# THE 2008 FBI GUIDELINES: CONTRADICTION OF ORIGINAL PURPOSE

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## I. INTRODUCTION

As charged at its inception, the Federal Bureau of Investigation (FBI) protects the citizens of the United States from both domestic and foreign security threats by selectively investigating individuals and groups that have shown a tendency towards or have threatened acts that would jeopardize national security.[1] In response to political climate and contemporary events, the Attorney General's office promulgated the first FBI guidelines in 1976, signaling a new era in which the Executive Branch would provide guidance and boundaries for its premier police force.[2] Attorney General Edward H. Levi created the original FBI guidelines in response to the staggering privacy and free speech violations exposed during the Nixon Administration, intending the guidelines to prevent such abuses in the future and protect U.S. citizens while permitting the FBI to perform its intelligence operations within constitutional boundaries.[3] Since their creation, the FBI guidelines have restricted the FBI's investigatory activities to those within constitutional limits, especially with respect to invasions of privacy and unwarranted surveillance of U.S. citizens; however, over the years, several revisions of the guidelines have chipped away at the boundaries that Attorney General Levi erected. The newest guidelines, which took effect on December 1, 2008 under the authority of then-Attorney General Michael B. Mukasey, affirmatively authorize the kinds of abuses and constitutional violations that the original FBI guidelines of 1976 sought to prevent.[4]

Attorneys General have used the FBI guidelines to express policy and react to contemporary security concerns. Though the Bush Administration expanded federal powers in the name of national security with successive guideline

[1] *See Act to Establish the Department of Justice*, ch. 150, 16 Stat. 162 (1870) (creating the Department of Justice headed by the Attorney General); *New Attorney General Guidelines for Domestic Intelligence Collection: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 1 (2008) (joint statement of Assistant Att'y Gen. Cook and Gen. Counsel Caproni), *available at* http://www.usdoj.gov/olp/national_security.htm. *See also* THE FBI: A COMPREHENSIVE REFERENCE GUIDE 38 (Athan Theoharis et al. eds., 1999).

[2] THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 1, at 38.

[3] Domestic Security Investigation Guidelines, *reprinted in FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 18-33 (1978) [hereinafter The Levi FBI Guidelines].

[4] *See* The Mukasey FBI Guidelines, *infra* note 194.

amendments, Attorney General Levi created the FBI guidelines to protect the liberties of U.S. citizens from the internal, domestic threats of President Nixon's abuses of power.[5] The executive power, extended to the Attorney General and the FBI by law, allowed President Nixon's and previous administrations to conduct at-will and without predicate the kinds of investigations typically applied to suspects of criminal activity for the purpose of indictment.[6] The FBI did not implement a formal court process, nor was there any set of rules governing the FBI's requirement to establish probable cause before commencing an investigation.[7] Under these practices, the abuses later uncovered by Attorney General Levi and the investigatory committees appointed by Congress included: secret surveillance of individuals opposing the Vietnam War; more than 500,000 files on domestic groups and U.S. citizens of all religions, beliefs, and political affiliations; and most infamously, the compilation of intelligence information and the surveillance of the National Association for the Advancement of Colored People (NAACP) and civil rights activists like Martin Luther King, Jr., whom the FBI targeted because he might "abandon his supposed 'obedience to white liberal doctrines.'"[8]

Undoubtedly, the threats of terrorism in the twenty-first century changed the landscape of national security. In response to the attacks on September 11, 2001, Attorney General John Ashcroft reverted to Cold War tactics and national security initiatives, reflected in his own revised FBI Guidelines, which still are not available in full. As was the case before Attorney General Levi's Guidelines, often vague, purportedly national security-related initiatives trumped individual rights. Although this was perhaps necessary, this led to widespread abuses of power by the Executive Branch via the FBI in the years following September 2001. The alleged abuses of the Bush Administration under the Ashcroft Guidelines included illegal surveillance of phone and internet records of U.S. citizens, the installation of surveillance devices in commercial phone service providers, warrantless wiretapping that still has no legal support from government memoranda, collection and purchase of commercial

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[5] *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 96th Cong. 1 (1980) (statement of Rep. Don Edwards).

[6] 28 U.S.C. § 503 (1966); *Final Report on Select Comm. to Study Government Operations with Respect to Intelligence Activities, Book II*, S. REP. No. 94-755, at 7–8 (1976). *See infra* Part II.A.

[7] 28 U.S.C. § 533 (2002) (the statutes authorizing the Attorney General to conduct searches, surveillance, and assistance in prosecutions do not impose limits); Exec. Order No. 12,333, *infra* note 42; *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 18-33, pt. 1, at 234 (1978) (statements of Jerry Berman, Chief Legislative Counsel of the ACLU).

[8] *Id.* at 8, 11–12; THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 1, at 37; Marvin J. Johnson, Interested Persons Memo: Analysis of Changes to Attorney General Guidelines (June 5, 2002), *available at* http://www.aclu.org/natsec/emergpowers/14430leg20020606.html.

data, and the FBI agents' attendance of public meetings which has a chilling effect on free speech.[9] Once again, an Attorney General has instituted major changes in the FBI Guidelines, which is within the Attorney General's power, taking the FBI in a new direction without any external oversight. President Bush's last appointed Attorney General, Michael B. Mukasey, further transformed the FBI Guidelines from a set of specific boundaries that limited the FBI to a free pass for the expansion of FBI activities under vague principles and the interpretations of the Attorney General.

Part II of this Note will examine the creation, purpose, and evolution of the FBI guidelines. It will provide the underlying rationale of the original FBI guidelines as a point of comparison for the Mukasey FBI Guidelines which do not adhere to this rationale. Part III will describe the Constitutional problems that have arisen as a result of the courts' interpretation of the Fourth Amendment in response to changing technology, new law enforcement objectives, and the Executive's assertion of interpretive power. Part IV will investigate the legal basis for the Attorney General's ability to create and change FBI guidelines, as well as the basis for criminal investigation by the FBI under federal law.[10] Part V will outline the new features of the FBI guidelines created by Attorney General Mukasey. Part VI argues that the 2008 Mukasey FBI Guidelines authorize and condone impermissible violations of Fourth Amendment rights. Part VII delineates the grave implications and consequences of the Mukasey FBI guidelines if they remain in effect.

## II. EVOLUTION OF THE FBI GUIDELINES

### A. *The Birth of FBI Guidelines*

In 1972, the Supreme Court ruled in *United States v. United States District Court for the Eastern District of Michigan* (*Keith*) that warrantless wiretapping and surveillance of U.S. citizens was unconstitutional, despite President Nix-

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[9] *See Judge Seeks Wiretapping Documents*, N.Y. TIMES, Nov. 1, 2008, at A24 (reporting FBI surveillance of a wide range of advocacy groups); Eric Lichtblau, *F.B.I. Watched Activist Groups, New Files Show*, N.Y. TIMES, Dec. 20, 2005, at A1 (illustrating the FBI's use of informants to monitor organizations like Greenpeace); Scott Shane, *Agency and Bush Are Sued over Domestic Surveillance*, N.Y. TIMES, Sept. 19, 2008, at A13 (reporting on the surveillance of internet and phone records without court oversight). *See also* HOWARD BALL, THE USA PATRIOT ACT OF 2001: BALANCING CIVIL LIBERTIES AND NATIONAL SECURITY 51 (2004); Johnson, *supra* note 8. *See generally* Gayle Horn, *Online Searches and Offline Challenges: The Chilling Effect, Anonymity and the New FBI Guidelines*, 60 N.Y.U. ANN. SURV. AM. L. 735 (2004–2005) (evaluating the FBI Guidelines on General Crimes, rather than the classified FBI Guidelines on National Security and Foreign Intelligence).

[10] This Note confines itself to the language of the guidelines themselves and resulting conflicts with modern conceptions of Fourth Amendment protections. Questions of the Attorney General's power to interpret the Constitution and federal law are beyond the scope of this Note.

on's assertion that such warrantless criminal investigation was necessary for "national security."[11] In addition, the decision firmly stated that no law or executive order could expand the executive powers beyond constitutional boundaries; while President Nixon could do anything within his constitutional power to protect the United States from threats to national security, there was nothing in the law that affirmatively extended the President's power to conduct unwarranted surveillance.[12] The Supreme Court's decision to protect citizens' Fourth Amendment rights over purported national security interests evinced a growing concern that the Executive considered itself above the constitutional limits on criminal investigation.[13]

President Nixon's assertion that he had the power to conduct unfettered intelligence operations stemmed from a long tradition of executive control of the FBI subject to little oversight.[14] During President Harding's Administration, the FBI had focused on the eradication of organized or "gangster" crime, which required federal law enforcement to increase its intelligence operations under the direction of Bureau of Investigation Directors William J. Burns and J. Edgar Hoover.[15] After both World War II and the Vietnam War, heightened concerns over communist influences and racial tensions led many political leaders to fear uprising and domestic bombings.[16] The FBI's own historical account of this period reports that increased "bombings" that occurred in the United States and the "potential dangers" posed by those who protested the Vietnam War necessitated increased surveillance and intelligence operations.[17] Regardless of the FBI's justifications, abuses occurred over the course of six administrations from Roosevelt to Nixon.[18] The Watergate scandal led to the eventual revelation that the FBI compiled secret dossiers on U.S. groups and individuals, including political figures such as members of Congress, under vague pretexts

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[11] 407 U.S. 297, 318–21 (1972).

[12] *Id.* at 303–05.

[13] JOHN T. ELLIFF, THE REFORM OF FBI INTELLIGENCE OPERATIONS 3-6 (1979). For a detailed examination of the *Keith* Case and its implications for the Fourth Amendment and national security measures, *see generally* Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259 (2008) [hereinafter *Lessons from Justice Powell and the Keith Case*].

[14] Nicholas M. Horrock, *F.B.I. Is Accused of Political Acts for Six Presidents*, N.Y. TIMES, Dec. 4, 1975, at A1; Nicholas M. Horrock, *Mr. Nixon Was Not the First to Use the Agency: Johnson Liked Its Reports: The F.B.I. as Private Presidential Police Force*, N.Y. TIMES, Feb. 9, 1975, at E5.

[15] History of the FBI, Lawless Years: 1921–1933, http://www.fbi.gov/libref/historic/history/vietnam.htm (last visited Oct. 29, 2009).

[16] *Id.*

[17] History of the FBI, Vietnam War Era: 1960's–1970's, http://www.fbi.gov/libref/historic/history/vietnam.htm (last visited Oct. 29, 2009).

[18] *See* articles cited *supra* note 14.

such as "to detect and prevent violence" and for national security, when the inevitable uses of the information were purely political or personal.[19]

In December 1974, as more reports of intelligence operations abuses made headlines, *New York Times* reporter Seymour Hersh exposed the CIA's programs for ongoing intelligence collection and monitoring of anti-war groups and civil rights activists.[20] Throughout late 1974 and 1975, the media reported on the FBI's surveillance and harassment of university professor Morris Starsky and civil rights activists such as Dr. Martin Luther King, Jr., followed by other reports of the FBI's interference with "small potato" political radicals.[21] This counter-intelligence program encompassed fifteen years of harassment techniques employed by the FBI to disrupt and deter groups and individuals from communicating their views.[22] In 1975, for the first time in the FBI's seventy-year history, the Senate and House formed legislative committees to review the agency's practices, appointing Sen. Frank Church and Rep. Otis Pike to lead the committees.[23] Later, the Senate created the Senate Select Committee on Intelligence to review intelligence practices in response to mounting reports of intrusive tactics and politically motivated investigations by agencies including the National Security Agency (NSA), Central Intelligence Agency (CIA), FBI, and other organizations.[24] These committees reviewed FBI records from previous decades and uncovered a variety of abuses, a lack of oversight, and general lawlessness of intelligence practices to further substantiate the accusations following the impeachment of President Nixon.[25]

Attorney General Levi created the first FBI guidelines in 1976 in response to the reports of Sen. Church's committee and the new Select Committee on Intelligence, both of which had reviewed the unlawful surveillance, unjustified gathering of intelligence, and profound abuses of the power to investigate and in-

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[19] *The F.B.I. as Private Presidential Police Force*, *supra* note 14; *F.B.I. Is Accused of Political Acts for Six Presidents*, *supra* note 14; Nicholas M. Horrock, *Levi Details Wide Scope of Hoover's Secret Files*, N.Y. TIMES, Feb. 28, 1975, at A1.

[20] Seymour M. Hersh, *Huge CIA Operation Reported in US Against Antiwar Forces, Other Dissidents During Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at A1.

