

A RAND NOTE

INTELLIGENCE CONSTRAINTS OF THE 1970s AND
DOMESTIC TERRORISM: VOL. I, EFFECTS ON THE
INCIDENCE, INVESTIGATION, AND PROSECUTION
OF TERRORIST ACTIVITY

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PREFACE

This Note is the final report of a study requested by the National Security Council/Special Coordinating Committee Working Group on Terrorism and funded by the Law Enforcement Assistance Administration of the U.S. Department of Justice. It addresses the question, To what extent did the post-Watergate intelligence "rules" affect law enforcement's ability to investigate and prosecute cases of domestic terrorism? In the course of the study, we assembled and summarized a selected sample of legal, legislative, and administrative constraints at the local, state, and federal levels on the collection, maintenance, use, and dissemination of information pertaining to domestic security matters. That survey is reported in companion Rand Note N-1902-DOJ, Intelligence Constraints of the 1970s and Domestic Terrorism: Vol. II, A Survey of Legal, Legislative, and Administrative Constraints, by Marvin M. Lavin, December 1982.

This Note assesses the effects of stricter rules and of perceptions or uncertainties regarding those rules on the investigation of domestic terrorist groups and crimes. In particular, it compares and contrasts the investigation of domestic terrorism and the prosecution of alleged terrorists during a period of regulatory flexibility (before 1975) and during a period of greatly increased constraints (1975 to 1980).

The Note examines 23 cases involving prosecutions under the "older" intelligence rules--that is, those of the period ending in 1974--and another 28 cases involving prosecutions under the "newer" intelligence rules--those of the period 1975 to 1980. Since the completion of this

study significant changes have been made in federal executive orders and departmental guidelines and in local police department guidelines. These changes affect investigations undertaken in 1981 and after. This study does not examine these regulatory changes or cases prosecuted under the post-1980 guidelines.

The two volumes should be of interest to local, state, and federal government officials concerned with domestic terrorism. They should be particularly useful for officials in law enforcement, prosecution, and the judiciary who are responsible for investigating, prosecuting, and adjudicating cases of domestic terrorism.

SUMMARY

Growing concern with privacy rights, together with revelations of abuses of power by government in the Watergate acts, illegal FBI counterintelligence activities, and excesses of the CIA, led in the 1970s to increased restrictions on the collection, retention, dissemination, and use of intelligence information at all levels of government. The present study compares the impacts of post-Watergate restrictions on terrorist-related intelligence activities by comparing investigatory and prosecutorial efficacy in the period 1960-1974 with that in 1975-1980. On December 4, 1981, after this study was completed, President Reagan issued Executive Order No. 12333 on United States Intelligence Activities, which liberalizes authority to assist and cooperate with state and local law-enforcement agencies. Pursuant to this Order, new guidelines for intelligence activities of federal agencies have modified some of the constraints on intelligence activities relating to terrorist incidents or crimes within the United States. This Note does not consider cases prosecuted during the Reagan Administration, nor does it examine impacts of regulatory changes affecting intelligence agencies in this period.

The present study addresses the question, Does empirical evidence support the contention that the more stringent intelligence rules and constraints of the 1970s adversely affected law enforcement's ability to investigate and prosecute cases of domestic terrorism and related crimes? Our assessment is based on an examination of case reports and information volunteered by law-enforcement agencies on 23 cases of

crimes relating to terrorism that were prosecuted at the state and/or federal level in 1974 and earlier under the more lenient "older" rules, and 28 cases that were prosecuted between 1975 and 1980 under the "newer" rules of the 1970s.

In a companion volume, we have selectively assembled and analyzed the rules of the 1970s affecting federal, state, and local intelligence activities.

SCOPE OF THE STUDY

Broadly characterized, intelligence constraints are either legal in origin (i.e., constitutionally, legislatively, or judicially derived) or administratively generated as guidelines, orders, rules, and prohibitions to implement policy and to interpret legal prescriptions. They exist at all government levels. The "newer" intelligence constraints--i.e., those in effect in the period 1975-1980--include the federal 1974 Privacy Act and Freedom of Information Act (FOIA), their state-level counterparts, and local-level police intelligence ordinances. "Newer" case law and court rules at the federal and state levels concern electronic and physical surveillance; access to bank, telephone, credit card, and other third-party records; discovery rules in criminal proceedings; the use of informants and undercover agents; and so on. "Newer" administrative constraints include the 1976 Attorney General's Guidelines for FBI Domestic Security Investigations and for Use of Informants[1]; California's Criminal Intelligence File Guidelines

[1] The "newer" administrative constraints of the 1970s (affecting the prosecution considered here) were largely superseded at the federal level by intelligence agency guidelines approved by the Attorney General in accordance with Executive Order 12333 (1981). Guidelines for the CIA and the Department of Defense were approved in 1982. Intelligence collection guidelines for the FBI were revised in 1980 and again in 1982. Their reissue is pending, as is the reissue of guidelines for the National Security Agency.

and Criminal Record Security, Statutes, and Regulations; and the New York and Los Angeles Police Departments' standards, procedures, and operational guidelines.

We focus on investigations of domestic terrorism; investigations of foreign-based or foreign-directed individuals or organizations are generally outside the scope of this study. Some of the cases included here involve prosecutions within the United States for crimes committed in the United States, but involving foreign nationals or foreign powers. While some foreign intelligence and counterintelligence information is furnished to U.S. law-enforcement agencies (in accordance with the International Terrorism section of the Attorney General's Guidelines for Foreign Intelligence Collection and for Counterintelligence Investigations), this study does not evaluate either the utility of the foreign intelligence provided or the effects of the foreign guidelines on the efficacy of domestic prosecutions.

Investigations within the United States in which foreign intelligence or foreign counterintelligence contributed to the prevention or prosecution of acts of domestic terrorism are included in this study.

The criminal charges in domestic terrorism cases are generally the same as those in ordinary federal or state prosecutions--weapons and explosives possession, and conspiracy to commit (or commission of) murder, assault, bombing, arson, kidnapping, armed robbery, burglary, auto theft, etc. However, crimes of domestic terrorism are generally not committed for personal gain, but are motivated by political, social, or racial concerns. They may include armed robbery committed to raise

funds to finance terrorist activities or incidental offenses committed by persons associated with a terrorist group.

