained by intercepting communications in violation of the Communications Act was inadmissible.³⁸

In early 1940, Attorney General Robert Jackson briefly reinstated the former policy that the FBI would not engage in any wiretapping.³⁹ On May 21, 1940, President Roosevelt sent the

36. 47 U.S.C. § 605(a) (1934) (current version at 47 U.S.C. § 605(a) (1996)).

37. 302 U.S. 379 (1937).

38. *Nardone v. United States*, 308 U.S. 338 (1939).

39. *Socialist Workers Party*, 642 F. Supp. at 1390. The discussion that follows regarding the FBI's policy concerning the use of electronic surveillance and the Fourth

Attorney General a memorandum stating that in the President's view the Supreme Court did not intend to have its decision apply to grave matters involving the defense of the nation. Roosevelt noted that certain foreign nations were engaged in sabotage and "fifth column" operations, and that preventive steps by the United States were essential. The President directed the Attorney General, in such cases as he should approve, to secure information by listening devices directed to the conversations of persons suspected of subversive activities against the government of the United States, including suspected spies. However, these operations were to be limited to aliens. In 1946, President Truman affirmed the policy of having the FBI use wiretaps in "cases vitally affecting domestic security."

The FBI developed a similar policy regarding the use of microphone surveillance: it could be used to protect against persons or entities thought to be subversive of the national security. In 1954 the Supreme Court decided *Irvine v. California*, where a defendant in a state criminal case claimed that evidence obtained by installing a microphone bug in his home was improperly admitted into evidence.⁴⁰ The entire Court agreed that the surreptitious installation of the microphone in a home and the overhearing of conversations there constituted a violation of the Fourth or Fifth Amendment.⁴¹ However, five of the justices held that the state court was not constitutionally required to exclude the evidence.⁴²

Although electronic surveillance continued, the price of obtaining this information was the inability to use it in criminal proceedings. (This may have been one of the reasons criminal cases were not made against the Socialist Workers Party and its principals.) This situation changed when Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, which included a statutory scheme for judicial approval of electronic surveillance in criminal cases, now commonly known as "Title III."⁴³ Ten years later, Congress passed the Foreign Intelligence Surveillance Act (FISA), which provided for a court composed

Amendment law affecting the legality of those practices has been extracted from the court's opinion.

40. 347 U.S. 128 (1954).

41. *Id.* at 132, 139.

42. *Id.* at 136.

43. 18 U.S.C. §§ 2510–2520 (1968) (current version at 18 U.S.C. §§ 2510–2520 (2004)).

of federal judges to rule on applications for warrants in *foreign* national security investigations.⁴⁴ The FISA statutory scheme is discussed in sub-section A(3) of Part I.

2. The *Keith* Case (1972)

After considering the lessons of *SWP*, today's critics should review another judicial opinion issued fourteen years earlier—issued after the advent of Title III but before FISA. The *Keith* case, as it is commonly known, arose at the height of the Vietnam era and is one of few times the Supreme Court accepted the opportunity to evaluate the particular Justice Department investigation methods designed to protect Americans from political violence.⁴⁵ (The case took its common name from District Judge Damon Keith, who had issued the order that the government challenged in its Supreme Court petition.)

A group of radicals known as the White Panther Party was charged with plotting to place dynamite in CIA offices in Ann Arbor, Michigan.⁴⁶ During pretrial proceedings, they moved to compel the Government to disclose certain electronic surveillance information and to conduct a hearing to determine whether this information “tainted” the evidence on which the indictment was based, or which the Government intended to offer at trial. In response, the Government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which one of the defendants had participated. The affidavit stated that the Attorney General had approved the wiretaps “to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.” The prosecutors asserted that the surveillance was lawful, though without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to protect the national security. The district court held that the surveillance violated the Fourth Amendment, and ordered the Government to make full disclosure to the defendants of their overheard conversations.⁴⁷

44. 50 U.S.C. §§ 1801–1811 (1978).

45. *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

46. *See id.* at 300–02 for a discussion of the facts of the case.

47. *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971).

The Government then filed a petition for a writ of mandamus with the Sixth Circuit, seeking to set aside the lower court's order. The court found the surveillance was unlawful and that the lower court had properly required disclosure of the overheard conversations.⁴⁸

The Supreme Court agreed to hear the dispute, and in its opinion, written by Justice Lewis Powell, the Court noted that the statute providing for judicial approval of electronic surveillance in criminal cases—Title III of the Omnibus Crime Control and Safe Streets Act⁴⁹—specifically excluded from its coverage the constitutional power of the President to take such measures as he deems necessary to protect the country against actual or potential attack, or to obtain foreign intelligence information deemed essential to the security of the United States.⁵⁰ This did not resolve the issue, however. Instead, the *Keith* Court ruled that Congress merely left whatever constitutional power that may have existed intact with this provision, without necessarily creating any new statutory authority.

Acknowledging that the President of the United States has the fundamental duty, under Article II, section 1, of the Constitution, to “preserve, protect and defend the Constitution of the United States,” as well as the implicit power to protect our government against those who would subvert or overthrow it by unlawful means, the Court found that the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts.⁵¹ As in *SWP*, the Court noted that the use of such surveillance in internal security cases had been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.⁵² Justice Powell then proceeded to make a clear-eyed statement of what was at stake, using language that would presage much of the current debates about the PATRIOT Act:

48. *United States v. United States District Court (Keith)*, 444 F.2d 651 (6th Cir. 1971).

49. 18 U.S.C. §§ 2510–2520 (1968) (current version at 18 U.S.C. §§ 2510–2520 (2004)).

50. *Keith*, 407 U.S. at 310–11.

51. *Id.*

52. *Id.*

Though the Government and respondents debate their seriousness and magnitude, threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them. The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances. The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission, and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens.⁵³

The Court ultimately affirmed the lower courts' rulings, rejecting the prosecutors' arguments that warrantless wiretaps in the interests of national security were permitted. In doing so, it rejected the government arguments in favor of a complete exemption of domestic security surveillance from prior judicial scrutiny. It reasoned that official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risked infringement of constitutionally protected privacy of speech.⁵⁴ It recognized the constitutional basis of the President's domestic security role, but held that it must be exercised in a manner compatible with the Fourth Amendment: through an appropriate judicial warrant procedure. The Court specifically noted that the warrant procedure need not involve an adversary proceeding, and that it could take the form of an *ex parte* request before a magistrate or judge:

Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values. Nor do we think the Government's domestic surveillance powers will be impaired to any significant degree. A prior warrant establishes presumptive validity of the surveillance and will minimize the burden of

53. *Id.* at 311–12.

54. *Id.* at 317.

justification in post-surveillance judicial review. By no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.⁵⁵

The language of this ruling is of pivotal importance to the current debate over the post-9/11 U.S. counter-terrorism offensive. The Supreme Court noted that, in light of the distinctions between Title III-authorized criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter that differ from those already established for certain crimes in Title III.⁵⁶ According to the Court, “Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.”⁵⁷

Why is this language so pivotal to today’s arguments? Within a few years of the *Keith* decision, Congress ultimately did exactly what the Supreme Court was suggesting: it enacted a statutory scheme that required judicial approval for every wiretap request sought for purposes of acquiring intelligence on national security threats. That statute is FISA.⁵⁸ It controls this area today, and has spawned an entire office of lawyers within the Department of Justice and a surveillance program in which every intrusive investigative step taken within the United States in the name of national security is approved in advance by an Article III judge. This law clearly divides government actions into two eras—those before 1978 and those after.