[21] Nicholas M. Horrock, *Ex-Officials Say F.B.I. Harassed Dr. King to Stop His Criticism*, N.Y. TIMES, Mar. 9, 1975; Nicholas M. Horrock, *F.B.I. Counter-Intelligence Is Under G.A.O. Scrutiny*, N.Y. TIMES, Jan. 30, 1975; Nicholas M. Horrock, *F.B.I. Harassed a Leftist Party*, N.Y. TIMES, Mar. 19, 1975, at A1; Nicholas M. Horrock, *Files of F.B.I. Showed It Harassed Teacher*, N.Y. TIMES, Jan. 29, 1975; Nicholas M. Horrock, *The F.B.I.'s Appetite for Very Small Potatoes*, N.Y. TIMES, Mar. 23, 1975. *See generally* Noam Chomsky, Domestic Terrorism: Notes on the State System of Oppression, 21 NEW POL. SCI., Sept. 1999, at 303, for a comprehensive overview of FBI activities during this period.

[22] *F.B.I. Counter-Intelligence Is Under G.A.O. Scrutiny*, *supra* note 21.

[23] *F.B.I. Counter-Intelligence Is Under G.A.O. Scrutiny*, *supra* note 21.

[24] THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 1, at 37.

[25] FINAL REPORT ON SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II, S. REP. NO. 94-755, at 11–12 (1976).

vade the privacy of civilians.[26] In addition, Congress passed a series of acts to restrict domestic intelligence operations, including the Federal Intelligence Surveillance Act (FISA), to prevent future "attendant violations of privacy and constitutional rights."[27] Acknowledging the past unconstitutional extensions of FBI power and the new legislative initiatives to prevent future abuse, Attorney General Levi recognized that a set of rules to guide the FBI's activities in the future were necessary, especially with respect to a President's personal use of the FBI to target political groups, congressmen, and vocal critics.[28]

Attorney General Levi created guidelines with a mind to increase supervision of non-criminal investigations and to allow investigations of political advocacy groups *only if* there was probable cause—a showing that there was at least an intent to carry out violent or criminal acts and/or the existence of exigent circumstances indicating that a full investigation was necessary.[29] The Levi FBI guidelines required both a factual basis and weighing of investigatory interests against privacy and free speech before the commencement of a criminal investigation; thus, without facts or circumstances that created a reasonable suspicion criminal activity, the FBI's agents could not begin an investigation.[30] Even to begin a limited investigation, an FBI agent would need the approval of a Special Agent in Charge or FBI Headquarters, and techniques specifically prohibited in limited and preliminary investigations included electronic surveillance and recruitment or "placement" of informants.[31] Electronic surveillance, recruitment of informants, attendance of demonstrations or meetings, and "mail covers" were techniques only available under full investigations, and the Levi FBI Guidelines *required* that certain factors be considered before a full investigation could begin. These factors included: the magnitude of alleged harm, the probability that the harm would occur, the "immediacy" of the threatened harm, and "the danger to privacy and free expression imposed by a full investigation."[32]

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[26] ELLIFF, *supra* note 13, at 3–6.

[27] THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 1, at 38. *See also* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

[28] *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 253–54 (1976) (statements of Att'y Gen. Levi). *See also Levi Details Wide Scope of Hoover's Secret Files*, N.Y. TIMES, Feb. 27, 1975, at A1.

[29] *See* IMPACT OF ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (THE LEVI GUIDELINES): REPORT OF THE CHAIRMAN ON THE SUBCOMM. ON SECURITY AND TERRORISM, S. REP. NO. 98-134, at 8–9 (1984); Chimel v. California, 395 U.S. 752, 761–62 (1969) (citing McDonald v. United States, 335 U.S. 451, 455–56 (1948)) (discussing the probable cause requirements for law enforcement activities and the consideration of exigencies); THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 1, at 38, 154.

[30] The Levi FBI Guidelines, *supra* note 3, at 22, II.I.

[31] The Levi FBI Guidelines, *supra* note 3, at 22, II.G.

[32] The Levi FBI Guidelines, *supra* note 3, at 22, II.I.

Officials reviewing the Levi FBI Guidelines have compared the standard for commencing an investigation under the Guidelines in practice to the typical criminal standard for conducting a search, which requires probable cause under the Fourth Amendment.[33] To satisfy due process requirements under a probable cause standard, an agent must have a reasonable belief that a suspect has committed a crime or is likely to do so, and the FBI must generally obtain a warrant to act upon information or to conduct surveillance that would otherwise be an invasion of privacy, unless exigent circumstances exist to require commencement of search without a warrant.[34]

As a police force of the Executive Branch, the post-Watergate era FBI was no different from other government law enforcement organizations: the committees that reviewed the FBI's practices wanted to hold the FBI to Constitutional standards.[35] Courts historically reviewed government searches and invasions of privacy according to the probable cause standard, and the Church Committee recommended that adhering to a probable cause standard was essential to protect civil liberties while also giving the FBI latitude to do that which was reasonable in the circumstances.[36] While such constitutional limitations existed before the Levi FBI Guidelines, the guidelines were a measure that—according to committee reports—would have prevented decades of abuses had the Executive clearly defined the FBI's boundaries at its creation.[37]

### B. *The Evolving Levi FBI Guidelines*

After Attorney General Levi implemented the FBI Guidelines in 1976, the number of open FBI investigations decreased markedly, a fact that even opponents to the FBI Guidelines were willing to admit.[38] At the time of hearings assessing the efficacy of the Levi FBI Guidelines, there had been no successful suits against the FBI.[39] The FBI Statutory Charter hearings of the Senate Judiciary Committee reviewed the abuses of the FBI under previous administrations

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[33] *See* S. REP. NO. 98-134, 8-9. *See also* U.S. CONST. amend. IV; Camara v. Municipal Court, 387 U.S. 523, 534 (1967) (holding that "[i]n cases in which the Fourth Amendment requires a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness").

[34] *See* United States v. Kincade, 379 F.3d 813, 822 (9th Cir. 2004) (outlining situations in which a warrant is not necessary for law enforcement to search or institute a seizure, such as those involving a dangerous weapon, evidence that may be destroyed, or actions taking place in certain "exempted areas" like airports and government buildings); ELLIFF, *supra* note 13, at 104.

[35] *See* S. REP. NO. 98-134, at 7–10; *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7, at 1–2 (statements of Chairman Edward M. Kennedy).

[36] *See* S. REP. NO. 98-134, at 7–10.

[37] *See FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7, at 1–3 (statements of Chairman Edward M. Kennedy).

[38] *See* S. REP. NO. 98-134, at 21–22.

[39] *Id.*

with the mission of creating a detailed charter for the FBI.[40] However, President Ronald Reagan's administration abandoned this task, possibly as a result of President Reagan's desire to maintain control of the FBI rather than subject the FBI to Congressional oversight.[41] The Reagan Administration proposed a series of laws authorizing the Executive's powers with respect to foreign intelligence and national security initiatives.[42] The Executive Branch reasserted its role in intelligence activities in Executive Order 12,333 of 1981, which outlined the powers of the Executive and gave the Attorney General the distinct duty of formulating intelligence and counterintelligence operations.[43] Thus, President Reagan expressly created the Attorney General's power to promulgate guidelines for the operation of the FBI and included a detailed list of the types of information that the FBI should actively seek.[44]

In 1982, the Senate charged the Judiciary Committee's Subcommittee on Security and Terrorism with the task of reviewing the Levi FBI Guidelines to assess their impact on security operations under FISA.[45] Following the Subcommittee's recommendations, coupled with the escalation of the Cold War, the Reagan Administration's national security agenda demanded more lenient standards for FBI investigations.[46] Attorney General William French Smith made changes to "clarify the scope" of the guidelines and to protect "the public from the greater sophistication and changing nature of domestic groups that are prone to violence."[47] Attorney General Smith's mission in promulgating the

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[40] *See generally FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7, at 1–3.

[41] RHODRI JEFFREYS-JONES, THE FBI: A HISTORY 197 (2007).

[42] *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981); *Excerpts from the Address by Smith on Countering Russians' Espionage*, N.Y. TIMES, Dec. 18, 1981; Judith Miller, *Attorney General Says U.S. Acts to Counter Rise in Soviet Spying*, N.Y. TIMES, Dec. 18, 1981, at A1; Judith Miller, *Reagan Broadens Power of C.I.A., Allowing Spying Activities in U.S.*, N.Y. TIMES, Dec. 4, 1981, at A1.

[43] Exec. Order No. 12,333, *supra* note 42.

[44] Exec. Order No. 12,333, *supra* note 42, at §§ 1.14, 2.

[45] IMPACT OF ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (THE LEVI GUIDELINES): REPORT OF THE CHAIRMAN ON THE SUBCOMM. ON SECURITY AND TERRORISM, S. REP. NO. 98-134, at 8–9 (1984).

[46] *Id. See generally* Mitchell S. Rubin, Note, *The FBI and Dissidents: A First Amendment Analysis of Attorney General Smith's 1983 FBI Guidelines on Domestic Security Investigations*, 27 ARIZ. L. REV. 453 (1985).

[47] Attorney General's Guidelines on Domestic Security/Terrorism Investigations, *reprinted in Attorney General's Guidelines for Domestic Security Investigations (Smith Guidelines): Hearing Before the Subcomm. on Security and Terrorism of the S. Comm. on the Judiciary*, 98th Cong. 52 (1983) [hereinafter The Smith FBI Guidelines]; Press Release, Department of Justice (Mar. 7, 1983), *reprinted in Attorney General's Guidelines for Domestic Security Investigations (Smith Guidelines): Hearing Before the Subcomm. on Security and Terrorism of the S. Comm. on the Judiciary*, 98th Cong. 47 (1983); THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 1, at 155.

new guidelines was in accord with Attorney General Levi's goals: to provide guidance to agents so they may act with "professional competence" while ensuring that the agency would be accountable under the law and the Constitution.[48]

The Smith Guidelines removed the distinction between Levi's "preliminary" and "limited" investigations and instead allowed the FBI to use the same techniques in all investigatory activities that fell short of a full investigation.[49] Thus, no additional approval was required for techniques such as interviewing potential targets and witnesses in the collection of preliminary, investigative materials.[50] However, Smith also limited the amount of extension time available for preliminary investigations, allowing the preliminary investigation to continue for only thirty days upon written approval, rather than ninety days.[51] Unless the FBI agents on the case could show that there was sufficient evidence to launch a full investigation, preliminary investigations could not remain open or extend beyond the prescribed limits.[52]

Furthermore, the Smith Guidelines differentiated General Crimes Investigations and Criminal Intelligence Investigations in sections II and III, a distinction which the Levi Guidelines had not expressly made.[53] In the introduction to Criminal Intelligence Investigations, the guidelines emphasized that political and social enterprises with the object of violence or criminal activity were fundamentally "different" from the "general crimes" for which prosecution marks the end of investigation.[54] Therefore, criminal intelligence investigations were to be "broader and less discriminate than usual," as compared to a general crimes investigation.[55] For this reason, one of the more important changes of the Smith Guidelines was the distinction of the "reasonable indication" standard for initiating full investigations.[56] This was different from the basic probable cause standard for obtaining a warrant for search and seizure and/or arrest, thus expanding the situations in which the FBI would initiate an investigation.[57]

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[48] Press Release, *supra* note 47, at 47–48.

[49] The Smith FBI Guidelines, *supra* note 47, § II.B.6; The Levi FBI Guidelines, *supra* note 3, § II.E, F; Note, *supra* note 46, at 454–55.

[50] ; The Smith FBI Guidelines, *supra* note 47, § II.B.6; The Levi FBI Guidelines, *supra* note 3, § II.E, F; Rubin, *supra* note 46, at 454–55.

[51] The Smith FBI Guidelines, *supra* note 47, § II.B.3; The Levi FBI Guidelines, *supra* note 3, § II.H.

[52] The Smith FBI Guidelines, *supra* note 47, § II.B.3.

[53] The Smith FBI Guidelines, *supra* note 47, § III; The FBI Levi Guidelines, *supra* note 3.

[54] The Smith FBI Guidelines, *supra* note 47, § III.

[55] The Smith FBI Guidelines, *supra* note 47, § III.

[56] The Smith FBI Guidelines, *supra* note 47, § II.C.

[57] The Smith FBI Guidelines, *supra* note 47, § II.C; Illinois v. Gates, 462 U.S. 213, 231 (1983) (highlighting the court's conception of probable cause standard versus reasonable indication standard, as applied to FBI investigatory operations).