METHODOLOGY

The study does not consider certain potential impacts of the newer constraints on intelligence gathering and use. For example, we have not attempted to measure the extent of reduction in this type of law-enforcement activity that may be attributed to these constraints. Rather, we have attempted to determine what practitioners (primarily law-enforcement officials and prosecutore) perceive the impacts to be, and then we have measured the impacts on the outcomes of a sample of federal and local domestic security cases.

We interviewed current and former law-enforcement officials and prosecutors in five major metropolitan areas[2] who had intimate knowledge of domestic security cases. From these interviews, we collected a sample of 51 cases, both federal and local.[3] The sample comprised all the significant cases that could be recalled and described by memory, occasionally refreshed with case materials. Twenty-three of the cases occurred before 1975, when the older intelligence rules were in effect, and 28 occurred between 1975 and 1980, under the newer rules, prior to modification by the Reagan Administration.

This basic data set, described case by case in the Appendix, provides the empirical information on which we evaluated two different types of cases: cases in which preventive intelligence was applied to

[2] New York, Chicago, Los Angeles, San Francisco and Oakland, and Miami Beach and Dade County.

[3] The 51 cases (i.e., planned or actual incidents) eventuated in 53 state and federal prosecutions and two "no prosecutions" (cases in which prevention/disruption programs tainted evidence and precluded prosecution).

abort acts of violence and other crimes relating to terrorism, whether or not prosecution was attempted, and cases of arrest and prosecution for crimes relating to terrorist acts or groups.

Thirteen of the 23 older rules cases involved the use of preventive intelligence, whereas only 10 of the 28 newer rules cases did. We evaluated the utility of preventive intelligence by considering whether the effort to prevent acts of violence or other crimes relating to terrorism actually precluded or aborted such acts. We also considered whether such preventive intelligence resulted in successful prosecutions.

We classified the arrest and prosecution case outcomes as (1) failures, i.e., cases resulting in acquittal at trial, pretrial dismissal by the prosecution or court, or dismissal at trial by the court[4]; (2) successes, i.e., cases resulting in the arrest and successful prosecution of all arrestees; or (3) partial successes (or partial failures), i.e., multidefendant cases resulting in successful prosecution of some defendants and unsuccessful prosecution of others. Cases that are categorized as investigative successes but that result in acquittals or dismissal of criminal cases were evaluated both as successes and as failures, to see what difference it would make in the analysis. The police may solve or "clear" a case by identifying and arresting the suspect, or an investigation may be a success in that the application of preventive intelligence prevented a criminal act, even though no suspect was convicted. Rather than adopting a rigid view of what constitutes success in such cases, we have analyzed the results both ways.

[4] Cases never solved by the police or the FBI were not included in our case sample because they are irrelevant for purposes of this analysis.

We determined the basis for the outcome in each case and identified which intelligence component and/or intelligence gathering technique, if any, was instrumental. Our basic analysis focused on how cases actually fared under the older and newer rules. In addition, we performed a more speculative statistical analysis by projecting outcomes under the "opposite" intelligence rules (i.e., we examined whether outcomes of cases that occurred under the older rules might have been different had the cases occurred under the newer rules and vice versa). Finally, we compared our interviewees' perceptions of the impacts with the impacts as measured by the case sample analysis to discern the degree of consistency between the two approaches.

Our case sample is small and is biased in certain ways. For example, the FBI declined to furnish case references or investigative files for the study, which introduced three sources of bias: (1) Compared with the total population of terrorist cases, our sample is more heavily weighted toward cases investigated (partially or wholly) and prosecuted at the state or local rather than the federal level; (2) the sample is more heavily weighted toward cases that reached arrest and prosecution than toward those in which incidents were prevented; and (3) of the cases in the sample that occurred under the older intelligence rules, few (in relation to the total population of cases) involved certain investigative techniques such as illegal electronic surveillance and surreptitious entry. Moreover, reliance on interviewees' memories probably affects the accuracy of the reports of older rules cases more than that of the newer rules cases, since memories fade and distort

with time. We tried to reduce inaccuracies by discussing each case with more than one interviewee, where feasible.

FINDINGS AND CONCLUSIONS

Because we were able to analyze only 51 relevant cases, not all of which involved intelligence operations, clear patterns must emerge from the analysis for findings to be meaningful. And indeed, some important findings did emerge. (We must emphasize that our conclusions apply only to the period 1964-1980; they do not reflect the impacts of the intelligence rules of the 1980s, since our database does not include post-1980 cases.)

First, it appears that intelligence operations are more important than other investigative techniques such as gathering physical evidence or seeking eyewitness identification of suspects or their property in terrorist-related cases. Well over 60 percent of the cases in our data base involved intelligence operations that were affected by the newer intelligence rules).

Second, our data suggest that the newer rules affected primarily the timing and availability of preventive intelligence, a finding that is consistent with the perceptions of the investigators and prosecutors we interviewed. Most preventive intelligence is gathered by informants and undercover police, although electronic surveillance also plays a role. The proportion of cases in which preventive intelligence techniques were used was roughly the same in both the older and newer rules periods, but the proportion of cases in which violence or other crimes were prevented declined under the newer rules.

The law-enforcement officials we interviewed asserted that the newer rules had reduced the acquisition of advance knowledge of crimes about to be committed and operations designed to prevent them from being

committed--operations sometimes as simple as letting the conspirators know that police are aware of their plans. Under the newer rules, intelligence became more reactive, supporting apprehension and prosecution, not prevention. Criminal standards (clear evidence of the commission or imminent commission of a crime, which is difficult to prove) must be applied for emplacement of informants within terrorist groups. The newer rules appear to have delayed or denied warnings that in the past had allowed the use of informant/undercover intelligence to prevent criminal acts.

Although our respondents were able to cite newer rules cases illustrating prevention, the extent of the shift from preventive intelligence to reactive intelligence cannot be measured. We have no way of knowing how many groups were deterred; how many bombings, murders, or violent demonstrations were prevented; or how much more political violence would have occurred. Our respondents asserted that intelligence operations were always very difficult, even under the older, more permissive, rules and that, in fact, most terrorist crimes remain unsolved.

Yet terrorist activity did not increase with the imposition of the newer rules; it did not even continue at the same level as in the late 1960s and early 1970s. Terrorist activity in the United States declined in the late 1970s, primarily for reasons that had nothing to do with intelligence operations. Some of the previously active groups had been destroyed, and, perhaps more important, some of the causes that inspired political violence--notably, American involvement in the war in Vietnam--no longer existed.