With regard to the pre-FISA counter-terrorism activities, the Supreme Court’s ruling in *Keith* set the stage for a series of lawsuits over warrantless electronic surveillance. In *Keith*, the Supreme Court explicitly left open the question of whether such surveillance was constitutional when undertaken to collect intelligence of *foreign* threats, and stated that its holding was

55. *Id.* at 321.

56. *Id.* at 322.

57. *Id.* at 322–23.

58. 50 U.S.C. §§ 1801–1811 (1978).

limited to warrantless surveillance directed at domestic threats.⁵⁹ The question of what remedies were available for persons aggrieved by the latter would be addressed in the tranche of civil lawsuits opened by *Keith*.

Among the first to try their hand at suing for illegal government surveillance, not surprisingly, were the interceptees from the *Keith* case itself, who—after the Supreme Court’s judgment—promptly sued the United States, President Richard Nixon, Attorneys General John Mitchell and Richard Kleindienst, and FBI Director Patrick Gray, based on claimed violations of the Fourth Amendment and Title III.⁶⁰ The district court granted summary judgment in favor of the Government, and the plaintiffs appealed. The Court of Appeals concluded that Mitchell was protected by qualified immunity as the plaintiffs had not produced any evidence that suggested he acted in bad faith rather than on the basis of adequate facts suggesting legitimate national security concerns.⁶¹ The plaintiffs then amended their complaint and successfully obtained a change of venue to the Eastern District of Michigan.⁶² They ultimately failed to show that the government’s interception and surveillance of conversations between defendants and attorneys violated their Sixth Amendment rights, and the lawsuit was dismissed.⁶³

Meanwhile, American law-enforcement did something for which its critics rarely give it credit: it cleaned house. The Department of Justice conducted a full-scale investigation of the FBI’s illegal activities, culminating in the April 1978 indictment of former high-level FBI officials L. Patrick Gray, III, W. Mark Felt, and Edward S. Miller.⁶⁴ This investigation yielded information suggesting that the FBI, and perhaps one or more Department of Justice attorneys, failed to disclose surreptitious entries in response to inquiries made by the General Accounting Office (GAO) in 1974, by several congressional committees in 1975, and by attorneys involved in the SWP lawsuit.⁶⁵ In response to this evidence, in April 1978, Attorney General Griffin B. Bell

59. *Keith*, 407 U.S. at 308–09.

60. *Sinclair v. Kleindeinst*, 645 F.2d 1080 (D.C. Cir. 1976).

61. *Id.* at 1085.

62. *Sinclair v. Kleindeinst*, 711 F.2d 291 (D.C. Cir. 1983).

63. *Sinclair v. Kleindeinst*, 916 F.2d 1109 (6th Cir. 1990).

64. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984).

65. *See id.* at 86–88 for a discussion of the facts of the case.

directed FBI Director William Webster to conduct an inquiry to determine whether FBI officials acted improperly in failing to discover and report all instances of surreptitious entry. The FBI investigation that followed was conducted by the FBI's Office of Professional Responsibility and led to a report to the Attorney General that was released to the public in July 1980.

Like the aggrieved citizens in *Keith*, a number of other persons who were the subject of electronic surveillance tried their hands in the civil courts. The plaintiffs included members of the Jewish Defense League (JDL) who were indicted in May 1971,⁶⁶ a former member of President Nixon's national security council staff whose telephones were tapped in an effort to isolate the leaking of sensitive foreign policy information to the news media,⁶⁷ and the former RAND Corporation analyst charged with leaking the Pentagon Papers.⁶⁸ With these cases, it is important to consider how U.S. courts responded to the actual lawsuits, rather than blithely concluding that everything the government did in the interests of national security was wrong or obviously beyond the pale. Most of these cases were resolved on the question of whether the officers in question were entitled to qualified immunity, an issue that essentially turned on how "outrageous" was their conduct. For example, in the JDL case (*Zweibon*), the D.C. Circuit held that the former Attorney General could claim qualified immunity from liability for damages for violating plaintiff's constitutional and statutory rights by authorizing warrantless wiretaps where, at the time the wiretaps were authorized, there was no clearly established warrant requirement for national security wiretaps.⁶⁹ In 1985, the Supreme Court in *Mitchell v. Forsyth* weighed in on the question of the immunity to which government officials were entitled

66. *Zweibon v. Mitchell*, 720 F.2d 162 (D.C. Cir. 1983).

67. *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided court*, 452 U.S. 713 (1981); *Halperin v. Kissinger*, 578 F. Supp. 231 (D.D.C. 1984).

68. *Ellsberg v. Mitchell*, 807 F.2d 204 (D.C. Cir. 1986).

69. *Zweibon*, 720 F.2d at 173. The court in *Halperin* held that former President Nixon was entitled to summary judgment as a matter of law on the basis of absolute immunity and that Kissinger, Mitchell, and Haldeman were entitled to summary judgment based on qualified immunity. *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided court*, 452 U.S. 713 (1981); *Halperin v. Kissinger*, 578 F. Supp. 231 (D.D.C. 1984). In *Ellsberg*, the Court of Appeals held that the former Attorney General was entitled to qualified immunity in civil damage action based upon wiretaps. *Ellsberg v. Mitchell*, 807 F.2d 204 (D.C. Cir. 1986).

when faced with civil lawsuits premised on warrantless electronic surveillance.⁷⁰

The *Keith* and *Forsyth* opinions may be interesting, but they are now merely historical artifacts. Why? Because the 1978 enactment of the FISA made these types of claims moot. It replaced the old system of warrantless surveillance with a system for judicial approval in every instance. Today, law-enforcement does not engage in warrantless wiretaps on persons within the United States, whether for foreign or domestic intelligence purposes, of the type that were at issue back then. FISA creates the sole legal basis for undertaking these types of surveillance activities.

3. FISA Today

Under FISA, the executive branch must seek advanced judicial approval prior to engaging in any form of electronic surveillance on persons located within the United States, for purposes of collecting information relevant to national security.⁷¹ Where wiretaps are needed in regular criminal investigations, the government relies on Title III of the Omnibus and Crime Control Act of 1968.⁷² The result is a very clear and unmistakable rule: there is no such thing as a lawful warrantless wiretap within the United States. Put another way, warrantless wiretaps by the FBI, no matter how noble the purpose, are illegal today.

70. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Mitchell* involved surveillance that began in 1970 on an antiwar group known as the East Coast Conspiracy to Save Lives (ECCSL) which, according to information received by the FBI, had made plans to blow up heating tunnels linking federal office buildings in Washington, D.C., and had discussed the possibility of kidnapping then National Security Adviser Henry Kissinger. As a result, in November 1970, Attorney General John Mitchell authorized a warrantless wiretap on the telephone of William Davidon, a Haverford College physics professor, for stated purpose of gathering of intelligence in the interest of national security. The wiretap was in place for 14 months. One of the persons caught on the wiretap was Keith Forsyth, who had a few conversations with Davidon. Forsyth learned of the wiretap in 1972, when, as a criminal defendant facing unrelated charges, he sought disclosure by the Government of any electronic surveillance to which he had been subjected. After the *Keith* decision, Forsyth sued the Attorney General, claiming that the surveillance violated Title III and the Fourth Amendment. John Mitchell (who by then had left office and had been convicted himself for his role in the Watergate scandal) contended that the decision in *Keith* should not be applied retroactively to the wiretap authorized in 1970 and that he was entitled either to absolute prosecutorial immunity or to qualified or “good faith” immunity. The Supreme Court found that Mitchell was entitled to assert a qualified immunity from suit and could prevail if he proved that he acted in good faith, which would turn on his state of mind in November 1970, when he authorized the wiretap.

71. 50 U.S.C. §§ 1801–1811 (1978).

72. 18 U.S.C. §§ 2510–2520 (1968) (current version at 18 U.S.C. §§ 2510–2520 (2004)).

Whether electronic surveillance is sought under FISA or Title III, the requests for authority involve the Department of Justice and the federal judiciary. While Title III requests are presented to federal judges throughout the United States, they are reviewed and approved in Washington by the Criminal Division's Office of Enforcement Operations (OEO).⁷³ FISA applications are presented to a special court that sits in Washington, known as the Foreign Intelligence Surveillance Court (FISC).⁷⁴ The FISC consists of U.S. District Court judges drawn from around the country, who travel to Washington for FISA-related business. FISA authority is overseen by a Department of Justice component known as the Office of Intelligence and Policy Review (OIPR).⁷⁵ These attorneys, like their colleagues who are prosecutors in the field, work with the FBI to gather and present information to a neutral and detached judicial officer.⁷⁶

How does FISA differ from Title III? Few of those differences have any constitutional relevance. Both Title III and FISA require prior judicial scrutiny of an application for an order authorizing electronic surveillance.⁷⁷ Under FISA, a judge on the FISC grants an application for an order approving electronic surveillance to "obtain foreign intelligence information" if "there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power," and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."⁷⁸ Title III allows a court to enter an ex parte order authorizing electronic surveillance if it determines on the basis of the facts submitted in the government's application that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" a specified predicate offense.⁷⁹ With the particularity requirements, although Title III

73. UNITED STATES ATTORNEYS' MANUAL, § 9-7.110.

74. 50 U.S.C. §§ 1803–1804.

75. As of November 2002, OIPR was composed of 31 lawyers and 25 support staff. *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surveillance Ct. Rev. 2002).

76. *See* *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987) (stating that FISA court is a "detached and neutral body.>").

77. 50 U.S.C. § 1805; 18 U.S.C. § 2518.

78. 50 U.S.C. § 1805(a)(3).

79. 18 U.S.C. § 2518(3)(a).

generally requires probable cause to believe that the facilities subject to surveillance are being used, or are about to be used, in connection with the commission of a crime, or are leased to, listed in the name of, or used by the individual committing the crime,⁸⁰ FISA requires probable cause to believe that each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent.⁸¹ Thus, FISA requires less of a nexus between the facility and the pertinent communications than Title III, but more of a nexus between the target and the pertinent communications. Both statutes have a “necessity” provision, which requires the court to find that the information sought is not available through normal investigative procedures.⁸² Both statutes also have duration provisions: Title III orders may last up to thirty days,⁸³ whereas FISA orders may last up to ninety days for U.S. persons.⁸⁴ Title III requires notice to the target (and, within the discretion of the judge, to other persons whose communications were intercepted) once the surveillance order expires.⁸⁵ FISA does not require notice to a person whose communications were intercepted unless the Government “intends to enter into evidence or otherwise use or disclose” such communications in a trial or other enumerated official proceedings.⁸⁶

Thus, while Title III contains some protections that are not in FISA, in many significant respects the two statutes are equivalent.⁸⁷ The differences between the two statutes do not rise to the level of constitutional proportion. Title III procedures, after all, are not constitutionally required.⁸⁸

The fact that there is no such thing as a “legal” warrantless wiretap does not make for good drama for those who argue that the United States is on a dangerous course. Selecting their

80. 18 U.S.C. § 2518(3)(d).

81. 50 U.S.C. § 1805(a)(3)(B).

82. 18 U.S.C. § 2518(3)(c); 50 U.S.C. §§ 1804(a)(7)(E)(ii), 1805(a)(5).

83. 18 U.S.C. § 2518(5).

84. 50 U.S.C. § 1805(e)(1).

85. 18 U.S.C. § 2518(8)(d).

86. 50 U.S.C. § 1806(c).

87. It should be noted that, in some ways, FISA contains additional protections for prospective interceptees. For example, FISA has more extensive reporting requirements than Title III, *compare* 18 U.S.C. § 2519(2) *with* 50 U.S.C. § 1808(a)(1), and is subject to close and continuing oversight by Congress as a check against executive branch abuses. *See* S. REP. NO. 95-701, at 11–12 (1978).

88. *In re Sealed Case*, 310 F.3d 717, 737–38 (Foreign Intel. Surveillance Ct. Rev. 2002).

arguments carefully, many of today's critics overlook the post-Watergate reform that has been in place now for a quarter decade (longer than the careers of most current agents and prosecutors). They would have the public believe that, with the PATRIOT Act, FISA has somehow been repealed, taking us back to the pre-*Keith* days when it was not necessary for law-enforcement to make any particularized judicial showing in advance of undertaking national security-based electronic surveillance.⁸⁹

Legal history, far from showing that we are likely to repeat the abuses of the past, should actually give comfort to people who fear arbitrary, lawless action by our nation's law enforcers. The system worked! Wiretaps continue, just not arbitrary ones. That should be sufficient for all except those persons who continue to believe that law-enforcement should keep its hands off phone lines entirely, an argument that is not frequently made anymore.⁹⁰ Even more comforting is the extensive history of court rulings carefully addressing the right people aggrieved by the FBI's COINTELPRO (a term used to describe the FBI's domestic counter-terrorism program) to access government records under the Freedom of Information Act (FOIA)⁹¹ and the regular civil discovery rules.⁹² Through the courts, private

89. The most significant change to FISA from the PATRIOT Act involves the loosening of information-sharing standards (sections 218 and 504). These changes amended FISA to change "the purpose" language in section 1804(a)(7)(B) to "a significant purpose" and added a provision allowing "Federal officers who conduct electronic surveillance to acquire foreign intelligence information" to "consult with Federal law-enforcement officers to coordinate efforts to investigate or protect against" attacks or other grave hostile acts, sabotage or international terrorism, or clandestine intelligence activities, by foreign powers or their agents. 50 U.S.C. § 1806(k)(1). These vital amendments have been almost universally heralded as necessary to permit U.S. law-enforcement to more effectively connect the dots to thwart terrorist attacks. *See In re Sealed Case*, 310 F.3d at 746 (explaining that "FISA's general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from 'ordinary crime control.' After the events of September 11, 2001, though, it is hard to imagine greater emergencies facing Americans than those experienced on that date.").