The criminal standard of probable cause for commencing a national security investigation was considered far too strict by some testifying at hearings.[58] Those opposing a probable cause standard believed that it would prevent the FBI from protecting the country from national security threats, which typical criminal investigations and processes could not discover.[59] The 1983 Security and Terrorism Subcommittee report expanded on the growing concern for the "criminal standard" for domestic security investigations, arguing that such a standard was "inhibit[ive]" and "limit[ed] the value of the FBI."[60] Under the new, less objective "reasonable indication" standard in the Smith Guidelines, the Attorney General's role was more discretionary, with few specific prohibitions.[61] Moreover, the general standard for commencing surveillance and investigation depended on "indications" of criminal activity, rather than on establishing probable cause and "reasonable suspicion" of criminal activity.[62] This subtle change allowed the FBI to monitor advocates, which harked back to practices of collecting intelligence on group activity based on belief or advocacy, thus rekindling fears of Nixon-era surveillance practices.[63]

In 1989, Attorney General Dick Thornburgh amended the FBI Guidelines to reflect changes in federal law but left the Smith FBI Guidelines for domestic security investigations as they were, with a "reasonable indication" standard that remained lower than the typical probable cause standard.[64] The Thornburgh Guidelines reflected no substantive changes and were in essence the same as the Smith Guidelines. Though the Smith and Thornburgh FBI Guidelines were more lenient in directing when to commence investigations, the Introduction and underlying tone of the guidelines remained faithful to the original purposes of the Levi FBI Guidelines: To safeguard U.S. citizens from national security threats with "care to protect individual rights and to insure that investigations [were] confined to matters of legitimate law enforcement interests."[65] Though the changes in 1983 and 1989 reflected a growing need for lenient intelligence standards in response to legitimate national security threats, First and Fourth Amendment concerns remained a strong barrier to expanding the FBI's authority as in the pre-Levi era. Claims of federal abuse of the FBI's

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[58] DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 111–13 (2006).

[59] *Id.*

[60] IMPACT OF ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (THE LEVI GUIDELINES): REPORT OF THE CHAIRMAN ON THE SUBCOMM. ON SECURITY AND TERRORISM, S. REP. NO. 98-134, at 9–10 (1984).

[61] The Smith FBI Guidelines, *supra* note 47.

[62] The Smith FBI Guidelines, *supra* note 47, at 68–69.

[63] Rubin, *supra* note 46, at 457.

[64] OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS pt. II.B (1) (1989) [hereinafter The Thornburgh FBI Guidelines].

[65] *Id.* at Introduction.

police power remained low, as the caseload on domestic intelligence remained low.[66]

### C. *The Ashcroft FBI Guidelines*

Attorney General John Ashcroft's substantial revisions to the guidelines took effect in 2003.[67] The new Ashcroft Guidelines responded to evolving national security concerns in the aftermath of the September 11, 2001 attacks and the recommendations of the Commission for the Review of FBI Security Programs.[68] The amended guidelines authorized confidential information sharing and pooling of intelligence between the FBI and other law enforcement agencies, as well as greater leeway in commencing and conducting "preliminary investigations" within the same scope as a full, general investigation.[69] The rewritten Introduction set the tone for Ashcroft's FBI Guidelines. There is no mention of individual rights, the importance of honoring Constitutional limitations to protect citizens, or the need for only "legitimate law enforcement" initiatives.[70] Pursuant to Executive Order 12233 and the new laws Congress had passed to permit broader intelligence operations in recent security threats, the Ashcroft FBI Guidelines pushed the power of the Attorney General to its limits.[71]

Instead of delineating national security initiatives and intelligence gathering as separate from criminal investigations, the trend since 9/11 has been to view intelligence operations as if they were another form of criminal investigation.[72]

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[66] *See* sources cited *supra* notes 45–52.

[67] OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION 1–6 (2003) (classification modified by Attorney General Alberto R. Gonzales, Aug. 2, 2007) [hereinafter The Ashcroft FBI Guidelines].

[68] COMMISSION FOR THE REVIEW OF FBI SECURITY PROGRAMS: A REVIEW OF FBI SECURITY PROGRAMS (2002). For a snapshot of the political climate at the time that Ashcroft promulgated his Guidelines in 2003, *see* Adam Clymer, *Ashcroft Calls on News Media to Help Explain Antiterrorism Laws*, N.Y. TIMES, June 20, 2003, at A12; Eric Lichtblau, *Despite Assurances, Bush's Antiterror Plan Is Rekindling Concern*, N.Y. TIMES, Sept. 14, 2003, at N32; Eric Lichtblau, *Justice Dept. Lists Use of New Power to Fight Terror*, N.Y. TIMES, May 20, 2003, at A1 [hereinafter *Justice Dept. Lists Use of New Power*]; Eric Lichtblau & Adam Liptak, *On Terror, Spying and Guns*, N.Y. TIMES, Mar. 14, 2003, at A1; Don Van Natta, *Six Groups Said to Be Monitored in U.S. or Possible Al Qaeda Links*, N.Y. TIMES, Aug. 23, 2003, at A1.

[69] Johnson, *supra* note 8.

[70] Exec. Order No.12,333, *supra* note 42; The Ashcroft FBI Guidelines, *supra* note 67, at 1–6.

[71] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001); Johnson, *supra* note 8.

[72] *New Attorney General Guidelines for Domestic Intelligence Collection: Hearing*

This view allowed Attorney General Ashcroft to justify more relaxed standards for beginning preliminary investigations, known as "assessments."[73] This new category of FBI action gave agents initiative to begin "prompt and limited checking of leads," instead of formally applying for clearance from FBI Headquarters or a supervisor before beginning an investigation.[74] The language of the new guidelines also permitted—via the USA PATRIOT Act[75]—the investigation and surveillance of groups associated with foreign powers, although these groups may be engaged in only political, nonviolent activities, as long as the motivation was to ensure "national security."[76]

Attorney General Ashcroft's overhaul of the guidelines was not subject to review by Congress or independent committees.[77] The new guidelines also were not made public at their creation, unlike the Mukasey FBI guidelines, which were available to civil liberties groups, members of Congress, and lawmakers even before their publication.[78] The Ashcroft FBI Guidelines' status remained "classified" until 2007, though general commentary from officials was available.[79] The current, published version of the Ashcroft FBI Guidelines of 2003 is partially classified and incomplete; there are numerous redacted or incomplete sections.[80] Missing from Ashcroft's Guidelines are portions of the section defining the "status" of any target of investigation with respect to his or her nationality.[81] The FBI's course of action may differ depending on whether the target is a U.S. citizen, yet the standard for determining who may receive protections as a citizen and who may be subject to investigation on a lower evidentiary threshold is unclear due to the unavailability of Part 2.[82] Other sections that have been omitted in the Ashcroft Guidelines include: provisions for full and preliminary investigations, investigation of agents of foreign governments, foreign intelligence collection, activities of other federal agencies in

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*Before the S. Select Comm. on Intelligence*, *supra* note 1, at 4 (statement of Sen. Christopher S. Bond, Vice Chairman, S. Select Comm. on Intelligence).

[73] *Id.*

[74] *Id.*

[75] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

[76] The Ashcroft FBI Guidelines, *supra* note 67; JEFFREYS-JONES, *supra* note 41, at 235.

[77] JEFFREYS-JONES, *supra* note 41, at 235; *New Attorney General Guidelines for Domestic Intelligence Collection: Hearing Before the S. Select Comm. on Intelligence*, *supra* note 1.

[78] *New Attorney General Guidelines for Domestic Intelligence Collection: Hearing Before the S. Select Comm. on Intelligence*, *supra* note 1 (noting the unprecedented step that Attorney General Mukasey has taken in conferring with Congress before adopting new guidelines).

[79] JEFFREYS-JONES, *supra* note 41, at 235.

[80] The Ashcroft FBI Guidelines, *supra* note 67.

[81] The Ashcroft FBI Guidelines, *supra* note 67, § I.C.II.

[82] The Ashcroft FBI Guidelines, *supra* note 67, § I.C.II.

the U.S., investigative techniques, and several items and their definitions within Part VIII Definitions.[83]

Attorney General Ashcroft's Guidelines for domestic intelligence activities followed the trend of Attorney General Smith's changes in the 1980's, reducing the standards for initiating investigations. Like the Reagan Administration, the Bush Administration strongly supported measures that would extend the FBI's powers in response to contemporary security concerns; Attorney General Ashcroft's new guidelines—and later the USA PATRIOT Act—reflected those extensions of FBI power.[84] While the Ashcroft FBI Guidelines alone did not create any new powers for the FBI, the Ashcroft FBI Guidelines did institute a widespread process of investigating and gathering evidence on individuals.[85] Under Ashcroft's changes, FBI agents had greater discretion and a permissive guide for commencing investigation, differing from criminal standards typically required for investigation by any government police force.[86] While the guidelines have been the user's manual for the FBI since 1976, at the will of the Executive Branch itself, the transformation of the guidelines from limitations to expansions of government power has been informed every step of the way by the changing laws that give power to federal agencies.

### D. *Current FBI Questions*

Recently, Congress has once again asserted the need for oversight of federal law enforcement after reports circulated that the CIA had been destroying incriminating evidence of its practices.[87] The Senate Judiciary Committee intends to review the practices of the CIA, FBI, and other Executive Branch agencies that may have engaged in abusive or unconstitutional techniques during the Bush Administration.[88] In the 1970s and 80s, when Congressional committees such as the Select Committee on Intelligence and the Judiciary Committee began review of agency practices, revision of the Guidelines typically

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[83] The Ashcroft FBI Guidelines, *supra* note 67, §§ II.B.1.c, II.B.2, II.E, IV.A.3, IV.C, V.5, V.18, VIII.

[84] The Ashcroft FBI Guidelines, *supra* note 67, § IV.B.

[85] *See* Horn, *supra* note 9; Clymer, *supra* note 68, at A12; Eric Lichtblau, *Justice Dept. Lists Use of New Power*, *supra* note 68, at A1; Van Natta, *supra* note 68, at A1.

[86] Horn, *supra* note 9; Jerry Berman, *The FBI Guidelines and the Need for Congressional Oversight: Some Observations and Lines of Inquiry*, CENTER FOR DEMOCRACY AND TECHNOLOGY, June 6, 2002, http://www.cdt.org/testimony/020606berman.shtml.

[87] *See* David Johnston, *For Holder, Inquiry on Interrogation Poses Tough Choice*, N.Y. TIMES, July 22, 2009, at A15; Eric Lichtblau, *Congress Looks into Obstruction as Calls for Justice Inquiry Rise*, N.Y. TIMES, Dec. 8, 2007, at A1; Mark Mazzetti, *Senate Panel to Pursue Investigation of C.I.A.*, N.Y. TIMES, Feb. 27, 2009, at A14 [hereinafter *Senate Panel to Pursue*]; Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, N.Y. TIMES, Mar. 3, 2009, at A16 [hereinafter *U.S. Says C.I.A. Destroyed*].

[88] Mazzetti, *Senate Panel to Pursue*, *supra* note 87.

followed, amid public scrutiny.[89] As the new administration of President Barack Obama, Attorney General Eric H. Holder, and the 111th Congress move forward, there may be similar approaches to overhauling the Guidelines in order to achieve new desired results of the Executive.

## III. LEGAL BASIS

### A. *Federal Bureau of Investigation and the Attorney General*

The Attorney General under President Theodore Roosevelt created the FBI in 1908.[90] The FBI provides the Department of Justice with its own police force, under the Attorney General's statutory authority, to control U.S. marshals for the use of the Department.[91] The Attorney General's office oversees the activities of the FBI, and the FBI is part of the Executive Branch. The Attorney General has the power to appoint officials to detect violations of federal law, gather information on criminal activities, and enforce federal law by bringing actions on behalf of the United States against alleged violators of federal law.[92] Beyond these general duties, the Attorney General and the FBI are bound by the Constitution and U.S. laws governing acts of federal law enforcement agencies.[93] Thus, without an act of Congress, neither the Executive nor the Attorney General can enlarge the powers of the Attorney General or the FBI.[94]

The Attorney General may designate procedures, research, technical systems, and directives for the guidance and function of the FBI, as delineated in executive orders delegating intelligence activities to ensure national security.[95] The Attorney General's power concerning the creation of the guidelines is also subject to sections 509, 510, and 533 of Title 28 of the United States Code, which do not limit unenumerated powers, such as the power to delegate and the power to initiate criminal investigations.[96] Thus, the Attorney General may change at will the structure of the FBI, the guidelines for the FBI, and the internal procedures by which the FBI operates; no act of Congress or any external body is necessary.[97] Executive Order 12,333 elaborated on the authorities of the Attorney General and the FBI in the context of national security, outlin-

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[89] COMMISSION FOR THE REVIEW OF FBI SECURITY PROGRAMS, *supra* note 68; The Smith FBI Guidelines, *supra* note 47; The Levi FBI Guidelines, *supra* note 3, at 1–2.