The political turmoil of the 1960s and early 1970s demanded an expansion of domestic intelligence activities. Had the country faced a growing terrorist threat, some of the newer rules might never have been imposed, or if they had been, their effect might have been reduced. But an angry public, outraged by abuses in areas other than the prevention of terrorism, demanded tighter controls on all intelligence operations. Had the public felt threatened and in need of protection against terrorism, more constraints on domestic intelligence would probably not have been tolerated.

A third conclusion is that both investigative and prosecutorial law-enforcement entities seemed to adapt successfully to the newer rules. There was no significant change in the rate of criminal conviction over the two time periods, either in cases whose outcomes hinged on investigative techniques that were affected by the newer rules or in cases whose outcomes did not hinge on such techniques.

The more speculative analysis we performed, projecting outcomes of prosecution under the "opposite" rules, showed a somewhat different pattern. Most of the prosecution failures under the newer rules might have been successes under the older rules. And some, or even most, of the successes under the older rules might have been failures under the newer rules, depending on whether informant and undercover operations could have begun at similar times and proceeded in the same ways. But we accord less weight to this speculative analysis and more to the analysis of actual case outcomes.

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We owe a special thanks to Mr. Perry Rivkind, Assistant Administrator of Operations Support, Office of Operations Support, Law Enforcement Assistance Administration, for his support in initiating the research and his continued support of the effort, sometimes in the face of considerable bureaucratic flak. He is a tough and imaginative administrator.

This study could not have been done without the cooperation of our interviewees--current and former law-enforcement and prosecution officials who have direct knowledge of the cases reported herein. Given the nature of the material contained in this Note, it seems prudent to preserve their anonymity. But we wish to acknowledge their current or past agency affiliations. In some cases we sought and received active and formal cooperation from these agencies; in others we received informal cooperation from specific individuals. The agency affiliations are the Cook County, Illinois, State Attorney's Office; Dade County, Florida, Public Safety Department; Dade County State Attorney's Office; Miami Police Department; Los Angeles Police Department; Los Angeles County District Attorney's Office; New York City Police Department; Manhattan District Attorney's Office; San Francisco Police Department; San Francisco District Attorney's Office; and the U.S. Attorney's Offices in Chicago and Miami.

Although the Federal Bureau of Investigation opted not to cooperate formally in our study, we were able to interview three former officials and Special Agents, to whom we are indebted.

We also wish to acknowledge the assistance of Rand staff members William Harris, Konrad Kellen, D. M. Landi, and Willis Ware, who reviewed earlier drafts of this Note and offered many helpful comments and suggestions.

We are greatly indebted to Janet DeLand for her patience, diligence, and skill in the seemingly never-ending task of editing the numerous revisions of this Note.

And finally, we wish to mention Alyce Raphael and Bernadine Siuda, our secretaries, upon whose dedication and hard work we always rely and too often take for granted.

CONTENTS

PREFACE	iii
SUMMARY	v
ACKNOWLEDGMENTS	xv
Section	
I. INTRODUCTION	1
Terminology	4
Historical Considerations	9
The Present Study	13
Organization of the Report	17
II. THE NATURE AND EXTENT OF DOMESTIC INTELLIGENCE CONSTRAINTS ...	18
Introduction	18
Initiating Domestic Security Investigations	19
Kinds of Information Gathered	22
Techniques of Information Gathering	30
Information Handling	35
Reporting and Controlling Security Investigations	47
III. METHODOLOGY	49
The Broad Approach	49
The Interviewees	50
The Case Sample	52
IV. THE CASE SAMPLE	54
Geographic Location	56
Nature of Cases	57
Terrorist Groups	59
Agency Source	61
V. ANALYSIS OF THE CASE SAMPLE	63
Case Outcome Classification	63
How Cases Actually Fared	74
How Cases Might Fare Under Opposite Rules	78
Conclusions	83

VI. THE INTERVIEWS	85
Intelligence Files	87
Undercover Operations	89
Informants	92
Other Limiting Factors	96
Beyond the Rules	97
Getting Around the Restrictions	103
Conclusions	104
VII. CONCLUDING REMARKS	106
Appendix: CASE SUMMARIES	109

I. INTRODUCTION

"There was a time when you knew what was going to happen." This remark was made by one of the police officers surrounding the West German consulate in Chicago on August 17, 1978. Inside, two armed Croatian extremists were holding eight persons hostage and demanding to communicate with another Croatian extremist who was being held in West Germany for the murder of a Yugoslav diplomat.

The officer's comment had by then become a common one. Law-enforcement officials complained that new rules on intelligence collection and retention seriously impaired their ability to anticipate possible terrorist incidents or to identify, locate, and apprehend those who have engaged in politically motivated crimes. In 1977, Stuart Knight, Director of the U.S. Secret Service, testified before the Senate Subcommittee on Criminal Laws and Procedures that there had been a 50 to 60 percent decrease in the intelligence his agency was receiving, and that the qualitative degradation might constitute an additional 25 percent reduction.[1] But did these increasing restrictions, in fact, impair the effectiveness of law enforcement against terrorism and related crimes?

Following the revelations of abuses by government agencies in the collection of intelligence, more stringent controls and limitations were placed on the intelligence operations of law-enforcement agencies at the federal, state, and local levels. These rules limited inquiry,

[1] The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security, Hearings Before the Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, Part 1, 95th Congress, First Session, July 27, 1977.

surveillance, and the keeping of files on certain persons and organizations; established strict criteria for the use of certain intelligence gathering techniques; limited the time that information could be retained in government files; restricted the transfer of information from one agency of government to another; in some cases compelled government agencies that maintain certain categories of information to routinely report what they had in their files, or to reveal it to the subject upon request; and established oversight groups and procedures to ensure compliance. The rules were set forth in federal legislation; Executive Orders; federal department, agency, and service directives; state legislation; guidelines at the local level; and individual court rulings.

Although most of the rules of the 1970s were enacted at the federal level, they often had both direct and indirect effects at the state and local levels. For example, the Department of Justice set forth regulations requiring that criminal-history records-handling practices be instituted to ensure security and privacy.[2] The regulations required each state to prepare and submit to the Law Enforcement Assistance Administration (LEAA) a security and privacy information plan for criminal-history records. The governor of each state was to designate the agency responsible for the implementation of the regulations. After submission and approval of a plan, the state had to certify compliance or provide a schedule for future implementation.