90. This argument was made by Justice William O. Douglas. In one of his last judicial opinions, he filed a dissent which referred to wiretapping as a "dirty business" and a "disease." *Heutsche v. United States*, 414 U.S. 898, 899 (1973) (Douglas, J., dissenting).

91. 5 U.S.C. § 552 (2004).

92. *See, e.g.*, *Wilkinson v. FBI*, 633 F. Supp. 336 (C.D. Cal. 1986) (FOIA request for information by representatives of the National Committee Against Repressive Legislation (NCARL)); *United States v. Buck*, 1986 WL 14970 (S.D.N.Y. Dec. 15, 1986) (subpoena request for FBI records concerning plaintiff); *Struth v. FBI*, 673 F. Supp. 949 (E.D. Wis. 1987) (FOIA request by members of an organization known as the New American Movement (NAM)); *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994) (FOIA request by representatives of a Cleveland group called "Afro Set" or the "Black Nationalist Party for

citizens can seek redress for abusive law-enforcement actions. Thanks to Congress, these people are entitled to government records upon which to base their challenges. This realization, comforting to the average citizen, may be a difficult pill for today's critics who seek to convince others that we are on the verge of a police state.

B. *Investigative Discretion*

If critics ignore the system that is now in place to guard against illegal electronic surveillance, they also try to leave the impression—again erroneously—that there is nothing to prevent the FBI from going on massive fishing expeditions which could ensnare innocent people. According to them, the FBI can now freely examine the library and video store records of innocent Americans without any factual predicate or articulable suspicion, and that all Americans should fear the threat of a tyrannical government scrutinizing their entertainment habits.

Of all the complaints about the PATRIOT Act, perhaps the one that rings the loudest involves section 215. By its terms, it merely allows the FBI to compel the production of third-party records in the course of a foreign intelligence investigation.⁹³ Significantly, the words “library,” “libraries,” and “librarians” appear nowhere in the PATRIOT Act. This fact has not prevented the organized groups of librarians (who, more than most citizens, may have less of an excuse to be misinformed) from arguing that Americans should be very afraid. These groups typically fail to explain how these same records were always obtainable, with rarely a complaint, through a regular grand jury subpoena, issued in such criminal investigations as in the Unabomber case. FBI investigations, of course, are governed by internal guidelines that are designed to prevent the abuses by rogue agents. These guidelines are also a matter of public record, have been hammered out through litigation, and are

Self Defense”); *Cleaver v. Kelley*, 427 F. Supp. 80 (D.D.C. 1976) (FOIA request for FBI files allegedly relevant to requestor’s upcoming state murder trial); *Pratt v. Webster*, 673 F.2d 408 (D.D.C. 1982) (FOIA request for disclosure of sensitive FBI records); *King v. Department of Justice*, 586 F. Supp. 286 (D.D.C. 1983) (FOIA request for FBI records pertaining to plaintiff’s deceased mother-in-law); *Williams v. FBI*, 730 F.2d 882 (2d Cir. 1984) (FOIA request for FBI investigative records).

93. 50 U.S.C. § 1861 (2001).

discussed extensively in judicial opinions that are available for all to see.

1. *Alliance to End Repression*

Consider the 1974 class action lawsuit filed by the ACLU and an entity known as the Alliance to End Repression against the city of Chicago and the FBI and CIA.⁹⁴ The class action lawsuit alleged the regular parade of law-enforcement horrors: harassment, infiltration, physical and verbal coercion, electronic and physical surveillance, summary punishment, and the collection, maintenance, and dissemination of dossiers.⁹⁵ The parties ultimately settled. In a court opinion approving the settlement, the court noted the gravamen of the plaintiffs' complaints: the official investigations were based on the subjects' lawful exercise of First Amendment rights and the investigative means were overly intrusive and violated the First and Fourth Amendments.

The settlement gave the plaintiffs the equivalent of the injunctive relief they sought in the litigation: the FBI agreed to be bound by internal guidelines that provided that, in conducting domestic security investigations and inquiries, the FBI shall be concerned only with conduct, and only with such conduct as is forbidden by a criminal law of the United States, or by a state criminal law when authorized by federal statute. The guidelines specifically prohibited investigation conducted solely on the basis of First Amendment activities or on the lawful exercise of any constitutional or legal right. They prohibited the FBI from employing any technique designed to impair their lawful and constitutionally protected political conduct or to defame the character or reputation of a U.S. resident. The guidelines required that investigations be conducted with minimal intrusion consistent with the need to collect information or evidence in a timely and effective manner, and in a manner reasonably designed to minimize unnecessary collection and recording of information about the lawful exercise of First Amendment rights. The settlement limited FBI electronic surveillance in Chicago to that authorized by Title III and FISA, and limited FBI warrantless, unconsented searches to

94. *Alliance to End Repression v. Chicago*, 91 F.R.D. 182 (N.D. Ill. 1981).

95. *See id.* at 185-97 for a discussion of the facts of the case and the agreements made in the settlement.

what is permitted by Fourth Amendment jurisprudence. It provided that all applicable federal statutes, Executive Orders, and Justice Department and FBI regulations governing physical or photographic surveillance, infiltration, and data collection, dissemination, and storage be made legally enforceable.

All in all, not a bad day's work for the plaintiffs' attorneys. Nevertheless, they were not yet done. In 1983, eighteen months after this settlement was approved, Attorney General William French Smith announced new guidelines for FBI investigations,⁹⁶ which superseded the Levi Guidelines of 1976. The 1983 guidelines permitted the initiation of investigations based on statements that advocate criminal activity or indicate an apparent intent to engage in a crime, unless it appears from the circumstances or context of the statements that there is a prospect of harm. Put another way, the 1983 guidelines created a general rule that First Amendment-protected expressive activity should not form the basis for the decision to initiate an investigation on a person or group but allowed for a limited exception if the statements seem indicative of imminent danger.

The plaintiffs in *Alliance* found this unpalatable, and they unsuccessfully sought an injunction against the new guidelines, charging that they were inconsistent with the consent decree in that they permitted, in limited circumstances, the initiation of FBI investigations based on speech.⁹⁷ The language of the Seventh Circuit's ruling against this injunction was remarkable, given the national security challenges we face some twenty years later:

[T]he First Amendment, as currently interpreted, places tight limits on the government's authority to punish those who counsel or advocate violence. The Supreme Court's decisions [speak in terms of "incitement."] . . . If, therefore, a new sect of religious fanatics announced that unless Chicagoans renounce their sinful ways it may become necessary to poison the city's water supply, or a newly organized group of white supremacists vowed to take revenge on Chicago for electing a black mayor, these statements, made by groups with no "track record" of violent acts, might well be privileged. . . . Or suppose the leaders of a newly formed organization of Puerto

96. THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS (1983).

97. *Alliance to End Repression v. Chicago*, 742 F.2d 1007 (7th Cir. 1984).