[90] *Act to Establish the Department of Justice*, *supra* note 1.

[91] *Act to Establish the Department of Justice*, *supra* note 1; JEFFREYS-JONES, *supra* note 41, at 39.

[92] 28 U.S.C. § 509 (2008); Cohen v. United States, 38 App. D.C. 123 (1912).

[93] 37 Op. Att'y Gen. 576 (1937); *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7, at 1–2 (statement of Chairman Edward M. Kennedy).

[94] *See* sources cited *supra* note 93.

[95] Exec. Order No. 12,333, *supra* note 42.

[96] 28 U.S.C. §§ 509, 510, 533 (2008).

[97] *Id.* § 510.

ing the kinds of intelligence and information collection the FBI should conduct.[98] The FBI guidelines are a product of the Attorney General's singular power to implement the Executive's national security and intelligence directives, as well as the power to make provisions for the delegation and authorization of authority and performance to agents.[99] As the discretionary power of the Attorney General and his or her delegates failed to adequately guide the FBI in its operations, Attorney Generals beginning with Edward Levi have created multiple guidelines to interpret the powers given by statute to the FBI. Thus, the Guidelines provide a process by which the Attorney General can fulfill his or her statutory duty of ensuring the purported compliance of FBI agents under applicable federal laws.[100]

### B. *Governing Law*

Congress passed FISA in 1978 to define the authorities and standards under which federal agencies could conduct intelligence and national security activities.[101] Based on ongoing FBI abuses of power during the pre-Levi eras, Congress responded by clarifying the authority of intelligence and law enforcement agencies, especially with respect to the Constitutional rights of U.S. citizens.[102] The Levi FBI Guidelines did not create any new powers for FBI agents, but rather interpreted federal law like FISA, the Omnibus Crime Act of 1968, and others so that FBI agents would know the legal and Constitutional boundaries of their duties.[103] As the laws have evolved to respond to new technologies and special concerns, such as the rise of global terrorism, the FBI Guidelines and practices have evolved to respond to new laws and contemporary issues.

FISA established the Foreign Intelligence Surveillance Court and an application process for government surveillance requests as a measure of protection against abuse of power.[104] However, Congress has since amended FISA to allow for more relaxed standards of initiating surveillance in response to the 9/11 attacks.[105] The USA PATRIOT Act of 2001 amended portions of FISA, as

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[98] Exec. Order No. 12,333, *supra* note 42.

[99] 28 U.S.C. § 510; Exec. Order No. 12,333; *supra* note 42.

[100] *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7 (statement of Chairman Edward M. Kennedy).

[101] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

[102] United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982) (discussing FISA generally and its rationale in response to past surveillance tactics by federal agents).

[103] *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 42 U.S.C. § 3711 (1968); THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 1, at 37–38.

[104] *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

[105] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783

well as other federal laws, to expand surveillance and wiretapping capabilities, giving the FBI greater freedom in its intelligence operations.[106] The PATRIOT Act also allows the FBI to obtain a warrant and conduct surveillance and investigations under FISA without first notifying the individual, but only if notification might have "adverse consequences" and as long as the individual eventually receives notice.[107] Via the Controlled Substances Act, the PATRIOT Act also permits the government to issue an administrative subpoena and obtain information from targets without consulting a court of law.[108] The broad language of the PATRIOT Act thus relaxes boundaries of the procedure and scope of government intelligence operations with respect to "national defense or the security of the United States."[109] This allows the FBI to apply FISA to any matter that the FBI determine—in its own opinion—is within the context of national security.[110]

The Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA") codified the application of "national security" initiatives and intelligence operations to U.S. citizens who were not agents of a foreign country.[111] In 2006, Congress renewed the PATRIOT Act to prevent its expiration.[112] Additionally, the Protect America Act of 2007 amended sections of FISA to further "moderniz[e]" the protections afforded by FISA.[113] In July 2008, President Bush signed the FISA Amendments Act of 2008, which enabled government organizations such as the FBI to conduct surveillance and intelligence operations without a warrant and without court approval in "emergency" situations.[114] These acts demonstrate that the trend in laws governing federal law enforcement activities is to expand the FBI's power to act within its own discretionary scope, rather than providing specific boundaries and requirements.[115]

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(1978); GINA MARIE STEVENS & CHARLES DOYLE, PRIVACY: AN ABBREVIATED OUTLINE OF FEDERAL STATUTES GOVERNING WIRETAPPING AND ELECTRONIC EAVESDROPPING, CONG. RESEARCH SERV. REP. FOR CONG. (2008); *see generally* ELAINE CASSEL, THE WAR ON CIVIL LIBERTIES: HOW BUSH AND ASHCROFT HAVE DISMANTLED THE BILL OF RIGHTS (2004).

[106] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

[107] *Id.* Title II, § 213 (there is no express time limit on the permitted delay of notice).

[108] *Id.* Title II, § 215.

[109] *Id.* Title II.

[110] *Id.*

[111] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No, § 1074, 118 Stat. 3638, 3694 (2004); BALL, *supra* note 9, at 237.

[112] Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007).

[113] 50 U.S.C. § 1801; Press Release, White House, President Bush Commends Congress on Passage of Intelligence Legislation (Oct. 5, 2007), *available at* http://www.justice.gov/archive/ll/docs/bush-comm-cong.pdf.

[114] FISA Amendments Act of 2008, H.R. 6304, 110th Cong. (2d Session 2008).

[115] FREDERICK M. KAISER, U.S. CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL

C. *Oversight*

When the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission") cited "intelligence failure" as a major contributing factor to the 9/11 attacks, the House and Senate formed a Joint Inquiry to pinpoint the shortcomings of the U.S. intelligence community.[116] While these inquiries and other congressional oversight have stimulated debate, courts have had a firmer hand with the intelligence community than Congress: under FISA, the Foreign Intelligence Surveillance Court ("FISC") ruled that intelligence agencies would need court authorization before implementing electronic surveillance, despite any interpretation of the law that the Attorney General may have used to conduct unwarranted surveillance.[117] There are no formal bodies that oversee the Attorney General, who answers only to the Executive. Though there have been attempts to create a formal charter and legislative oversight of the FBI, courts remain the sole check on the FBI's activities.[118]

D. *The Role of FISA, the USA PATRIOT Act, and the Protect America Act*

The USA PATRIOT Act, passed by Congress in 2001, altered FISA in the same way that the Ashcroft guidelines chipped away at the protections that Levi had implemented in the FBI's practices in the 1970's.[119] Since the creation of the Ashcroft Guidelines, members of Congress have proposed a return to the original Levi FBI Guidelines in response to mounting concerns about potential abuses of power by the FBI in racial profiling, surveillance without a reasonable indication of criminal activity, and widespread invasions of privacy of individuals connected to political groups.[120] The American Civil Liberties Union ("ACLU") and members of Congress have urged that the guidelines should be amended to reflect the Levi FBI Guideline criminal standards for probable cause, which would make it more difficult for the FBI to overextend its discretionary power in invading the rights of citizens.[121]

Because the FBI receives its orders from the Attorney General without limi-

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OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES (RL 32525) 27 (Sept. 16, 2008).

[116] RICHARD A. BEST, INTELLIGENCE ISSUES FOR CONGRESS, CRS REPORT FOR CONGRESS 20 (2008).

[117] *Id.* at 15.

[118] See *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7, at 1–2 (statements of Chairman Edward M. Kennedy).

[119] *See generally* CHARLES DOYLE & BRIAN T. YEH, CONGRESSIONAL RESEARCH SERVICE, LIBRARIES AND THE USA PATRIOT ACT (Feb. 3, 2006); CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, THE USA PATRIOT ACT: A LEGAL ANALYSIS (Apr. 15, 2002).

[120] 154 CONG. REC. 84, E989 (daily ed. May 21, 2008) (statement of Sen. Robert Scott); Eric Lichtblau, *F.B.I. Tells Offices to Count Local Muslims and Mosques*, N.Y. TIMES, Jan. 28, 2003, at A13.

[121] Johnson, *supra* note 8.

tation from any separate political body or set of governing rules, the FBI guidelines exist at the will of the Attorney General.[122] In response to the 9/11 attacks, the Executive has once again placed the interests of "security" above individual rights, as guaranteed by the Fourth and Fourteenth Amendments. Legislation such as the PATRIOT Act has created a great deal of controversy surrounding Congress's seemingly blatant disregard for the personal freedoms guaranteed by the Constitution. The latest step in the sacrifice of personal freedoms is the promulgation of the new FBI Guidelines from the Attorney General, presented formally by Attorney General Michael B. Mukasey and FBI Director Robert S. Mueller on October 3, 2008. The guidelines took effect on December 1, 2008.

## IV. THE CONSTITUTIONAL QUESTION

In 1972, in *United States v. United States District Court (Keith)*, the U.S. Supreme Court applied a constitutional analysis to surveillance and criminal investigatory practices of the federal government and held that even the President would need to establish probable cause before invading the privacy of an individual.[123] Noting that politically unpopular groups have often been targets of government surveillance, the Supreme Court stressed that political or social disfavor would not justify a violation of the Fourth Amendment right of individuals and groups to be free from unwarranted search and seizure.[124] The *Keith* case echoed the important distinctions that the Supreme Court had drawn five years earlier in *Katz v. United States*: wiretapping by federal law enforcement was subject to Fourth Amendment restrictions, as surveillance was an activity included in "search and seizure."[125]

While ensuring domestic security by "maintaining of intelligence with respect to subversive forces" was of paramount importance to the President, the Supreme Court rejected the President's assertion that the duty to protect domestic security allowed the federal government to conduct searches or surveillance without a warrant.[126] In subsequent cases, courts have affirmed that federal law enforcement may not invade the privacy of individuals or groups without satisfying due process requirements of probable cause or a showing of "special needs" or emergency.[127] The most immediate safeguard to citizens' Fourth

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[122] ELLIFF, *supra* note 13, at 5–7.

[123] United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 314 (1972).

[124] *Id.*

[125] Katz v. United States, 389 U.S. 347, 356–59 (1967); *see generally* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); *Lessons from Justice Powell and the Keith Case*, *supra* note 13, at 1262–63.

[126] *Keith*, 407 U.S. at 318–19.

[127] *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), United States v. Jacobsen, 466 U.S. 109 (1984), Illinois v. Gates, 462 U.S. 213 (1983); United States v. Abu-Jihaad, 531 F. Supp. 2d

Amendment rights is the procedures afforded by the courts issuing warrants to FBI agents, and such procedures exist to ensure that no search or seizure occurs unless there is reasonable suspicion and due process requirements have been satisfied.[128] Beyond the scope of this Note, yet intertwined with the Fourth Amendment question, are the issues of chilling effects of FBI searches on the First Amendment and the Equal Protection dangers in the disparate application of such searches.[129] The procedures and activities of the FBI affect multiple constitutional rights, which make the substantive policies of the FBI an important indicator of the FBI's overall respect for civil liberties.

### A. *The Fourth Amendment*

Under the Fourth Amendment, government agents may not conduct "unreasonable search and seizure."[130] The purpose of the Fourth Amendment is to ensure that the means of investigation or law enforcement will not unreasonably infringe upon privacy interests.[131] Courts agree, regardless of context, that the standard for assessing action of law enforcement agents is reasonableness, which typically requires probable cause.[132] Probable cause is "a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."[133] A court will assess the reasonableness of the search or seizure by "balancing the nature of intrusion on the individual's privacy against the promotion of legitimate governmental interests."[134] Law enforcement must typically satisfy this requirement by applying for and obtaining a warrant from a neutral magistrate.[135] Where "proba-

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299 (D. Conn. 2008), United States v. Scarfo, 180 F. Supp. 2d 572 (D.N.J. 2001). *But see In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

[128] THE USA PATRIOT ACT: A LEGAL ANALYSIS, *supra* note 119; SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE H.R. COMM. ON THE JUDICIARY, REPORT ON FBI UNDERCOVER OPERATIONS 36 (Comm. Print 1984).