Different offices and services within government agencies and departments may interpret presidential and departmental directives somewhat differently. And beyond the rules themselves, there was a new

[2] 40 Federal Register 22114, as amended 41 Federal Register 11714.

atmosphere governing intelligence activities. In the wake of criminal prosecution of government officials for illegal intelligence activities and the seemingly greater likelihood of exposure to such activities, senior and middle-level bureaucrats may have become cautious beyond the letter of the new rules for fear of getting into trouble over the slightest infraction. In an effort to avoid repetition of certain past abuses, proportionately less weight may have been attached to possible adverse effects of the new legislation and directives. Revelations of abuses during the Vietnam War and in the immediate post-Watergate atmosphere made it difficult to argue against the proposed rules.

No in-depth assessment has as yet been made of the effects of the 1970s rules individually or, more importantly, of their overall effect. A preliminary assessment made by the President's Foreign Intelligence Advisory Board in 1976 was mainly prospective and contains classified information. Two other studies carried out by the Government Accounting Office (GAO) are discussed below.

A fundamental question is whether these rules, which we shall call the "newer" rules, impose unintended and unwarranted restrictions on essential intelligence activities. The fundamental research problem is how to make such an assessment without getting trapped in an unproductive philosophical debate about the role of intelligence in a free society, or the perceived conflict between the preservation of civil liberties and the intelligence activities necessary for the legitimate suppression or at least containment of terrorist violence and the protection of national security information. This Note, therefore, looks at the record, with emphasis on terrorism and politically motivated crimes. Would the newer rules, if they had been operative, have precluded the use of intelligence

methods employed in past cases? And would that have led to failure in cases where law-enforcement agencies were successful?

TERMINOLOGY

The crime of "terrorism" does not appear in the criminal code of the United States. Terrorist crimes are ordinary crimes--arson, kidnapping, murder, etc.--carried out with the objective of publicizing the existence of a group and its cause and creating fear and alarm to achieve political ends. For purposes of investigation and prosecution, no distinction is made between a criminal act and an act of terrorism. Anticipating and possibly preventing such acts are the basic objectives of domestic security (sometimes called "domestic intelligence") investigations, the area of this inquiry.

The GAO, in its reviews of FBI domestic intelligence operations, considered the issue of what constitutes domestic security or intelligence. While noting the long-standing failure of the FBI to publicly define the term, the GAO interpreted "domestic intelligence" to apply "generally to the FBI's efforts to detect and gather information on individuals within the United States who allegedly attempt to overthrow the government or deprive others of their civil liberties or rights." [3] With this definition as a guide, the GAO concluded that FBI domestic intelligence investigations covered subversion, extremism, sedition, treason, sabotage, certain bombings, violation of anti-riot laws, and protection of foreign officials.

[3] "FBI Domestic Intelligence Operations--Their Purpose and Scope: Issues that Need to be Resolved," Appendix to the FBI Oversight Hearings--1976, House Subcommittee on Civil and Constitutional Rights, 94th Congress, First and Second Sessions, September 24, 1975, and February 24, 1976, Part 2, Serial No. 2, pp. 148-243.

In its follow-up report,[4] the GAO adopted the characterization given in the Attorney General's Guidelines for Domestic Security Investigations.[5] The Guidelines state that

Domestic security investigations are conducted ... to ascertain information on the activities of individuals, or the activities of groups, that involve or will involve the use of force or violation of federal law, for the purpose of:

1. overthrowing the government of the United States or the government of a state;
2. substantially interfering, in the United States, with the activities of a foreign government or its authorized representatives;
3. substantially impairing for the purpose of influencing U.S. government policies or decisions (a) the functioning of the government of the United States, (b) the functioning of the government of a state, or (c) interstate commerce;
4. depriving persons of their civil rights under the Constitution, laws, or treaties of the United States.

The GAO then distinguished domestic security investigations from ordinary criminal investigations in terms of (1) the basis for initiating the investigation, (2) the purpose and scope of the investigation, and (3) the investigative techniques used, particularly the use of informants.

The GAO observed that a preliminary domestic intelligence investigation[6] may be initiated on the basis of slightly less

[4] "FBI Domestic Intelligence Operations--An Uncertain Future," Report of the Comptroller General of the United States, November 9, 1977, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 95th Congress, First Session, on the FBI Charter Proposals, June 6, 27, and November 9, 1977, Part 1, 1978, pp. 119-157.

[5] These Guidelines are reproduced in full as Appendix A of companion Rand Note N-1902-DOJ, Intelligence Constraints of the 1970s and Domestic Terrorism: Vol. II, A Survey of Legal, Legislative, and Administrative Constraints, Marvin M. Lavin, December 1982.

[6] Preliminary, limited, and full investigations are defined in Sec. II.

substantive information (e.g., ideological rhetoric plus preparation for possibly illegal activity) than is required to initiate a criminal investigation (which must be based on evidence of the commission or preparation for the commission of a specific crime).

Whereas criminal investigation is directed toward the accumulation of evidence related to a specific crime, a domestic security investigation is undertaken to accumulate background information on the activities of target individuals and groups for the purposes of (1) anticipating violence and (2) developing information that facilitates related criminal investigations.

Finally, the GAO noted that domestic security investigations tend to be more sustained and less intensive than criminal investigations. In particular, the use of informants differs significantly between the two types of investigation. In criminal investigations, irregular contact is made to determine what knowledge the source may have concerning a specific crime, or a short-term operation is mounted to develop the necessary evidence for prosecution. By contrast, informant efforts in domestic security investigations are generally long-term and continual.

The linkage between domestic security and domestic terrorism is indicated in the descriptions of U.S. Department of Justice programs.[7] The mission of the terrorism program is to

[7] "Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1980," Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 96th Congress, First Session, Part 5, Department of Justice, Washington, D.C., 1979.

... detect, prevent, and/or react to unlawful, violent activities of individuals or groups whose intent is to either overthrow the government; interfere with the activities of a foreign government in the United States; substantially impair the functioning of the Federal Government, a state government, or interstate commerce; or deprive Americans of civil rights as guaranteed by the Constitution. The mission is accomplished through investigations of violations of certain federal statutes that logically relate to domestic terrorism, such as bombing matters; protection of foreign officials and official guests of the United States; neutrality matters; sabotage; sedition; treason; atomic energy matters, including extortion by threat of a nuclear device; espionage; passport and visa violations; and false identity matters.[8]

The terrorism program has two parts. The first part is domestic intelligence, which constitutes the preventive phase. It consists of detection, identification, and collection of evidence for the prosecution of terrorists and groups that have the propensity, inclination, and capacity to engage in terrorist acts. This function includes investigations conducted according to the Attorney General's Guidelines as well as investigations of civil unrest and anti-riot laws.[9] The second part, terrorism-criminal investigations, is the reactive phase. It consists mainly of investigations of terrorist bombings and threats but also includes the other investigatory items listed above.[10]

[8] *Idem*, p. 786.