Rican separatists went around Chicago making speeches to the effect that, if the United States does not grant Puerto Rico independence soon, it will be necessary to begin terrorist activities on the mainland United States. These speeches could not, in all probability, be made the basis of a prosecution. Therefore, under the interpretation of the consent decree urged by the plaintiffs, whereby the Justice Department would have no power to investigate anything that cannot be punished, the FBI probably could not even investigate any of these hypothetical groups. And since [the plaintiff's interpretation] applies to all investigations, not just investigations of groups, many threats made by individuals against other individuals could not be investigated either, for such threats, too, enjoy broad protection under the First Amendment

We doubt that in agreeing to the consent decree the Justice Department tied its hands to such an extent; for if it did, it was trifling with the public safety of the people of Chicago The FBI always has investigated people who advocate or threaten to commit serious violations of federal law, even if the violations are not imminent; and it always will. It "has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obliged to wear blinders until it may be too late for prevention."⁹⁸

In addition to making perfect sense, this language represents a remarkable description of what is at stake in discussions designed to hamstring our national security apparatus based on hypothetical fears. The entire *Alliance* litigation stands as an historical illustration of something the current Department of Justice representatives say on the subject of the PATRIOT Act: private citizens are entitled to be heard on what type of police authority they will tolerate. That is the essence of democracy, and everyone should embrace this type of healthy dialogue. Whether the analysis occurs as part of the legislative process or through litigation, the main point is that it happens. Since it does, we are hardly approaching tyranny. In *Alliance*, aggrieved citizens sought redress through litigation, something equally available today for those who sincerely believe the PATRIOT Act

98. *Id.* at 1014–15 (quoting *Socialist Workers Party v. Attorney General*, 510 F.2d 253, 256 (2d Cir. 1974)). The Seventh Circuit also stated that the FBI "need not wait till the bombs begin to go off, or even till the bomb factory is found," and noted that, between 1970 and 1980, domestic terrorist organizations committed more than 400 bombings in the United States. *Id.* at 1015.

is unconstitutional.⁹⁹ If the critics opt for that route, however, they cannot continue to ignore the rules and tradition of that process, which include a consideration of this doctrine known as *legal precedent*, of which the *Alliance* litigation is part.

In *Alliance*, the judiciary had a clear reaction to what is now being suggested by today's critics: the United States should somehow tie its hands in the face of threats by those who would kill us. As the court noted, the "FBI cannot hope to nip terrorist conspiracies in the bud if it may not investigate proto-terrorist organizations."¹⁰⁰ While nobody wants their name in an FBI investigative file, and the knowledge that the FBI monitors groups advocating violent change may deter people from associating with them, this cost "would be outweighed by the benefits in preventing crimes of violence, provided that the FBI did not prolong its investigation after it became clear that the only menace of a group under investigation was rhetorical and ideological."¹⁰¹ American constitutional protections, at some point, give way to the need to protect against real carnage planned by truly violent organizations. This recognition—involving the process of line-drawing frequently undertaken by professional policymakers, for nationwide applicability—should not be shocking to the public. As the court noted, presciently:

The organizations that the decree sought to protect, organizations such as the ACLU and the NAACP, do not go around making threats to commit violent acts, and are not the acorns from which grow such trees as the FALN, the Posse Comitatus, the White Knights of the Ku Klux Klan, the Black Liberation Army, the New World Liberation Front, the Republic of New Africa, the Weather Underground, the Jewish Armed Resistance, Omega 9, and other menacing groups. . . .

. . . .

We doubt that any neutral observer would think it appropriate that the FBI should be governed by other than a uniform national set of investigatory standards—that it should

99. Modern critics of U.S. counter-terrorism efforts have conflated these two types of civic challenges, and have undertaken a political effort to enact municipal ordinances which forbid state and local officials from assisting federal employees in any "unconstitutional" application of the PATRIOT Act. These ordinances and the arguments supporting them typically fail to explain how federal employees, under the PATRIOT Act or otherwise, are permitted to engage in "unconstitutional" acts in the first instance, and how individual state and local officials can judge these violations when they see them.

100. *Id.* at 1015.

101. *Id.* at 1016.

operate under one set of constraints everywhere but Chicago, and under another and tighter set in Chicago, so that this city can become a sanctuary for nascent terrorist organizations.¹⁰²

This court opinion was published twenty years ago, yet today's critics continue to seize on the "abuses of the past," rather than how real courts redressed them, to argue that today's counter-terrorism efforts are somehow a natural regression to what was long ago prohibited. They apparently believe that none of their listeners will check their words against actual history. Today's critics are not, by any stretch of the imagination, the first to ever consider these issues. They should think carefully before throwing around such words as "unprecedented."¹⁰³

2. *Alliance* (Revisited)

The *Alliance* litigation came back in the 21st Century, this time at the hands of the city, which sought relief from the terms of the 1981 consent decree to allow their public safety officers to meet the growing threat of international terrorism. The resulting Seventh Circuit opinion, published nine months (to the day) *before* the events of 9/11, offers little support to those who claim courts do not understand or agree with what the Department of Justice is currently doing:

The City wants flexibility to meet new threats to the safety of Chicago's citizens. In the heyday of the Red Squad, law enforcers from J. Edgar Hoover's FBI on down to the local level in Chicago focused to an unhealthy degree on political dissidents, whose primary activity was advocacy though it sometimes spilled over into violence. Today the concern, prudent and not paranoid, is with ideologically motivated terrorism. The City does not want to resurrect the Red Squad. It wants to be able to keep tabs on incipient terrorist groups. New groups of political extremists, believers in and advocates of violence, form daily around the world. If one forms in or migrates to Chicago, the decree renders the police helpless to do anything to protect the public against the day when the group decides to commit a terrorist act. Until the group goes beyond the advocacy of violence and begins preparatory actions that might create reasonable suspicion of imminent

102. *Id.* at 1018-19.

103. *See, e.g., One Year Since September 11: An Unprecedented Assault on Democratic Rights*, World Socialist Web Site (Sept. 11, 2002), at <http://www.wsws.org/articles/2002/sep2002/demo-s11.shtml>.

criminal activity, the hands of the police are tied. And if the police have been forbidden to investigate until then, if the investigation cannot begin until the group is well on its way toward the commission of terrorist acts, the investigation may come too late to prevent the acts or to identify the perpetrators.¹⁰⁴

It would seem that judicial language, coming just months before 9/11 and the PATRIOT Act, would be relevant to those willing to undertake a serious effort to understand the lessons of history. That conclusion, of course, assumes they care about history and have done their legal research.¹⁰⁵ The tendency to ignore the past in an attempt to get people to believe the worst about America's police officers extends to other areas of U.S. counter-terrorism efforts such as the prosecution of lawyers, the aggressive use of legitimate investigative techniques like the grand jury process, and the prosecution of terrorists for non-terrorist crimes, referred to by John Ashcroft as the "spitting on the sidewalk" brand of law-enforcement. These policy decisions, like the FBI strategy and investigative guidelines in monitoring violent groups, are no secret. They are also neither unprecedented nor unconstitutional.

III. HISTORICAL PRECEDENTS FOR TODAY'S COUNTER-TERRORISM MEASURES

104. *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 802 (7th Cir. 2001).