[129] 151 CONG. REC. H6221 (daily ed. July 21, 2005) (statement of Rep. Jackson-Lee); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 693 (1978). *See also* Memorandum from the Office of the Assistant Att'y Gen., United States Dept. of Justice, to Glenn A. Fine, Inspector General, Re: Constitutionality of Certain FBI Intelligence Bulletins (Apr. 5, 2004); Press Release, ACLU, ACLU Launches Nationwide Effort to Expose Illegal FBI Spying on Political and Religious Groups (Dec. 2, 2004), *available at* http://www.aclu.org/safefree/general/18713prs20041202.html.

[130] U.S. CONST. amend. IV.

[131] Illinois v. McArthur, 531 U.S. 326, 330 (2001).

[132] Camara v. Municipal Court, 387 U.S. 523, 534–35 (1967). *But cf.* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 828–29 (2002) (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989)).

[133] BLACK'S LAW DICTIONARY 1239 (8th ed. 2004).

[134] *Earls*, 536 U.S. at 828–29 (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

[135] United States v. Place, 462 U.S. 696, 701 (1983).

ble cause" for search and seizure exists, the law enforcement agent's actions would no longer be unreasonable, and the government agent may conduct a search without running afoul of the Fourth Amendment protections.[136]

In conducting its intelligence operations, the FBI as a law enforcement agency must apply for authorization to begin any operation that constitutes a search or seizure.[137] A "search" may be any type of electronic surveillance or other method of investigation that is not necessarily physical.[138] Where there is a "reasonable expectation of privacy" in the target of search (i.e., one's physical person, a personal computer, or a home), courts will require probable cause before law enforcement may conduct a search.[139] Establishing that there is a reasonable expectation of privacy is essential to the application of the Fourth Amendment because an agent need only establish probable cause when society recognizes a reasonable expectation of privacy in the subject of search or seizure.[140] The standards for establishing probable cause may differ under the federal law at issue, depending on the nature of the evidence or exigent circumstances that require government action in the interest of saving life or preventing destruction of valuable evidence.[141]

Because the FBI's process remains a mystery, its standards and procedures for establishing probable cause and obtaining authorization to conduct searches and seizures are highly contested and constitutionally ambiguous. The courts disagreed with President Nixon's assertion in *Keith* and *Ehrlichman* that "national security" was a compelling enough reason for the Executive Branch to abridge a citizen's Fourth Amendment rights.[142] Both courts stated that al-

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[136] Terry v. Ohio, 392 U.S. 1, 30–31 (1968). *See Camara*, 387 U.S. at 534–35.

[137] *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (holding that reasonableness standard applied to FBI agent's actions in determining whether agent had probable cause to search a residence for fugitive, given the information that the agent possessed at the time); STEVENS & DOYLE, *supra* note 105, at 3–5.

[138] Katz v. United States, 389 U.S. 347, 355–56 (1967).

[139] United States v. Jacobsen, 466 U.S. 109, 113 (1984); *Katz*, 389 U.S. at 355–57 (establishing that the "probable cause" standard applies to actions of law enforcement in assessing the reasonableness of the search or seizure with respect to the integrity of the defendant's Fourth Amendment rights).

[140] *Jacobsen*, 466 U.S. at 123; BLACK'S LAW DICTIONARY 1239 (8th ed. 2004). See also Peter S. Swire, *Katz Is Dead. Long Live Katz*, 102 MICH. L. REV. 910 (2004), for an analysis of the "reasonable expectation of privacy" requirement for an individual to assert his or her Fourth Amendment rights and challenge a search or seizure.

[141] *See Terry*, 392 U.S. at 30 (1968); *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 168 (2d Cir. 2008) (indicating that, in the instance of both criminal and non-criminal searches, law enforcement may conduct searches without a warrant in some circumstances); Rise v. Oregon, 59 F.3d 1556, 1566 (9th Cir. 1995); ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 107–10 (2d ed. 2003); STEVENS & DOYLE, *supra* note 105, at 42.

[142] United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 314 (1972); United States v. Ehrlichman, 376 F. Supp. 29, 33 (D.C. Cir. 1974).

though the Executive Branch has special responsibilities with respect to national security, an individual's rights are not subordinate to such a vague governmental interest.[143] The Executive Branch and the FBI are thus held to the same "strict constitutional and statutory limitations on trespassory searches and arrests even when known foreign agents are involved."[144]

B. *Exceptions to the Strict Warrant Requirement*

In some specific situations, law enforcement may not need to obtain a warrant or find probable cause to conduct search or seizure; such exceptions are narrow and few and have arisen as a result of reoccurrence of specific situations, such as drug testing in high-school sports.[145] Courts have relaxed the standards for investigation or government action when there is an emergency situation or "special needs" at stake. Such relaxed standards subject law enforcement activities to less stringent review and requirements than the standards for a general criminal prosecution involving no special circumstances.[146] In addition, the reasonableness requirement for an investigation may vary, depending on the "totality of the circumstances" and the government interest at issue.[147] Thus, in situations in which law enforcement asserts that a legitimate national security interest, such as border control, demands freer rein in searching individuals or vehicles, a court is more likely to find a search reasonable though there was no process for obtaining a warrant at the border.

Similarly, where the agent wishes to conduct surveillance or less invasive measures that fall under the Fourth Amendment, a court's warrant requirements or assessment of reasonableness will relax to reflect the extent of the invasion involved.[148] Though law enforcement may need to provide the courts with less evidence or information to obtain a warrant for initiating an investigation rather than a warrant for arrest or seizure, criminal predicate or probable cause—that is, evidence that a federal crime has been or will be committed—is still necessary for investigations.[149] Despite this nuanced treatment of warrant require-

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[143] *Keith*, 407 U.S. at 314; *Ehrlichman*, 376 F. Supp. at 33.

[144] *Ehrlichman*, 376 F. Supp. at 33.

[145] *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 828–29 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 657 (1995); United States v. Humphries, 308 F. App'x 892, 895 (6th Cir. 2009) (quoting Thompson v. Louisiana, 469 U.S. 17, 21 (1984)).

[146] *See* Katz v. United States, 389 U.S. 347, 364 (1967) (White, J., concurring). *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) ("[T]he Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.").

[147] *Cf. In re* Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 08-01, slip op. at 13–15 (FISA Ct. Rev. Aug. 22, 2008) (released in redacted form by Court Order (Jan. 12, 2009)).

[148] Terry v. Ohio, 392 U.S. 1, 24 (1968).

[149] *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 831 n.171 (2004) ("The govern-

ments and reasonableness, no court has said expressly that a broad "national security" initiative will allow the Executive absolute free rein to conduct surveillance, investigations, and other manner of searches without review by a neutral magistrate.[150]

### C. *Purpose Beyond Ordinary Crime Control*

In establishing the legitimacy of an investigation or search, law enforcement must prove that the primary purpose of their acts is not ordinary crime control in order for a specific case to meet the requirements of a "special needs" situation, such as the foreign intelligence surveillance exception.[151] In ordinary criminal investigations, the warrant requirement is more important for the protection of Fourth Amendment rights because individual suspicion is necessary for the government to infringe upon the individual's rights.[152] A general crime initiative is not enough to infringe upon the individual rights of a passing citizen without a warrant; however, in special situations beyond ordinary crime control on an individual basis, law enforcement is not targeting an individual but rather a special security concern that often involves group activity.[153] In the prevention of organized crime, terrorism, or espionage, the underlying purposes behind punishing individual violations of criminal law are "moot", and law enforcement must focus on detection and prevention of special hazards.[154]

While courts are reluctant to extend or create new "special needs," the foreign intelligence surveillance exception gained momentum under new FISA additions that focus certain law enforcement efforts on detecting potential threats from "foreign powers."[155] Most notably, courts examining this impor-

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ment may not take advantage of any arguably relaxed . . . standard for warrantless searches . . . when its true purpose is to obtain evidence of criminal activity . . . ." (quoting Nat'l Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 943 n.12 (D.C. Cir. 1987)). *See also* DEMPSEY & COLE, *supra* note 58, at 113.

[150] *In re Directives*, No. 08-01, slip op., at 14 (recognizing that there is a *narrow* foreign intelligence exception to the warrant requirement but there remains no general national security exception or special need (citing United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 308–09 (1972)).

[151] *Id.*, at 15–16 (citing *In re* Sealed Case, 310 F. 3d 717, 742–45 (FISA Ct. Rev. 2002)).

[152] City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000) (citing Delaware v. Prouse, 440 U.S. 648, 659, n.18 (1979)).

[153] *In re Directives,* No. 08-01, slip op., at 15.

[154] *In re* Sealed Case, 310 F.3d 745 (FISA Ct. Rev. 2002) (discussing the "special needs" exceptions to warrant requirements in the context of foreign intelligence surveillance, clarifying the standard articulated poorly in United Stated v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)).

[155] *Id.* at 738, 745–46 (focusing on the use of "foreign power" outside the context of regular criminal activity and application FISA surveillance provisions solely to foreign powers—domestic groups are thus not subject to these provisions). *See also* 50 U.S.C. § 1801(a) (2006).

tant issue have distinguished between permissible surveillance tactics and impermissible "general crime" initiatives that do not pass Fourth Amendment scrutiny. The limiting factor in those situations was the element of "foreign" threat; border protection allowed for warrantless searching, whereas police at a typical highway checkpoint could not institute arbitrary searches without probable cause.[156] Thus the ordinary criminal investigation—the primary purpose of which is prosecution—differs from the foreign intelligence surveillance investigation, which seeks to address the "special" case of terrorism and is a legitimate basis for government action.[157] This distinction is crucial for intelligence operations that target a foreign power as opposed to a domestic one because warrantless surveillance falls under the "special need" exemption and does not violate Fourth Amendment rights.[158]

### D. *Judicial Interpretation of the Fourth Amendment as Applied to Law Enforcement*

Many courts are having difficulty reconciling the advances of new technologies, newly-enacted anti-terror laws, and the traditional probable cause standards.[159] In *Katz v. United States*, the Supreme Court recognized that new technologies would pose difficulties for courts in determining whether a defendant had a reasonable expectation in the object of search or whether the agents were in fact conducting a "search or seizure" under the Fourth Amendment.[160] Courts have remained concerned that technology will advance before the judicial process can check law enforcement's "exploitation" of emerging technologies; the use of technology to violate Fourth Amendment rights can occur while there is no consensus as to whether the new technology involves a "search or seizure".[161] If the new technology does not involve a "search or seizure" or if the court is not prepared to recognize a reasonable expectation of privacy, then the defendant will not have the same constitutional safeguards. Thus, these potential consequences illustrate the importance of capturing new technologies or subjects of search within the language of the Fourth Amendment.[162]

The "reasonable expectation of privacy" standard that the Supreme Court

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[156] *In re Sealed Case*, 310 F.3d at 739.

[157] *Edmond*, 531 U.S. at 42–43; Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 657 (1995) (discussing the underpinnings of "special needs" exceptions to the constitutional requirement of a warrant where unique situations arise outside the prosecutorial purpose of investigations and law enforcement); *In re Sealed Case*, 310 F.3d at 745.

[158] *In re Directives*, No. 08-01 slip op., at 14–16.

[159] *See generally* California v. Ciraolo, 476 U.S. 207 (1986); United States v. Jacobsen, 466 U.S. 109 (1984).

[160] Katz v. United States, 389 U.S. 347, 353 (1967).

[161] *See* United States v. Karo, 468 U.S. 705, 712 (1984); Whalen v. Roe, 429 U.S. 589, 606–07 (1977) (Brennan, J., concurring).

[162] *See* Olmstead v. United States, 277 U.S. 438, 487 (1928) (Butler, J., dissenting); Kerr, *supra* note 149.

created in *Katz* quickly became the standard by which courts assessed the reasonableness and constitutionality of law enforcement activities under Fourth Amendment challenges.[163] When law enforcement uses new technology to obtain information that previously would have been unavailable, some courts have applied the *Katz* standard by reasoning that without the new technology, the search could not have been lawfully conducted by physical methods.[164] Accordingly, the law enforcement's technologically advanced method is therefore "presumptively unreasonable without a warrant."[165] Thus, courts still focus on the expectation of privacy in the physical area being searched, rather than on the method of search; if the place or object is protected, the technology at issue should have no special power to escape *Katz* Fourth Amendment analysis.[166]

However, some scholars have attributed courts' continued consideration of property concepts to the courts' general desire to give government agents more discretion in their law enforcement activities.[167] While the probable cause standards apply to the traditional areas of home and personal space, other "property" such as information "held by innocent third parties," transmissions by cordless phones or radios, or anticipatory evidence is outside the scope of the Fourth Amendment, according to some courts.[168] The effect of *Katz*, which purported to clarify the constitutional standards for search and seizure, has been a fifty-year history of conflicting interpretations by the Supreme Court and often deference to statutory language of the crime at issue, when in doubt.[169] Thus, the interpretative power of the Supreme Court has not yielded a unified conception of exactly when and how FBI agents may use certain investigatory techniques.