[9] Investigations of foreign-based or foreign-directed individuals or organizations must conform to the Attorney General's Foreign Counterintelligence Guidelines, issued in 1976, and the Foreign Intelligence Surveillance Act, 50 U.S.C. Sec. 1801 and seq. (1978). Such investigations are generally outside the scope of this study.

[10] Forty-seven percent of the investigative time in the FBI terrorism program is spent on terrorist bombing and threats; 17 percent is spent on protection of foreign officials; and the remainder is divided among domestic security, espionage, neutrality, passport and visa matters, terrorism informants, false identity matters, and Atomic Energy Act violations. The number of domestic security investigations conducted by the FBI declined dramatically during the 1970s: In July 1973, there were 21,414; in March 1976, 4,868; in September 1976, 626; in February 1978, 102; and in February 1979, 53. (*Idem*, p. 879, Exhibit No. 12.)

The domestic security guidelines do not specify the federal crimes whose violation may serve the illicit purposes enumerated above. There are, nonetheless, many federal criminal statutes defining such offenses, examples of which are given below.

Domestic security and terrorist activities are generally not specifically defined in state or local laws, but are regarded as criminal activities largely motivated by political and social factors, i.e., factors other than pecuniary gain for personal ends. There are exceptions, however: In 1977, the California legislature enacted Section 422.5 of the Penal Code, defining terrorism as the creation of "a climate of fear and intimidation by means of threats or violent action causing sustained fear for personal safety in order to achieve social or political goals," and Section 422, which made terrorist threat-making a felony. In a number of major cities--including New York, Los Angeles, Chicago, Washington, Houston, Atlanta, and Detroit--domestic intelligence was differentiated from ordinary criminal intelligence in order to clarify and limit the scope of operations of police intelligence units.[11] Domestic security matters are usually characterized as activities affecting public order and government operation rather than as unique criminal offenses.[12]

[11] See J. Goldman and L. Green, "How Police Intelligence Units Operate," Los Angeles Times, May 15, 1980, Part 1.

[12] For example, the public security unit of the New York City Police Department's Intelligence Division, which was established 68 years ago as the Radical Bureau, seeks intelligence about activities that have potential for violence or disorder; adversely affect the availability of foods and services to the public; create traffic, crowd control, or noise problems; require notification to or coordination with other city, state, or federal agencies; have serious national and/or international ramifications, in the event violence or disorder ensues; involve deliberate and concerted illegal behavior as a form of protest; foment intergroup hostilities, counterdemonstrations, assaults, destruction of property, etc.; or involve groups or individuals advocating

HISTORICAL CONSIDERATIONS

Federal domestic intelligence gathering activities began in 1917, when the Investigation Bureau of the U.S. Justice Department created an extensive file-card index of suspected radicals and began to conduct widespread surveillance of individuals, using informants and mass-arrest tactics. In 1919, the General Intelligence Division of the Investigation Bureau began a similar program. There was widespread criticism of these activities, especially from the Congress, and in 1924 the Attorney General ordered that investigations by the Bureau (under its new director, J. Edgar Hoover) be limited to cases involving violations of federal law. Existing intelligence files were not destroyed, but the gathering of information was ordered to cease. For the next twelve years, the files maintained by the Bureau of Intelligence were expanded with volunteered information on radical activities, but the only federal intelligence investigations were those made by military units tracing the activities of radical movements.

Then in 1936, the newly named Federal Bureau of Investigation launched a vigorous program of domestic intelligence gathering, under incomplete Presidential authority. An Executive Order of 1936 ordered that all investigations relating to espionage, sabotage, and neutrality violations were to be handled only by the FBI. The FBI systematically collected information on subversive activities in industry, government, the media, and education, developing an extensive library of radical

(1) violence and/or violent attacks on government operations or on police officers or other public officials, (2) racial, religious, or ethnic conflict between religious and ethnic groups, and (3) achievement of goals by unlawful means. See "Procedures--Public Security Activities of the NYPD Intelligence Division," in FBI Domestic Intelligence Operations, op. cit.

literature and intelligence files. It was reinforced by the enactment of the Smith Act, which made it a crime to advocate overthrow of the government, and the Voorhis Act, which required registration of all organizations having foreign ties and advocating the violent overthrow of the government.

Between 1945 and 1960, domestic intelligence gathering was motivated by the fear of Communism and, in particular, the American Communist Party (ACP). The FBI developed a Security Index of people who warranted detention in the event of war and called for placement of all ACP members on the Index. FBI investigations covered not only the ACP but other leftist organizations such as the Socialist Workers Party (SWP). Under its COMINFIL program, the FBI directed an extensive campaign against Communist infiltration in American society. Covert mail openings, unauthorized wiretaps and buggings, and illegal break-ins were not unusual.

In 1956, the FBI began the first of its COINTELPRO programs, a series of offensive actions to weaken and dismantle domestic security targets. (The 1956 operation was directed against the ACP; a second operation in the early 1960s focused on the SWP, because of its support of the Cuban revolution.) Concomitantly, state and local efforts-- particularly in California, Illinois, Maryland, Michigan, New York, and Washington--were undertaken to combat the "Communist menace." Sedition laws, criminal syndicalism laws, criminal anarchy laws, and insurrection laws proliferated.

Domestic security investigations grew and proliferated extensively between 1960 and 1974, as a result of instabilities associated with anti-war movements, civil rights movements and their opposition, and

so-called "new left" efforts, among others. Eventually, federal operations became well coordinated and received systematic cooperation from local police units. White extremist groups that mounted violent resistance to civil rights movements were at first a particular target; later, domestic security efforts by law-enforcement agencies shifted to black nationalist organizations. An FBI COINTELPRO program was launched against such organizations in 1967. The anti-war rallies and other urban disorders prompted another COINTELPRO program, beginning in 1968, against the "new left," which included the student anti-war movements, underground newspapers, and other "subversive" entities. By the early 1970s, "extremists," "activists," and "militants" had become the primary objects of attention. In July 1973, over 21,000 domestic security investigations were being conducted by the FBI.