105. According to Anthony Romero, Executive Director of the ACLU, "The FBI is dangerously targeting Americans who are engaged in nothing more than lawful protest and dissent. . . . The line between terrorism and legitimate civil disobedience is blurred, and I have a serious concern about whether we're going back to the days of Hoover." *Quoted in*, Eric Lichtblau, *FBI Scrutinizes Antiwar Rallies*, N.Y. TIMES, Nov. 23, 2003, at A1. The response, by an unnamed FBI official could have been written by the court in *Alliance*.

We're not concerned with individuals who are exercising their constitutional rights. . . . But it's obvious that there are individuals capable of violence at these [anti-war] events. We know that there are anarchists that are actively involved in trying to sabotage and commit acts of violence at these different events, and we also know that these large gathering would be a prime target for terrorist groups.

Id. It may be entirely fair for people like Mr. Romero to disagree with the wisdom the decisions of U.S. courts. What is not fair is to consciously ignore these decisions' existence while issuing wholesale condemnations of the American law-enforcement community.

A. They Prosecute Lawyers, Don't They?

The case of Lynne Stewart brings audible sighs at town-hall debates about the PATRIOT Act. Stewart is a well-known New York criminal lawyer who defended Sheik Abdul Rahman, convicted in 1995 of seditious conspiracy in New York. She found herself indicted after 9/11 when the Department of Justice discovered that she was using her legal status to help Rahman communicate with his radical adherents on the outside in violation of prison rules. Stewart managed to get some of the charges against her dismissed before being recharged by superseding indictment.¹⁰⁶ As of this writing, her case is pending.

Modern critics point to the Stewart case as the quintessential example of heavy-handedness by today's Justice Department. This argument assumes that the United States generally does not prosecute attorneys, and its willingness to do so now is somehow outrageous. This claim ignores history.

Consider the case of Arthur Turco, who was admitted to the New York Bar in December 1967.¹⁰⁷ His practice consisted largely of assisting the Black Panther Party and its members.¹⁰⁸ In February 1970, he was arrested in New York City and charged with possession of weapons, dangerous drugs, hypodermic instruments, and with obstructing government administration. He was released on bail. In April he traveled to Canada, apparently without notifying the New York authorities, to make a speech at McGill University. While there, he learned that he had been indicted in Baltimore, Maryland, in connection with the murder on July 12, 1969 of Eugene Anderson, a Black Panther suspected of being a government informant.

Through an attorney in Maryland, Turco attempted unsuccessfully to negotiate a release on bail if he returned from Canada. He remained in Canada, obtained a false identification card, and assumed the name of Leon Wright, to avoid extradition to the United States. When he failed to return home, his bail in the New York case was forfeited, and he was charged with bail jumping. Seven-and-a-half months after he entered Canada, Turco was questioned by Canadian authorities in connection with a general widespread investigation of the

106. *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

107. *Turco v. Monroe County Bar Association*, 554 F.2d 515, 517 (2d Cir. 1977).

108. *See id.* at 517-18 for a discussion of the facts of the case.

kidnapping of a Canadian official. The officials accidentally discovered Turco's real identity and learned that U.S. charges were pending against him. Turco was brought back to Maryland.

In June and July of 1971 Turco was tried in Baltimore along with Black Panther codefendants for the Eugene Anderson slaying. After three weeks of trial the jury could not reach a verdict on the charges against him. Before his retrial he pleaded guilty, in February 1972, to one charge of common-law assault in satisfaction of all of the charges in the May 1970 indictments. He was sentenced to a term of imprisonment of five years, with execution of the sentence suspended. In federal court, Turco unsuccessfully challenged the constitutionality of the state bar disciplinary action taken against him.¹⁰⁹

Simply stated, the current prosecution of Lynne Stewart is not without precedent. Being a licensed professional does not immunize one from criminal liability when getting too close to the criminals one represents. Department of Justice lawyers have always been ready to charge fellow members of the bar when they step over the line, and have done so in a variety of cases that stretch beyond terrorism.¹¹⁰ Defense lawyers' complaints about this treatment predate 9/11.¹¹¹ Lynne Stewart is not the first attorney to find herself in the dock.

B. *The Grand Jury Process*

If one recognizes the value of keeping an eye on terrorists in our midst, it is probably a small step to accept the inevitability of using all legal resources available for that task. The key to thwarting any terrorist plot is information. American law-enforcement today would be remiss if it did not use everything in its power to obtain information relevant to public safety. That means aggressively using something that has been with us since

109. *Id.* at 517–18.

110. *See, e.g.*, *United States v. Cuento*, 151 F.3d 620 (7th Cir. 1998); *United States v. Aguilar*, 515 U.S. 593 (1995); *United States v. Goulding*, 26 F.3d 656 (7th Cir. 1994); *United States v. Cintolo*, 8181 F.2d 980 (1st Cir. 1987); *United States v. Robinson*, 15 F.3d 862 (9th Cir. 1994). *See* PAUL LIBERATORE, *THE ROAD TO HELL: THE TRUE STORY OF GEORGE JACKSON, STEPHEN BINGHAM, AND THE SAN QUENTIN MASSACRE* (1996) (discussing the attempted San Quentin prison escape during which inmate George Jackson and several prison guards were killed (described *supra* Part I.A) and how a civil rights lawyer named Stephen Bingham was accused of smuggling the gun used by Jackson during a legal consultation).

111. *See, e.g.*, Barry Turow, *Yes, You Can Be Prosecuted for Providing Traditional Legal Services*, *CHAMPION MAG.*, Jan./Feb. 1999.

the beginning of our constitutional form of government: the grand jury process.¹¹² In the federal system, the grand jury meets in private, and its deliberations are secret.¹¹³ It is illegal for prosecutors, court reporters, or jurors to describe what goes on behind its closed doors.¹¹⁴ Any person who has ever served in this role will attest to that.

The federal grand jury was created by the U.S. Constitution, which means it is not going away anytime soon. Although modern critics sometime liken it to a medieval star chamber when it begins to focus its immense investigative power, the fact remains that grand jury operations are the subject of well-defined legal principles.

One such principle is this: the grand jury is entitled to any information that is not “privileged.”¹¹⁵ The term “privilege” is based on the legal recognition that certain types of relationships should be sanctified and promoted, so that parties to these relationships can be open with each other without fear of compromising confidences or secrets. By recognizing a privilege, society accepts the notion that the law will protect these qualifying secrets from disclosure, even when they are being sought for very important reasons—like disruption of terrorism. The natural corollary is that, when it comes to information that can be sought by law-enforcement, everything else is fair game.

In American federal law, recognized privileges protect confidential communications between a husband and wife, between an attorney and client, between a doctor and patient, and between a spiritual advisor and penitent.¹¹⁶ They do not protect the communications between a journalist and an unnamed source, although claims of “journalistic privilege” have been advanced so aggressively that such information is now protected by statute¹¹⁷ and the Department of Justice does not request the issuance of grand jury subpoenas to reporters without special internal approval.¹¹⁸

112. U.S. CONST. amend. V.; 28 U.S.C.A. § 1861 (1994).

113. FED. R. CIV. P. 6(d), (e).

114. FED. R. CIV. P. 6(e)(2).

115. *United States v. Calandra*, 414 U.S. 338, 353 (1974).