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[163] *See* Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (applying the "reasonable expectation of privacy" standard articulated in *Katz*). *See also* Kyllo v. United States, 533 U.S. 27, 33 (2001) (iterating the continued application of the "reasonable expectation of privacy standard" originally formulated in *Katz*); Smith v. Maryland, 442 U.S. 735, 740 (1979) (applying the "reasonable expectation of privacy" standard as the binding precedent of *Katz*). See generally Peter Winn, *Katz and the Origins of the 'Reasonable Expectation of Privacy' Test*, 40 McGEORGE L. REV. 1 (2009) for an analysis and history of *Katz v. United States*.

[164] United States v. Broadway, 580 F. Supp. 2d 1179, 1190–91 (D. Colo. 2008) (citing *Kyllo*, 533 U.S. at 40).

[165] *Id.*

[166] *See id.*

[167] *See* Kerr, *supra* note 149; Swire, *supra* note 140. For an assessment of the inconsistency of the Supreme Court's Fourth Amendment interpretations following *Katz*, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985) (highlighting the lack of majority consensus, unpredictability of outcomes in similar cases, and effect these inconsistencies have had on law enforcement).

[168] *See* Guest v. Leis, 225 F.3d 325, 335–36 (6th Cir. 2001); United States v. Smith, 978 F.2d 171, 180 (5th Cir. 1992); *In re* Grand Jury Proceedings, 827 F.2d 301, 302–03 (8th Cir. 1987); United States v. Rose, 669 F.2d 23, 25 (1st Cir. 1982); United States v. Kennedy, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000).

[169] Kerr, *supra* note 149, at 808–09. *See generally* Bradley, supra note 167.

E. *Conflicting Executive Interpretations*

The Executive Branch, in issuing orders and enforcing laws, has often taken a different view of the Fourth Amendment. As the branch charged with implementing laws created by Congress, the Executive may wish to extend its power to the edge of Constitutional limits to ensure national security and gather evidence for prosecution of crimes.[170] While some suggest that the courts are the primary Constitutional interpreter, the statutory authority of the Attorney General suggests that he or she must interpret the applicable laws and direct national security operations in such a way to comport with those laws.[171] However, if the Attorney General's interpretation is at odds with the court's ultimate application of doctrine, like the "special needs exception," then the Attorney General's position will lead ultimately to confusion among courts, agents, and civilians.[172] In addition, the Attorney General's interpretation could in some situations infringe upon Fourth Amendment rights that courts recognize. Apart from the Executive's *right* to interpret, a conflicting interpretation that purports to overrule the Supreme Court implies an "imperial president" who may operate without regard for the Court.[173]

While different state legislatures and judges may take opposing positions on an issue depending on prevailing ideological persuasions, the Attorney General's interpretation affects the entire country because it can authorize practices that will affect many more individuals and groups. The Attorney General must answer to U.S. courts when an individual files a claim alleging that the Attorney General and attendant agencies have acted in contravention to the Constitution. However, if the Attorney General has the right to interpret the Constitution and that right is on par with the power of the Supreme Court, claims of this nature are inherently problematic. Further, if national security concerns fall under "war powers," allowing the Executive to take quick action without regard for Constitutional limitations, the Attorney General's Guidelines may be immune to challenges.[174]

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[170] *See* Saby Ghoshray, *False Consciousness and the Presidential War Power: Examining the Shadowy Bends of the Constitutional Curvature*, 49 SANTA CLARA L. REV. 165, 166–67 (2009) [hereinafter Ghoshray, *False Consciousness*]; William G. Hyland Jr., *Law v. National Security: When Lawyers Make Terrorism Policy*, 7 RICH. J. GLOBAL L. & BUS. 247 (2008).

[171] 28 U.S.C. § 510; Exec. Order No. 12,333, *supra* note 42; James Madison, *Notes on Debates in the Federal Convention of 1787* (June 18, 1787), *available at* http://avalon.law.yale.edu/18th_century/debates_618.asp; Ghoshray, *False Consciousness*, *supra* note 170.

[172] *See* Saby Ghoshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295, 296–99 (2008).

[173] *Id.*

[174] *Id.* at 301–03 (citing David S. Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential Power*, 57 ST. JOHN'S L. REV. 213, 272–73 (1983); William P. Rogers, *Congress, the President, and the War Powers*, 59 CAL L. REV.

Addressing the issue of interpretative authority, the *Doe v. Mukasey* Court iterated the position that, "[o]nce constitutional standards have been authoritatively enunciated, Congress may not legislatively supersede them," making the point that other branches could not dismiss the Supreme Court's rulings.[175] The District Court in *Doe v. Mukasey* considered the authority of the Supreme Court's interpretation and the possibility of deferring to the Executive in the interest of "national security."[176] However, the Court did not assert complete authority of the judiciary to "revise" a law and assert power over the Executive's interpretation, nor did the Court answer unilaterally whether a court could defer completely to the Executive when national security was at issue.[177] Nevertheless, assuming that the Executive does not have the absolute authority to conduct its operations without regard for the Supreme Court's constitutional standards, the FBI Guidelines may be unconstitutional where they violate recognized Fourth Amendment standards, regardless of alternate theories of interpretation.

### F. *Constitutional Safeguards of the Levi Guidelines*

The FBI intelligence and surveillance abuses of the 1970s sparked greater concern for the protection of both First and Fourth Amendment rights, which were of paramount importance in consideration of the Levi FBI Guidelines and FISA.[178] By requiring a warrant before an investigation, the Levi FBI Guidelines ensured that an examination of probable cause would take place and an independent court of law would assess whether the activity to be investigated showed the requisite intent to commit acts of violence.[179] Although some members of the Security and Terrorism Subcommittee wanted to relax the warrant requirements of the Levi FBI guidelines, the Subcommittee reports included discussion of the protective nature of the Levi Guidelines and the reduction in constitutional violations in the years following their passage.[180] Thus, while law enforcement considerations encouraged members of Congress to relax the

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1194, 1213 (1971); Jeffrey W. Taliaferro, *Hegemonic Delusions Power, Liberal Imperialism, and the Bush Doctrine*, 31 FLETCHER F. OF WORLD AFF. 175, 175–76 (2007)).

[175] John Doe, Inc. v. Mukasey, 549 F.3d 861, 871 (2d Cir. 2008) (citing Dickerson v. United States, 530 U.S. 428, 437 (2000)).

[176] *Id.* at 871.

[177] *Id.* at 871–72 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." (quoting City of Boerne v. Flores, 521 U.S. 507, 535, 536 (1997))).

[178] ELLIFF, *supra* note 13, at 8–11.

[179] The Levi FBI Guidelines, *supra* note 3.

[180] IMPACT OF ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (THE LEVI GUIDELINES): REPORT OF THE CHAIRMAN ON THE SUBCOMM. ON SECURITY AND TERRORISM, S. REP. NO. 98-134, at 8–10 (1984).

Levi standards, lawmakers noted that Levi's standards led to fewer abuses and violations of civil liberties.[181]

The House Judiciary Committee's Subcommittee on Civil and Constitutional Rights conducted a four-year study of the FBI's undercover operations.[182] In 1984, it found that such large-scale investigations of U.S. citizens were particularly harmful to innocents because the FBI often failed to monitor agents and supervise operations, which would have ensured that the ongoing investigations were conducted lawfully.[183] The Subcommittee's final report indicated that Attorney General Philip Heymann had assured the Subcommittee that the FBI's procedure included independent review of requests for investigation and that the FBI would only initiate a criminal investigation if there was "adequate basis" for suspecting an individual or group was engaging in criminal activity.[184] However, the Subcommittee found the FBI's application of its guidelines to undercover operations wholly inadequate, urging the FBI to limit its undercover operations to situations in which an "independent judicial officer has determined that sufficient evidence exists" to indicate that a group or individual will commit a crime, in accordance with federal laws governing intelligence activities like wiretapping.[185] As a reaction to widespread abuse, the goal of the Levi Guidelines was to limit the FBI to only those activities that were constitutionally permissible. Thus, Attorney General Levi created his Guidelines to ensure that the independent warrant process as well as constitutional standards would prevent future abuse.[186]

### G. *Threats Posed by the Ashcroft Guidelines*

The Ashcroft FBI Guidelines, incorporating the PATRIOT Act, the Protect America Act and IRTPA, gave the FBI more power to conduct warrantless surveillance and investigations, as reflected in their broader language. Though the full text of the guidelines is not available, the ACLU reports that based on the Ashcroft Guidelines' vague wording and lack of oversight, the FBI may commence its intelligence operations as long as there is a claimed "national security" purpose in conducting such investigations.[187] Vague terms like "national security" may give FBI agents clearance to investigate a group based on mere political affiliation or subversive advocacy, as long as the agent's perception of the situation involves national security.[188] Retrospective review of in-

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[181] *Id.*

[182] *FBI Oversight*, *supra* note 5, at 2, 4–5.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7, at 1–2 (statements of Chairman Edward M. Kennedy).

[187] Johnson, *supra* note 8.

[188] Johnson, *supra* note 8.

vestigations is also available in lieu of an independent judicial review, allowing the FBI to commence investigations under the Ashcroft Guidelines without first consulting an independent judicial body.[189]

In addition, the PATRIOT Act amendments to the FISA gave the FBI greater authority and warrant capabilities through measures such as National Security Letters, which permit the FBI to subpoena and collect business records without court approval.[190] The Ashcroft Guidelines also extend investigation periods, allowing the FBI to continue surveillance and investigation although there still may not be enough evidence to initiate criminal prosecution.[191] Without the full text of the Ashcroft Guidelines, the extent of the potentially abusive practices is still unknown. Based on what is available, it appears as though the Ashcroft Guidelines have already posed threats of Fourth Amendment violations in unreasonable searches, seizures, and invasions of privacy.

## V. THE 2008 FBI GUIDELINES

On October 3, 2008, Attorney General Michael B. Mukasey and FBI Director Robert S. Mueller announced the completion of the new FBI guidelines, which were to take effect in December 2008.[192] The text of the new Attorney General's Guidelines for Domestic FBI Operations ("Mukasey FBI Guidelines") is available on the Department of Justice's website, making these guidelines the first to be publicly available in full, including an introduction, during their applicable timeframe.[193] Unlike past reviews of FBI guidelines that were not subject to public comment, the Senate hearings in which Assistant Attorneys General testified and other reports have provided even more public information about both the impact of the new guidelines and the mounting concerns of current FBI practices.[194] Attorney General Mukasey considered the recommendations of Congressional committees, the White House, and civil liberties groups in drafting the new guidelines and asserted that the new guidelines are

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189 JEFFREYS-JONES, *supra* note 41, at 235.

190 50 U.S.C. § 1861(f)(2)(C)(ii), as amended by the USA PATRIOT Act; BRIAN T. YEH & CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS (Dec. 21, 2006).

191 Johnson, *supra* note 8.

192 Joint Statement of Attorney General Michael B. Mukasey and FBI Director Robert S. Mueller on the Issuance of the Attorney General Guidelines for Domestic FBI Operations (Oct. 3, 2008), *available at* http://www.fbi.gov/pressrel/pressrel08/agg_statement100308.htm.