The turning point came in 1974, as the result of a variety of factors. The revelations of the Watergate scandal concerning law-enforcement abuses of civil rights had a profound effect. National concerns about the right to privacy (the Constitutional dimensions of which began to be clarified by the U.S. Supreme Court in the mid-1960s) and about secrecy in government culminated in sweeping legislation at both federal and state levels. Privacy statutes were enacted to shield both government-held and privately held personal information and to assure access by the public to government records. Administrative controls on domestic intelligence activities implemented to avoid civil rights violations resulted in the adoption of new guidelines within law-enforcement agencies. A torrent of case law emerged to constrain domestic security operations, and public attention was sustained by continuing Congressional hearings.

The result was a precipitous decline in domestic security activity by law-enforcement agencies at all levels of government. New legal and administrative impediments to intelligence gathering curtailed such activity, and law enforcement tended to react to supposed or perceived rather than actual constraints. Moreover, resources allocated to domestic security investigations declined simply because domestic terrorism abated noticeably in the late 1970s.

The erosion of law-enforcement intelligence in general and of domestic security intelligence in particular were seen by some as a pernicious development. Many people felt that those responsible for public security were being seriously penalized. In 1978 Congressional hearings,[13] law-enforcement officials testified about the crippling of their abilities to deal with terrorism, civil disturbances, and other domestic security problems, claiming that effective intelligence gathering no longer existed. These officials stated that

- o Informants had virtually disappeared because of freedom-of-information laws and related court decisions and restrictions.
- o Intelligence was no longer freely shared among law-enforcement agencies despite the highly mobile nature of terrorist groups.
- o Electronic surveillance was completely forbidden in 21 states and could be used only under extraordinary circumstances and pursuant to a court order in virtually all of the remaining states.

[13] The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security, Report of the Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, 95th Congress, Second Session, Washington, D.C., 1978.

- o Access to telephone records, bank records, and other third-party records by law-enforcement agencies generally required a court order, and some states required that the subject be notified[14]--all of which could completely vitiate an investigation in cases where immediate access to records was needed to prevent a crime or make an arrest.
- o Intelligence units at state and local levels had been disbanded or reduced to an almost inoperable level.
- o Valuable intelligence files had been completely destroyed in some jurisdictions, impounded in others, and extensively purged in still others.

The domestic security activities of law-enforcement agencies have reflected strong currents of change through recent decades. What was the situation by the end of the 1970s? This study addresses one aspect of that question, as explained below.

THE PRESENT STUDY

This study appraises the impact of the legal and administrative constraints of the 1970s on intelligence gathering and use with respect to domestic security,[15] first, as viewed by law-enforcement officials, and second, on the outcome of a sample of federal and state prosecutions of domestic security cases. We have not attempted to evaluate the impact of these constraints on domestic security cases that did not culminate in

[14] Even where state law does not mandate notification, many banks, telephone companies, and other private organizations holding third-party records notify the subject as a matter of policy.

[15] These constraints are described in detail in Rand Note N-1902-DOJ.

criminal proceedings, although several cases that resulted in the prevention or deterrence of crimes are included in the study.

This study does not measure the extent of the reduction in intelligence gathering and use in the domestic security context that may be attributed to these constraints. Nor does it address the philosophical issue of the proper balance between domestic intelligence constraints and the protection of civil rights.

We examined 51 cases involving incidents of domestic terrorism, 23 of which occurred in the mid-1960s to mid-1970s, and 28 of which occurred in the mid-1970s and later, after the newer constraints were implemented. Both federal and local cases are included in each time period. Information was obtained from interviewees in five major urban areas who were involved in the cases or who had close personal knowledge of them (local police, active and retired local and federal prosecutors, and retired FBI officials). Our analytical approach was to identify the intelligence element (if any) that was decisive in the outcome (i.e., prevention, arrests, prosecution, judgment or verdict, sentence) of each case and then to estimate

- o Whether, in the earlier cases, the outcome might have been different if the newer constraints had been in effect.
- o Whether, in the more recent cases, the outcome might have been different if the older rules had been in effect.

In a number of respects, the GAO follow-up study is an antecedent to the present study. The distinctions between the two are summarized in Table 1. Both studies are concerned with certain impacts of law-enforcement constraints, primarily those that affect intelligence

Table 1

DIFFERENCES BETWEEN THE GAO FOLLOW-UP STUDY AND THE RAND STUDY

Item	GAO Follow-Up Study	Rand Study
Focus	Impact of Attorney General's Guidelines and relevant FBI policy changes on extent, conduct, and results of domestic security investigations by FBI field offices.	Impact of legal and administrative constraints at all governmental levels, as viewed by law-enforcement officials and in terms of outcomes of domestic security cases.
Time period of cases ^a considered	April-November 1976.	Mid-1960s through late 1970s (older rules, pre-1974; newer rules, 1974-1980).
Jurisdictions of cases	Federal only; FBI field offices in New York, Miami, Los Angeles, San Francisco, Minneapolis.	Federal and local; mainly New York, Miami, Los Angeles, San Francisco, and Chicago areas.
Case sample	319 randomly sampled cases from a total of 2,431 FBI domestic security investigations.	51 domestic terrorism cases (half under older rules, half under newer rules).
Information sources	FBI-prepared case summaries; selected file documents; interviews of U.S. Dept. of Justice and FBI officials.	Interviews with current and former investigators and prosecutors involved in or familiar with the cases.
Impact measures	FBI domestic security case-load; distribution of investigative techniques before and after new rules; investigative results.	Outcomes of cases (prevention, prosecution, judgment or verdict, sentence); decisive intelligence technique; comparisons of older and newer cases.
Completion date	Fourth quarter, 1977.	Fourth quarter, 1980.

^aThe term "case" is used differently in the two studies: In the GAO study, a case can be a file of an individual or group investigated by the FBI. In the Rand study, a case refers to a file of a crime or series of crimes, prevented or prosecuted.

gathering and use, on domestic security operations and results; and both rely on case studies to illuminate their investigation. But the studies differ markedly in scope, depth, sources, and emphasis. While the Rand study is more recent, the intervening years have seen relatively little domestic terrorism. However, the Rand study covers a much broader time period, enabling us to discern before-and-after patterns and to identify changes attributable to the newer intelligence constraints. Unlike the GAO study, the present investigation concentrates on cases that culminated in judgment or verdict and sentence, showing how changes in intelligence rules have affected the outcomes of criminal proceedings. Finally, the GAO follow-up study addresses the merit of domestic security operations per se within the FBI context; our study does not consider that issue.