116. FED. R. EVID. 501 and advisory committee’s note.

117. 42 U.S.C. § 2000aa (2003).

118. UNITED STATES ATTORNEYS’ MANUAL, § 9-19.240.

Although it has not yet fully bloomed, there are growing indications that today's critics will soon be claiming that the Department of Justice is abusing the grand jury investigative power.¹¹⁹ This trend started shortly after 9/11, when one court found improper the government's use of a material witness warrant to detain a grand jury witness.¹²⁰ This decision, hailed at the time as a major defeat for U.S. counter-terrorism efforts, was ultimately reversed.¹²¹

Before jumping with both feet into this area, critics should consider the lessons of similar attempts from thirty years ago when persons held in contempt of court for refusing to cooperate with grand jury inquiries into violent organizations tried to argue that the process was unfair, unconstitutional or illegal. These persons included a paralegal within an organization established to protect radical organizations from unwanted government scrutiny,¹²² a *New York Times* reporter specializing in the Black Panther Party,¹²³ staff members of *The Black Panther* newspaper,¹²⁴ and the manager of a radio station who broadcast a communiqué from the Weather Underground claiming responsibility for bombing of a government building.¹²⁵ In each of these cases, their legal arguments failed.

Better yet, those who are tempted to fight the grand jury should consider the fate of Weather Underground leader Bernardine Dohrn, now a gainfully employed academic in Chicago, who was able to avoid further incarceration by being publicly humiliated. Dohrn was held in contempt of court for refusing to comply with the Court's order to provide a sample of her handwriting to a federal grand jury investigating a series of robberies, including the 1981 Brinks robbery in which two New York cops were killed. After seven months of incarceration, Dohrn's attorneys filed papers in which they claimed—apparently in a desperate attempt to emancipate her—that

119. See, e.g., Sara Sun Beal & James E. Felman, *Responses to the September 11 Attacks: The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes in Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699, 715–18 (2002) (arguing, in part, that an unintended consequence of the PATRIOT Act is the potential for expanding the investigating powers of grand juries).

120. *United States v. Awadallah*, 202 F. Supp. 2d 82 (S.D.N.Y. 2002).

121. *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003).

122. *In re Fula*, 672 F.2d 279 (2d Cir. 1982).

123. *United States v. Caldwell*, 408 U.S. 665 (1972).

124. *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972).

125. *In re Lewis*, 377 F. Supp. 297 (C.D. Cal. 1974).

Dohrn, having “a view of the law and a view of life and her rights and obligations that is myopic, convoluted, unrealistic, childish, and inexplicable,” was “intractable in her views and beliefs to the point of fanaticism [and] may well perceive herself as a second Joan of Arc[,] now suffering an ordeal that must be endured for the causes she believes in, whatever they might be.”¹²⁶ Dohrn was ultimately released, but at the cost of being publicly labeled as a fanatic by her attorneys. To her, this was undoubtedly a painful price to pay.¹²⁷

C. *Honestly Aggressive*

If history denies modern critics the right to complain about the legality of electronic surveillance or the unfettered discretion in the hands of law-enforcement, and the “unprecedented” use of the grand jury and prosecution of defense lawyers, perhaps they are at least entitled to argue that the essence of today’s counter-terrorism program is without parallel. Here again, the case books show that the current U.S. counter-terrorism program is fully in line with what has been attempted and upheld in the past. If courts have disapproved of these practices, it was not in a wholesale way as in the case of warrantless electronic surveillance.

It is Robert Kennedy who John Ashcroft credits with one of the key tenets of current U.S. counter-terrorism enforcement. Speaking to a conference of mayors shortly after 9/11, the Attorney General made the following statement:

Robert Kennedy’s Justice Department, it is said, would arrest mobsters for “spitting on the sidewalk” if it would help in the battle against organized crime. Let the terrorists be warned: If you overstay your visa—even by one day—we will arrest you. If

126. *In re Dohrn*, 560 F. Supp. 179 (S.D.N.Y. 1983).

127. To the extent there is any question about whether famous 1960s figures care about how they are perceived by the public, consider the steps they have taken when they take offense to how they have been depicted in the media. Following the most racially-charged trial in modern Virgin Islands history—arising from the September 6, 1972 mass murder at the Fountain Valley Golf Course in St. Croix—the black defendants were convicted. The radical defense lawyers (who had agreed to represent the accused free of charge) then took issue with a local news account of a letter the judge had received from a fellow jurist complimenting him on his ability to keep the trial from turning into a circus. The letter’s writer merely noted that he had presided over a Maryland trial involving some of the same defense attorneys, and that they had made similar attempts to politicize the case. As a result of the news article, the defense lawyers filed a defamation action against the judge and the newspaper. The lawsuit was ultimately dismissed. *Ratner v. Young*, 465 F. Supp. 386 (D.V.I. 1979).

you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.¹²⁸

Critics should at least credit the government for being transparent in its aggressiveness. They should also consider the not-so-subtle reference to history before they refer to what is happening today as without precedent.

The “spitting on the sidewalk” strategy actually goes back even further to the Chicago mob wars of the 1930s, when dedicated Treasury agents found a tool in the criminal tax laws to put away Al Capone. Today’s critics do not like the fact that modern prosecutors, like their colleagues from the past, are not limited to terrorism laws in their efforts to fulfill their new public safety mandate of preventing terrorism attacks before they occur, nor that these tactics seem to be accepted by the general consensus of the American public. Recently, the attacks on the PATRIOT Act have noted that it is being used in non-terrorism cases, as if that was somehow unexpected.¹²⁹ In response, some commentators have noted that many of these non-terrorism, money laundering provisions were inserted into the PATRIOT Act at the insistence of such Democratic legislators as Paul Sarbanes, Tom Daschle, and John Kerry.¹³⁰ Neither political party, it seems, has a monopoly on civil liberties or a muscular national security, which is the reason why we have careerists in high-level law-enforcement positions, many of whom were around in the days of Bush I and Clinton and whose expertise helped craft and implement the PATRIOT Act.

To be sure, using all legal tools to disrupt threatened violence is hardly a new thing. In the 1960s, the Department of Justice sought to disrupt organized violence through many of the same non-terrorism tools that are being used (and criticized) today. A number of non-terrorism prosecutions against left-wing radicals—ranging from state extortion charges,¹³¹ RICO,¹³²

128. Attorney General John Ashcroft, Remarks for the U.S. Mayors Conference (Oct. 25, 2001), *available at* www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm.

129. John Berlau, *Money Laundering and Mission Creep*, INSIGHT ON THE NEWS., Jan. 19, 2004, at 28.

130. *Id.*

131. *Moore v. Newell*, 548 F.2d 671 (6th Cir. 1977).

132. *Shakur v. United States*, 32 F. Supp. 2d 651 (S.D.N.Y. 1999).

Hobbs Act,¹³³ the offenses of interstate transportation of stolen property,¹³⁴ and firearms violations¹³⁵—were undertaken.