193 *Id.*

194 The Attorney General Guidelines for Domestic FBI Operations, Department of Justice (issued on Sept. 29, 2008), *available at* http://www.justice.gov/opa/opa_documents.htm [*hereinafter* The Mukasey FBI Guidelines]; *New Attorney General Guidelines for Domestic Intelligence Collection: Hearing Before the S. Select Comm. on Intelligence*, *supra* note 1. The Mukasey FBI Guidelines are available on the Department of Justice's website: http://www.usdoj.gov.

different because the Attorney General would openly discuss them.[195] However, the Mukasey FBI Guidelines follow the same general trend that has been building since 9/11 and the passage of the Ashcroft Guidelines: Purported "national security" initiatives continue to trump the individual rights of U.S. citizens, while agents may commence investigations without any specific factual showing.[196]

### A. *Assessments*

The Mukasey FBI Guidelines outline the purpose and procedure for "assessments," a new form of preliminary investigation that became available to the FBI as a method of intelligence gathering in the changes that Attorney General Ashcroft made to the guidelines in 2003.[197] Assessments are defined broadly as a method of "obtaining information" and "detect[ing] . . . threats to the national security," as well as "prevent[ing] . . . federal crimes."[198] Under Investigations and Intelligence Gathering, Section A of the Guidelines clearly addresses assessments as a process distinct from preliminary or full investigations, but assessments and investigations exist for the same purposes of "detect[ing] . . . criminal activity," "prevent[ing] . . . threats to the national security," and "collect[ing] foreign intelligence."[199] While preliminary or full investigations should begin under one of the three circumstances listed, assessments do not require a specific showing or circumstance for commencement.[200]

Section II.A also lists the kinds of activities in an assessment that are acceptable, as well as acceptable methods of obtaining information.[201] "Any" supervisory approval is permissible for an agent to begin an assessment, but no section delineates what a supervisory approval might entail or what circumstances warrant an assessment.[202] Thus, where a lead may not merit a full investigation, it seems that an agent may arbitrarily commence an assessment without making any factual showing.[203] There are no notice requirements to FBI Headquarters for assessments, nor are there any formal process requirements or time limitations on assessments.[204]

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[195] Memorandum for the Heads of Department Components, The Attorney General's Guidelines for Domestic FBI Operations (Sept. 29, 2008), *available at* http://www.usdoj.gov/ag/readingroom/guidelines-memo.pdf.

[196] Eric Lichtblau, *Department of Justice Completes Revision of FBI Guidelines for Terrorism Investigations*, N.Y. TIMES, Oct. 3, 2008, at A10.

[197] Ashcroft Guidelines, *supra* note 67; The Mukasey FBI Guidelines, *supra* note 194.

[198] The Mukasey FBI Guidelines, *supra* note 194, § II.A.1.

[199] The Mukasey FBI Guidelines, *supra* note 194, §§ II.A.1, II.B.1.

[200] The Mukasey FBI Guidelines, *supra* note 194, §§ II.A, II.B.3.

[201] The Mukasey FBI Guidelines, *supra* note 194, §§ II.A.3–4.

[202] The Mukasey FBI Guidelines, *supra* note 194, § II.A.2

[203] The Mukasey FBI Guidelines, *supra* note 194, § II.A.

[204] The Mukasey FBI Guidelines, *supra* note 194, § II.A.

B. *Investigations*

An agent may begin a preliminary investigation after satisfying approval procedures under Section II.B.2 if circumstances show that a person or group is or may be planning or engaging in activities that are federal crimes or that pose a threat to national security.[205] Preliminary investigations may last for six months and may be extended by another six months at the discretion of a special agent in charge.[206] An agent may commence a full investigation if the investigation "may obtain foreign intelligence that is responsive to a foreign intelligence requirement," rather than requiring current criminal activity or possibility of criminal activity.[207] All "lawful methods" are allowed in full investigations, while preliminary investigations restrict all "lawful methods" slightly by excluding certain kinds of electronic surveillance, physical searches, or other measures of foreign intelligence collection under FISA.[208] There is a notice requirement to FBI Headquarters and the National Security Division of the Department of Justice for "predicated" investigations relating to national security or foreign intelligence of 30 days.[209] Once an FBI agent begins an investigation, there are no notice requirements for the targets that are subject to investigation.

In authorizing investigations for the FBI itself or on behalf of other organizations, the Mukasey Guidelines permit these investigations on violations of federal statutes or simply for "threats to national security."[210] "Threats to national security," as defined in Section VII, relate broadly to crimes "by, for, or on behalf of" any foreign source.[211] In addition, threats to national security generally include threats mentioned in Executive Order 12,333 and other "successor order[s]."[212] Under Section V.A, the Guidelines list the "Particular Methods" available under preliminary and full investigations; all but three methods listed are unavailable for preliminary investigations. Specifically authorized in this section are "trash covers" and searches of any property where a target does not have a "reasonable expectation of privacy;" "monitoring devices," apart from electronic surveillance under 18 U.S.C. §§ 2510-2522 or FISA; the use of "pen registers and trap and trace devices;" National Security Letters; and general "undercover operations," which the Guidelines do not define.[213]

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[205] The Mukasey FBI Guidelines, *supra* note 194, §§ II.B.3.a–b.

[206] The Mukasey FBI Guidelines, *supra* note 194, § II.B.4.a.ii.

[207] The Mukasey FBI Guidelines, *supra* note 194, §§ II.B.3.a–b, II.B.4.b.i.

[208] The Mukasey FBI Guidelines, *supra* note 194, §§ II.B.4.a.iii, II.B.4.b.ii., V.A.11–13.

[209] The Mukasey FBI Guidelines, *supra* note 194, §§ II.B.5.a–c.

[210] The Mukasey FBI Guidelines, *supra* note 194, § II.

[211] The Mukasey FBI Guidelines, *supra* note 194, § VII.S.

[212] The Mukasey FBI Guidelines, *supra* note 194.

[213] The Mukasey FBI Guidelines, *supra* note 194, § V.A.

C. *Conduct and Permitted Activities*

In other sections of the Mukasey FBI Guidelines, "classified investigative technologies," whatever those may be, are permissible when there is an issue of national security or foreign intelligence; yet, these technologies may not be permitted where plain, federal criminal law is concerned.[214] When an agent engages in "otherwise illegal activity" in an investigation, no approval beyond the general procedure for any "undercover operation" is necessary.[215] This provision allows agents to engage in certain felonious conduct—such as purchasing and controlling contraband, making bribe payment or false representations, and engaging in criminal recording activities; however, agents may not engage in acts of violence beyond "lawful use of force" or illegal electronic surveillance.[216] In matters of national security or foreign intelligence gathering, agents may need to consult with the National Security Division if their illegal acts fall outside those listed in section V.C.3.[217]

As to the information-sharing provisions—which numerous advisory groups, committees, and independent parties have advocated as a remedy to department conflicts and cooperation barriers—all information relating to national security and foreign intelligence in domestic operations will be available to the National Security Division.[218] The White House will be able to obtain national security and foreign intelligence information from the FBI under the provided procedures.[219] Section VI.D.1 highlights the National Security Division's involvement in the FBI's intelligence information-sharing program, as well as the FBI's operations and investigations.[220] This section also charges the National Security Division with establishing methods for sharing its own information with the United States Attorneys' Offices where appropriate.[221]

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[214] The Mukasey FBI Guidelines, *supra* note 194, § V.B.2. Attorney General Mukasey intended to make the new Guidelines more accessible than the old ones, which divided subjects of investigations into general crimes and national security threats. *See Hearing Before the S. Select Comm. on Intelligence* (joint statement of Assistant Att'y Gen. Cook and Gen. Counsel Caproni), *supra* note 1. The distinction was confusing, according to Mukasey, and this was one of the motivating factors in creating one set of guidelines for agents and repealing the existing multiple guidelines from different decades and administrations. *See* Memorandum for the Heads of Department Components, *supra* note 195. However, it is worth noting that Mukasey's own guidelines still make the same distinctions for some of the techniques.

[215] The Mukasey FBI Guidelines, *supra* note 194, § V.C.1.

[216] The Mukasey FBI Guidelines, *supra* note 194, §§ V.C.3–4.

[217] The Mukasey FBI Guidelines, *supra* note 194, §§ V.C.5–6.

[218] The Mukasey FBI Guidelines, *supra* note 194, § VI.D.1.

[219] The Mukasey FBI Guidelines, *supra* note 194, § VI.D.2.

[220] The Mukasey FBI Guidelines, *supra* note 194, § VI.D.1.

[221] The Mukasey FBI Guidelines, *supra* note 194.

## VI. Comparative Evaluation of the Mukasey Guidelines

### A. *Probable Cause for Initiating Investigations*

Under the Mukasey Guidelines, the standards for beginning an assessment or investigation are more lenient than under previous guidelines.[222] Under the Levi FBI Guidelines' standard for infringing upon a citizen's privacy for the purposes of investigation, a court would have required facts showing "the immediacy of the threat," the probability that the threat would be carried out, the "magnitude of the threatened harm," and that such a threat pertained to a violation of federal law.[223] In light of those facts, a court would have also considered the potential dangers that the investigation would pose as threat to the Constitutional rights of the individual or group.[224] There are no warrant or process procedures outlined or referenced in the Mukasey Guidelines besides the general inter-departmental reporting requirements in some instances.

The Mukasey FBI Guidelines do not distinguish between standards for "national security" or "foreign intelligence" initiatives for the purposes of Part II, on Investigations and Intelligence Gathering.[225] Given the courts' willingness to recognize a "special need" for foreign intelligence but not for basic national security threats, the Guidelines' failure to distinguish these categories presents an inherent probable cause problem for agents.[226] Following the reasoning of courts addressing the issue, the FBI would need to obtain court authorization in accord with the Fourth Amendment to conduct any activity constituting a search or a seizure where "national security" was concerned.[227] Under foreign intelligence investigations, on the other hand, FBI agents may not need to establish probable cause and obtain a warrant.[228] Compared to the Levi Guidelines, the Mukasey Guidelines do not provide express guidance on independent judicial review prior to investigation or surveillance, nor do they provide evidentiary standards for commencing an investigation.

### B. *Ongoing Surveillance*

In many cases, the FBI may gather information to begin a criminal investiga-

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[222] The Mukasey FBI Guidelines, *supra* note 194; Ashcroft Guidelines, *supra* note 67; The Levi FBI Guidelines, *supra* note 3. The Ashcroft FBI Guidelines are not available in their entirety; many portions of the guidelines, including those that establish the standard for commencing investigations, remain classified and are not included in the version that is available to the public.

[223] Impact of Attorney General's Guidelines for Domestic Security Investigations (The Levi Guidelines): Report of the Chairman on the Subcomm. on Security and Terrorism, S. Rep. No. 98-134, at 9–10 (1984).

[224] *Id.*

[225] The Mukasey FBI Guidelines, *supra* note 194, § II.A.1.

[226] *See* sources cited *supra* notes 137–141, 145–158 and accompanying text.

[227] *See* sources cited *supra* notes 137–141, 145–158 and accompanying text.

[228] *See supra* notes 150–153.

tion of an individual but find later that there is no basis for such an investigation. Thus, ongoing evaluation of investigations and surveillance is crucial to protecting individual rights once the FBI has established that a justification for surveillance no longer exists. Once the FBI has obtained information on a group or individual, the FBI may share that information without any articulated restriction in order to "protect against or prevent a crime or threat to the national security."[229] The Guidelines do not provide a time limit or applicable laws that would restrict an agent's ability to share FBI files with other agencies or individuals.[230] There is no judicial process or review for ongoing investigations included in the assessment, preliminary investigation, or full investigation provisions. Only preliminary investigations are subject to a time limitation, which is six months, but an agent may extend a preliminary investigation with approval of a supervisor.[231]

The Levi Guidelines, on the other hand, required at least "periodic" or annual review and included provisions exclusively on termination of investigations.[232] In addition, the Levi Guidelines had a "retention period" requirement and more detailed information sharing provisions, including a specific requirement of "assessment of reliability" for anonymous sources.[233] Without a strict time limit on investigations, an individual remains subject to the investigatory procedures authorized under the Guidelines, though cause for investigation may no longer exist. Assessments and full investigations remain open-ended under the Mukasey guidelines, as there is no independent review process to assess the validity of an ongoing investigation.[234] Thus, in addition to a lack of guidance on commencing investigations and searches, the Mukasey FBI Guidelines do not provide the duration and retention limitations that the Levi Guidelines included to prevent Fourth Amendment violations in ongoing investigatory practices.

## VII. THE FBI GUIDELINES PROMOTE VIOLATIONS OF FOURTH AMENDMENT RIGHTS

As discussed above, the Mukasey Guidelines no longer require probable cause for FBI agents to investigate individuals and invade their constitutionally-guaranteed freedoms from unreasonable search. Beyond Fourth Amendment issues, the Mukasey Guidelines also condone measures that amount to racial profiling and allow FBI agents to investigate individuals based on religious or racial affiliation, a practice that has been popularized by measures such as the investigation of certain demographics based on the higher concentration of

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229 The Mukasey FBI Guidelines, *supra* note 194, § VI.B.1.f.