The criminal charges in the cases considered here are generally not distinguishable from those in other criminal prosecutions, except that they include a much higher incidence of explosives offenses.[16] But the crimes--typically murder, assault with a deadly weapon, kidnapping, auto theft, burglary, armed robbery, weapons possession, etc.--were not usually committed for personal gain, although some may have been undertaken to raise funds to finance terrorist activity. In some instances, the crimes appear to have been a "lark," an incidental offense committed by someone associated with a terrorist group. Some of the defendants and/or their groups were the targets of a domestic security investigation prior to the commission of the crimes charged; in a few cases, the investigation resulted in the prevention of criminal acts.

[16] Federal prosecutions are sometimes exceptional in this respect, for there are several-score criminal statutes underlying the Attorney General's guidelines.

It is important to note that the line between domestic and international terrorism is often a thin one. One experienced local investigator said that most of the cases of terrorism, bombing, political extortion, etc., that he had seen involved significant foreign contacts, foreign training, or foreign sponsorship. Other sources emphasized that important leads concerning domestic terrorist groups have sometimes come from foreign intelligence investigations. A domestic security matter may easily become a foreign intelligence situation, bringing into play different investigatory constraints. These considerations are, however, beyond the scope of this study.

ORGANIZATION OF THE REPORT

Section II summarizes the survey of domestic intelligence gathering constraints reported in companion Note N-1902-DOJ. Section III presents the methodology of the study, especially our approach to interviewing and to case collection.

The case sample is described in various ways in Sec. IV--by geographical area, by time of occurrence, by agency source, by type of crime and terrorist group. Also, the contents of a case summary are characterized.

The analytic technique is explained in Sec. V. Summary tables of the case sample are given, along with separate analyses of older and newer cases. Samples from the two time periods are compared, and overall findings are presented, along with qualifications.

Section VI summarizes the views expressed by our interviewees and compares those views with the findings of the case sample analysis. Concluding remarks are given in Sec. VII. The Appendix presents individual case summaries.

II. THE NATURE AND EXTENT OF DOMESTIC INTELLIGENCE CONSTRAINTS

INTRODUCTION

This section summarizes a limited survey of rules of the 1970s on the collection, maintenance, use, and dissemination of information pertaining to domestic security matters.[1]

Broadly characterized, intelligence constraints are of two types: legal (constitutionally, legislatively, or judicially derived) and administrative (guidelines, orders, rules, prohibitions, etc., formulated to implement policy and/or to interpret prescriptions).

Domestic security intelligence constraints have developed continually but unevenly. The survey summarized here is selective rather than exhaustive, and legal constraints receive more attention than administrative constraints.[2] Nevertheless, the survey illuminates the nature and extent of a wide range of limitations on most aspects of domestic security intelligence.

This survey deals with actual, palpable constraints; it does not consider the impact of supposed (i.e., putative) constraints that result from uncertainty in interpreting statutory and judicial law or from concerns about the disclosure of domestic security information or its sources and potential legal liability for impermissible conduct in obtaining and handling such information. Although supposed constraints can have a significant impact on investigative and prosecutorial effectiveness, their analysis is beyond the scope of this study.

[1] The survey is reported in detail in Rand Note N-1902-DOJ.

[2] This imbalance is the result of difficulties we experienced in obtaining access to certain administrative source materials, in particular, investigators' manuals.

In this section, we do not distinguish between "older" and "newer" intelligence constraints, but simply observe the time at which constraints became effective.

INITIATING DOMESTIC SECURITY INVESTIGATIONS

In the 1970s, pronounced constraints on initiating domestic security investigations were implemented. These were primarily administrative guidelines or rules to aid in determining whether the character and activities of target organizations and individuals justified the initiation of intelligence gathering investigations. The leading issue in promulgating such constraints is the standard adopted to justify initiation of an investigation. Should the law-enforcement agency involved be required to have attained a specified level of confidence that a violent crime (or conspiracy to commit one) has occurred, is in progress, or is imminent? Or should some lesser standard prevail?

Examples of initiation constraints include the following.

Relevant portions of the Attorney General's Guidelines for FBI Domestic Security Investigations (March 10, 1976). These landmark guidelines directly addressed the initiation of FBI domestic security investigations. They set out bases for these investigations, identified how and by whom authorization for initiation may be given, and distinguished among three types of investigations: (1) preliminary, (2) limited, and (3) full. Authorization of a full investigation could be given only on the basis of specific and articulable facts giving reason to believe that an individual or group was or might be attempting to overthrow or impair the functioning of government, to interfere (within the United

States) with the activities of a foreign government, to impair interstate commerce, or to deprive people of civil rights.[3] The guidelines did not mandate a strict "criminal" standard for initiating a security investigation, i.e., probable cause to believe a crime has been or is being committed; on the other hand, they did not allow even a preliminary investigation to begin solely on the basis of speech or association that prompted law-enforcement concerns.

On August 30, 1976, the FBI itself adopted a more stringent policy that required, for example, that the investigation of an individual because of his association with an organization could be undertaken only if the organization itself was the subject of a full investigation and the individual was in a policymaking position or had already shown himself likely to use force or violence in violation of federal law.

The Seattle Police Intelligence Ordinance. This ordinance became effective on January 1, 1980, establishing policies governing the Seattle Police Department in collecting, receiving, and transmitting information; establishing procedures, controls, and prohibitions on the collection and use of particular types of information; regulating and forbidding certain police operations; establishing the powers of a criminal intelligence section and its personnel; and providing enforcement procedures, administrative penalties, and civil remedies.

This local legislation focused especially on restricted information (i.e., information concerning political or religious associations, activities, beliefs, or opinions). Restricted information could not be collected unless the subject of the information was reasonably suspected

[3] Authorization depends on four factors: the magnitude of the threatened harm, the likelihood it will occur, the immediacy of the threat, and the danger to privacy and free expression posed by a full investigation.

of criminal activity or the information related to the reliability or knowledgeableability of a victim or witness. An intelligence investigation involving restricted information had to be authorized by a police lieutenant or higher-ranking officer, applying given criteria.