To be fair, certain defendants argued that they were being punished for their First Amendment activity. Oscar Mitchell, a job developer for the Congress of Racial Equality (CORE) was convicted in St. Louis under the Hobbs Act for threatening violence and organizing Black Panther activity against a store owner who refused to hire a black manager. Mitchell claimed his extortionate demands were constitutionally protected and that the court erroneously refused to permit him to introduce evidence of his benevolent intent.¹³⁶ Yusuf Oziz Shabazz, convicted in Detroit of transporting stolen American Express money orders across state lines, claimed that, as a member of the Black Panthers, he frequently traveled around the country serving as a government informant, and he was merely trying to avoid bank transactions that would have identified him to his Black Panther brothers who might work at the bank. For this reason, he bought the money orders using an alias.¹³⁷ Each conviction was affirmed.¹³⁸

Also not unique is the government's focus on the charitable status of entities linked to terrorists¹³⁹ or its concern about prison recruitment by radical elements.¹⁴⁰ Unlike the abuses of COINTELPRO, which are well documented, history has not shown that these particular enforcement initiatives were widely accepted as examples of the FBI "going too far."

IV. CONCLUSION: THE USES AND ABUSES OF HISTORY

In the end, no matter how sincerely we believe in the correctness of our own position, the actors in the current counter-terrorism debate will be judged by history. This is inevitable as long as history is considered relevant. Where it

133. *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972).

134. *Shabazz v. United States*, 446 F.2d 77 (8th Cir. 1971).

135. *United States v. Cecil*, 457 F.2d 1178 (8th Cir. 1972).

136. *Mitchell*, 463 F.2d at 191.

137. *Shabazz*, 446 F.2d at 77.

138. *Mitchell*, 463 F.2d at 193; *Shabazz*, 446 F.2d at 79.

139. *See Black Panther Party v. Alexander*, 1975 WL 552 (N.D. Cal. Mar. 21, 1975) (deciding that the IRS can use an administrative summons to inquire into the tax status of the Black Panther Party and its president).

140. *See O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973) (holding that clergymen had no fundamental First Amendment rights under free exercise clause to enter prison when their activities were aimed at promoting "black militancy" rather than religion).

comes to the law and those who practice it, history should be relevant. This article posits that many of those who are quick to claim that history is on their side—that Americans who fail to learn from the abuses of an earlier era are doomed to repeat them—are themselves engaged in their own form of historical abuse. If several decades from now people look back on the post-9/11 America and conclude that our nation's law enforcers and those leaders who set policy were on the wrong track, so be it. If this happens, it will not be because American citizens had no recourse in the courts, as some critics have suggested.

In his dissenting opinion from the infamous Japanese internment case, Justice Robert Jackson wrote:

The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.¹⁴¹

Justice Jackson's words were written in frustration, based on his colleagues' finding that military orders are essentially non-justiciable even when obviously unconstitutional. Significantly, his frustration could not extend the judicial reviewability of the actions of American law-enforcement. As a former Attorney General, Justice Jackson knew that federal prosecutors and agents operate under the rule of law. Whatever judicial deference is offered to the conduct of the U.S. military in times of war, the same is not true (at least not to the same extent) regarding the enforcers of American law. As the cases and statutes described above show, the Department of Justice and the FBI are public servants, and those who feel aggrieved by today's counter-terrorism enforcement policies do indeed have political and judicial remedies. People who are alarmed by such things as the PATRIOT Act should acknowledge that American courts, which operate on the basis of historical precedent, remain available and are willing, when necessary, to redraw the lines between collective security and personal liberty. Persons who avail themselves of the process, however, need to appreciate

141. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

history as much as the courts do. If one accepts these rules, the courts will remain a haven. Just ask former Black Panther leader Bobby Seale.

Seale was charged with conspiracy to incite a riot at the 1968 Democratic National Convention, in what became known as the Chicago Seven trial.¹⁴² The trial began in September 1969. On November 5, a mistrial was declared as to Seale, he was summarily cited with sixteen counts of contempt of court for several oral outbursts in the courtroom, and he was sentenced to four years in prison.¹⁴³ The Government thereafter dropped the remaining charges against him.

Seale resigned from the Black Panther Party in 1974 because he was disgusted by its militancy.¹⁴⁴ Twenty years later, he was living in Philadelphia, working on an unpaid basis as a “community liaison” for Temple University. He had published a book entitled *Barbeque’n with Bobby Seale* and engaged in commercial advertisements for a well-known brand of ice-cream and for a local bank. Following the release of a film entitled “Panther” in 1995, Seale sued Gramercy Pictures, PolyGram Filmed Entertainment Distribution, Inc., Working Title Group, Inc., and Tribeca Productions, Inc., arguing that the film’s portrayal of him violated his privacy by placing him in a false light.¹⁴⁵ The lawsuit turned into a vehicle for arguing the truth about the Black Panther Party and his role in it.

The court credited the claim that the Black Panther Party engaged in overt political activity, such as demonstrations and protests, although it found that Seale and the Black Panther Party rejected Dr. Martin Luther King Jr.’s calls for non-violent resistance to physical attack.¹⁴⁶ In his deposition, Seale testified that the Black Panthers advocated that black people should own guns for “self-defense against the racist power structure or any racist who attacked us,” and that he himself led a group of gun-carrying demonstrators onto the floor of the California State Legislature during a protest march in 1967. The court noted that much publicity surrounded the Black Panther Party in the

142. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972).

143. *United States v. Seale*, 461 F.2d 345, 350 (7th Cir. 1972).

144. *See Seale v. Gramercy Pictures*, 949 F. Supp. 331, 334 (E.D. Pa. 1996) (discussing Bobby Seale’s biographical information).

145. *Id.*

146. *See id.* at 334 (further discussing the facts of the case).

late 1960s following several armed confrontations with police in which several Party members were killed. Although by 1969 chapters of the Black Panther Party had been organized in several major cities across the country, including Philadelphia, the size and strength of the Party started to decline after 1970. Huey P. Newton had been imprisoned and convicted of manslaughter in the 1967 shooting death of an Oakland police officer.

The court's decision focused on two alleged falsehoods in the movie, of which Seale complained: (1) a scene in the film in which his character is depicted illegally purchasing firearms, which he claimed departed from his deliberate and conscious policy of abiding by the mandate of applicable legal codes in order to maintain Party discipline and avoid giving police provocation; and (2) a scene which depicts his character and the character of Eldridge Cleaver engaging in a verbal disagreement as to whether Party members should engage in acts of retaliatory violence against police officers in the wake of the assassination of Dr. Martin Luther King, Jr.¹⁴⁷ The district court found that Seale had sustained his burden of raising a genuine issue of material fact and Gramercy Pictures' motion for summary judgment was denied.¹⁴⁸ Seale, however, lost his claim following the bench trial. However, he was able to tell his story, and defend his good name.¹⁴⁹

Bobby Seale, it seemed, cared about the judgment of history. He was heard through the law.

147. *Id.* at 338.

148. *Id.* at 338–39.

149. *Seale v. Gramercy Pictures*, 964 F. Supp. 918 (E.D. Pa. 1997).