230 The Mukasey FBI Guidelines, *supra* note 194, § VI.

231 The Mukasey FBI Guidelines, *supra* note 194, § II.B.4.a.ii.

232 The Levi FBI Guidelines, *supra* note 3, §§ II, III.

233 The Levi FBI Guidelines, *supra* note 3, §§ II, III, IV.A.4, IV.C.

234 The Mukasey FBI Guidelines, *supra* note 194, §§ II.A, II.B.4.

mosques per capita.[235] Furthermore, the new provisions concerning foreign suspects in the United States will allow the FBI to pursue individuals at the request of other nations, making the FBI akin to an independent police force for hire. These developments further strip the FBI Guidelines of the Constitutional protections they sought to infuse in the FBI's operations in 1976.[236] The broader provisions of Mukasey's FBI Guidelines increase the risk of discriminatory or arbitrary intelligence activities, in some cases, condoning such practices. For the forgoing reasons, the Mukasey FBI Guidelines authorize unconstitutional violations of Fourth Amendment rights to be free of unreasonable search and seizure and violate the principles upon which Attorney General Levi instituted the Guidelines in 1976.

### A. *Lack of Adequate Process*

In the Church Committee sessions and other FBI Oversight hearings in 1970s, one of the chief goals of FBI policy reform was creating guidelines that would provide boundaries and clearly establish under what circumstances an agent may seek informants, gather new information, and conduct surveillance.[237] In contrast, the Mukasey FBI Guidelines allow the "assessment" of threats or the investigation of a group or individual based on any "investigative lead," a term which is not defined.[238] Moreover, no established criteria trigger the availability of an assessment.[239] The new guidelines set no boundaries apart from requiring "supervisory approval requirements," which again are not defined; thus, the Mukasey FBI Guidelines do not indicate what evidentiary standards are necessary for a target to become subject to investigative activities that were once specifically forbidden in preliminary and limited investigations.[240] Further, apart from the interest of preventing crime generally, the Mukasey FBI Guidelines allow FBI agents to conduct assessments without criminal predicate, merely for the sake of collecting intelligence.[241] This practice harks back to the Nixon era when the FBI had free rein to compile information and conduct surveillance with no legitimate purpose beyond the collection efforts themselves.[242] Thus, by expressly authorizing the kinds of activities that Levi curtailed, the Mukasey FBI Guidelines permit agents to ignore constitutional standards as they did in the 1960s and 70s. Under the Guidelines, it

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[235] Lichtblau, *F.B.I. Tells Offices to Count Local Muslims and Mosques*, *supra* note 120.

[236] *See* The Levi FBI Guidelines, *supra* note 3.

[237] *See* The Levi FBI Guidelines, *supra* note 3.

[238] The Mukasey FBI Guidelines, *supra* note 194, §§ II, II.A.1-3.

[239] The Mukasey FBI Guidelines, *supra* note 194, §§ II, II.A.1-3.

[240] The Mukasey FBI Guidelines, *supra* note 194, § II.A.2. The Levi and Smith Guidelines upheld the original, right-protecting purpose of the FBI Guidelines and included concrete standards to guide the investigatory activities of agents. *See* Smith FBI Guidelines, *supra* note 47, § II.B.3; Levi FBI Guidelines, *supra* note 3, §§ II, III.

[241] *See* The Mukasey FBI Guidelines, *supra* note 194, §§ II, II.A.1-3.

[242] *See supra* text accompanying notes 18–25.

appears that any group advocating support for Iraqi freedom, as an example, might be a target of full investigation if the FBI deems that group to be somehow related to terrorists in Iraq simply by association with the country and heritage.

For preliminary and full investigations, the Mukasey Guidelines also do not provide an evidentiary standard, such as "reasonable suspicion," or even the lower standard of "reasonable indication"; consequently, the circumstances under which an agent may commence an investigation do not require any indication of the likelihood a crime will be committed, reliability of the source, or any other objective standard.[243] Once again, without boundaries for the commencement of investigations and surveillance, the FBI may conceivably initiate an investigation on a group based on its "furthering political or social goals" tenuously connected to any kind of "provision of support for" violence and violation of federal law.[244] The language is convoluted, and rather than requiring a clear evidentiary standard, the guidelines allow a full investigation if there is any evidence that a group may be connected to any other group advocating violence, even if there is no showing of knowledge or intent to be so involved.[245]

With no clear process or requirement for initiating an assessment or investigation, any association with a foreign group could allow the FBI to implement a variety of techniques like visual monitoring, National Security Letters, or certain surveillance techniques.[246] Additionally, instead of clear proscription of techniques that violate Constitutional rights, the Mukasey Guidelines have condoned the FBI's use of "all lawful methods" without requiring the FBI to establish any legitimate purpose for commencing a general, full investigation.[247]

Referring back to the seminal *Keith* case in which the Supreme Court reminded the Executive that it was subject to the Constitution and the laws of the United States, the FBI's original guidelines protected privacy and Fourth Amendment rights by specifically limiting the FBI's activities to comport with the principle that vague "national security" interests are insufficient reason to target politically unpopular groups without complying with proper Fourth Amendment warrant requirements.[248] Without requiring that the FBI use measures with the least impact or providing more specific requirements for the authorization of "all lawful methods," the FBI's new Guidelines set the stage for abuses as the FBI may authorize investigation or assessment based on an

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[243] *See* The Mukasey FBI Guidelines, *supra* note 194, § II.B.3.

[244] *See* The Mukasey FBI Guidelines, *supra* note 194, § II.C.1.d.

[245] *See* The Mukasey FBI Guidelines, *supra* note 194, § II.C.1.

[246] *See* The Mukasey FBI Guidelines, *supra* note 194, § V.A.

[247] *See* The Mukasey FBI Guidelines, *supra* note 194, § II.B.4.

[248] United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 314 (1972); Frederick Schauer, *Fear, Risk and The First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 693 (1978); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 832–40 (1969).

"evolution of authority" because the Guidelines have not clearly defined the parameters.[249]

### B. *Probable Cause and Warrant Requirements*

In a memorandum published to accompany the Guidelines, Attorney General Mukasey asserted that the standard for initiating a criminal investigation would be the probable cause standard applied by courts to evaluate whether a target's Fourth Amendment rights have been violated.[250] As discussed above, the surveillance and investigatory activities of the FBI are a type of search and seizure even though physical evidence has not been obtained nor have physical searches occurred.[251]

While the use of probable cause in a national security context has been hotly debated for decades in the context of the FBI, many civil liberties groups, journalists, and members of Congress have been calling for a return to Levi's original incorporation of the probable cause standard into FBI practices.[252] Courts are not willing to recognize a general national security exception to the warrant or probable cause requirements for law enforcement activities, and in the context of an American citizen, the foreign intelligence "special needs" exception would be difficult to extend for searches and seizure.[253] The Mukasey Guidelines have failed to comport with the underlying purpose of FBI Guidelines—providing agents in the field with constitutionally accurate guidance—because the Mukasey Guidelines do not provide a probable cause requirement or a standard by which agents may assess a special need or exemption from the Fourth Amendment process requirements. Without mention of the sacred individual rights afforded by the Fourth Amendment, the Mukasey Guidelines in effect expand the powers of the FBI and disregard the abuses of the 1960s and 70s that created the need for the original Levi FBI Guidelines in the first place.

## VIII. THE IMPLICATIONS OF THE MUKASEY GUIDELINES

Chairman Edward Kennedy, at the 1978 Senate Judiciary Committee hearings on the FBI Statutory Charter, urged the importance of the roles of Congress and the Executive Branch in guiding and clearly limiting the FBI's activities, rather than relying on the FBI to police itself at the risk of developing

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[249] *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, *supra* note 7, at 2 (statements of Chairman Edward M. Kennedy).

[250] Office of the Attorney General, Memorandum for the Heads of Department Components, *The Attorney General's Guidelines for Domestic FBI Operations* (Sept. 29, 2008), *available at* http://www.justice.gov/ag/readingroom/guidelines-memo.pdf.

[251] Kerr, *supra* note 149, at 831.

[252] 154 CONG. REC. E989 (2008) (*Introduction to the Resolution to Replace the Ashcroft FBI Guidelines with the Levi FBI Guidelines*); Johnson, *supra* note 8.

[253] *See In re* Sealed Case, 310 F.3d 717, 745–46 (Foreign Int. Surv. Ct. Rev. 2002).

practice based on "practical convenience, political whim, or personal bias."[254] Once again, Congress has asserted the need for oversight of federal law enforcement after reports circulated that the CIA had been destroying incriminating evidence of its practices.[255] The Senate Judiciary Committee intends to begin reviewing the practices of the CIA, FBI, as well as other Executive Branch agencies that may have engaged in abusive or unconstitutional techniques during the Bush Administration.[256]

### A. *The Inherent Problems of Executive Publications*

Though the Guidelines were a remarkable first step to addressing FBI abuses in the 1970s, the inherent problem in executive interpretation of the Constitution is that the Attorney General may guide FBI agents to act in a manner that does not comport with the courts' reading and application of the Fourth Amendment and warrant requirements. The Guidelines will not be an adequate guide unless they are all-inclusive and exhaustive of the requirements that the law imposes before government action. Otherwise, FBI agents will not know when and how far they can carry on investigations. If the Attorney General fails to include standards for initiating what may constitute a search, guidelines that seem easier to apply, like the Mukasey Guidelines, may only lead agents into overextension of power and violation of civil liberties. While the Attorney General sets the tone for federal law enforcement as part of the executive team, vague or incomplete terms in the Guidelines will perpetuate the kinds of abuses that have occurred over the past five years because the terms fail to provide what the court would require for the agent's act to pass Constitutional muster. In response to the FBI's widespread abuses of power and judicial interpretation to the Fourth Amendment requirements, Attorney General Levi included specific standards that would guide agents and prevent continuation of abuses. Attorney General Mukasey's interpretation of federal law, however, is inherently problematic because the Guidelines purport to delineate FBI powers rather than drawing boundaries according to current and historical conceptions of the Fourth Amendment rights. Besides harm to innocent citizens, the Attorney General's broader, more lenient reading of the Fourth Amendment will encourage agents to act against the judicial interpretations of federal law, leading to more claims against federal agents and confusion as to whether the Guidelines can provide immunity to FBI actions.

### B. *Abuse of Search and Seizure Without Probable Cause*

In 1978, Congress recognized that without a standard procedure for judicial

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[254] The Levi FBI Guidelines, *supra* note 3, at 2–3.

[255] Eric Lichtblau, *Congress Looks into Obstruction as Calls for Justice Inquiry Rise*, N.Y. TIMES, Dec. 8, 2007; *Senate Panel to Pursue*, *supra* note 87; *U.S. Says C.I.A. Destroyed*, *supra* note 87.

[256] *Senate Panel to Pursue*, *supra* note 87.

authorization of electronic surveillance, the FBI could become the personal intelligence force of the Executive, à la Watergate. Without the safeguard of a standard like probable cause in its practical guidance, the FBI may arbitrarily investigate, search, and monitor individuals without prior authorization, in violation of an individual's Fourth Amendment rights. The current Guidelines do not provide a cognizable Constitutional standard, unlike the Levi FBI Guidelines, which specifically required factual basis and weighing of investigation interests against privacy interests, much like a court would do in assessing whether the agent's acts had compromised an individual's Fourth Amendment rights.[257] Without a requirement of probable cause, it is far more likely that FBI acts will violate Fourth Amendment rights because there is no requirement for agents to weigh Fourth Amendment considerations before acting. As the courts examine these violations, there is only retroactive application of probable cause analysis to determine the constitutionality of an agent's acts. However, if the Guidelines required those considerations of probable cause or a warrant application process before an FBI action, proactive application of the original Levi Guideline safeguards would prevent those violations bfrom ever occurring.

## IX. CONCLUSION

Though federal law enforcement agencies surely must protect the United States when legitimate threats jeopardize national security and the safety of Americans, there remains a fine balance between national security interests and civil liberties in which no Constitutional right should be sacrificed for nominal government action taken in the name of "security."[258] Looking back to the political climate that prompted the creation of boundaries for the FBI, the current Mukasey FBI Guidelines reflect the kinds of extensions of power that Edward Levi and others feared would occur once those in charge of law enforcement oversight began to finesse statutory and judicial language. Noting that the 9/11 Commission and Joint Inquiries have cited lack of proper analysis rather than lack of information as the major problem, the Bush Administration and its Attorneys General have extended the powers of the FBI without respect for expert, independent recommendations. Without probable cause standards that comport with traditional Fourth Amendment analysis, the FBI Guidelines as they now stand expressly authorize the FBI to violate the Constitutional rights of Americans without regard for jurisprudential direction otherwise.

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[257] The Levi FBI Guidelines, *supra* note 3, § II.I.

[258] William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2174, 2179–80 (2002).