Intelligence Guidelines and Procedures for Police Agencies. Two leading examples of local administrative intelligence constraints are the Procedures for Public Security Activities of the New York Police Department Intelligence Division and the Proposed Operational Guidelines for the Los Angeles Police Department Public Disorder Intelligence Division (PDID). Both prescribed who has authority to initiate an investigation to obtain intelligence by whom, under what conditions, and for what purposes.[4] The PDID guidelines distinguished between preliminary and in-depth investigations; the NYPD procedures distinguished between initial and additional investigations.

Case Law, Statutory Law, and Executive Orders. Leading cases from state and federal jurisdictions generally concur in upholding the legality of law-enforcement intelligence activities, provided the government "can demonstrate a compelling state interest that justifies the resultant deterrents of First Amendment rights and which cannot be served by alternative means less intrusive on fundamental rights." [5] On the other hand, the issue of a specific agency's having authority to

[4] The Proposed Operational Guidelines for the PDID were an interim joint product of the Police Commission and the Police Department, published on April 22, 1980. They were complemented by the PDID Standards and Procedures, which concerned the retention and maintenance of intelligence files, adopted in 1976.

[5] White v. Davis, 13 Cal.3d 757 (1975). Other leading cases include Anderson v. Sills, 56 N.J. 210 (1979); Socialist Workers Party v. Attorney General, 95 S.Ct. 425 (1974); Fifth Avenue Peace Parade Committee v. L. Patrick Gray, 480 F.2d 326 (1973). See The Erosion of Law Enforcement Intelligence..., 1977, op. cit., particularly Chap. V, "Is Law Enforcement Intelligence Legal? A Summary of Court Rulings," pp. 43-48.

initiate security investigations has produced no consensus. The FBI finds its security investigation authority in five Presidential Directives issued from June 1936 to December 1953; under two Executive Orders, dated April 27, 1953, and July 2, 1971; and under the statute 28 U.S.C. Section 533, dated September 6, 1966.[6] In reviewing this authority, the GAO stated, "it is not clearly spelled out, but must be distilled through an interpretative process that leaves it vulnerable to continuous questioning and debate." [7] Presumably, the FBI charter now under consideration by the Congress will resolve legal uncertainties about FBI authority for initiating security investigations.

KINDS OF INFORMATION GATHERED

Information gathered in domestic security investigations must be relevant, necessary, timely, and not violative of legal protections such as the right to privacy and the First Amendment.[8] These requirements are reflected in a variety of constraints on the kinds of information that can be gathered, including (1) direct investigatory controls, (2) First Amendment protections, (3) privacy protections, (4) statutory law, and (5) state-level case law.

[6] A legal brief on this authority appeared as Appendix IV, pp. 248-258, in "FBI Oversight Hearings--1976," House of Representatives Subcommittee on Civil and Constitutional Rights, 94th Congress, First and Second Sessions, September 24, 1975, and February 24, 1976.

[7] "FBI Domestic Intelligence Operations--Their Purpose and Scope: Issues that Need to be Resolved," Report to the House Committee on the Judiciary by the Comptroller General of the United States, February 24, 1976, reproduced as an appendix to the 1976 FBI Oversight Hearings, op. cit.

[8] These descriptive terms are meaningful only in relation to the purposes of information gathering in security investigations. These purposes are controversial, e.g., there is opposition to the long-standing FBI purpose to remain informed about the strength, danger, and activities of extremist groups.

The growth of constraints on kinds of information in the 1970s reflected fresh concerns about First Amendment rights and rights of privacy, as well as continuing attention to Fourth Amendment (search and seizure) rights and others. The thrust of the newer rules was to compel security investigators to obtain approval from an objective magistrate before gathering personal information of various kinds by certain means. With some exceptions, the subjects of security investigations were put on notice as a result of the legal process that security investigators were required to use.

Direct Investigatory Controls

The Attorney General's Guidelines spelled out the kinds (and sources) of information that are permitted to be gathered in a preliminary or a limited investigation to ascertain whether or not there is a factual basis for opening a full investigation. Information gathered in a full investigation must relate to activities of individuals or groups that are the bases for investigation as set out in the guidelines, e.g., activities involving violation of federal law for the purpose of overthrowing the government.

The Seattle Police Ordinance stated conditions permitting the gathering of restricted information (and also private sexual information) by the police. These conditions concern the information's relevance to a lawful purpose of the information gathering, its necessity and timeliness, and the protection of privacy and First Amendment rights, among others.

The NYPD Procedures permitted public security personnel to gather only intelligence information that would, with substantial probability, aid

the NYPD to maintain public order, protect life and property, and insure orderly functioning of the city. In particular, information on political beliefs or preferences of any individual, group, or organization could not be gathered unless it concerned public security functions. A similar limitation applied to data concerning the public habits, predilections, and associates of any person, either as an individual or as a member of an organization. The procedures specified restrictions on the kinds of information obtained by electronic surveillance, photographic intelligence, and undercover agents.

The Proposed Guidelines of the Los Angeles PDID mandated that no information could be recorded about political or religious activities, beliefs, or opinions of an individual, group, or organization unless that information was relevant to a significant threat to public order. Only information that could be properly maintained in a file, subject to periodic review and audit, could be recorded; and individuals' personal associations could be recorded only if the PDID's mission of protecting against unlawful public disorder, threats to life and property, and unlawful interference with civil rights was involved.

First Amendment Protections

A primary issue here concerns the presence of police at public meetings. Some public meetings are a clear source of concern to those responsible for domestic security, yet monitoring of these meetings is widely asserted to stifle the free expression of ideas and causes and to deter free association. What must be resolved is the acceptable balance between these chilling effects on First Amendment rights and the avoidance of public violence and governmental disruption. It is mainly the courts that have spoken to this balance. Leading cases, e.g., White

v. Davis, op. cit., have consistently held that reasonable intrusions on First Amendment rights are permissible when a compelling state interest is involved.

Privacy Protections

Constitutional rights of privacy have given rise to a large and diverse body of statutes, court decisions, and administrative regulations. Here, we are concerned primarily with personal information, held by government or third parties.[9]

Seven states have enacted omnibus statutes regulating all kinds of individually identifiable information held by government agencies, including its disclosure to other government agencies.[10] These statutes generally resemble the federal Privacy Act of 1974 and in four instances apply to local as well as state agencies. State-level statutory privacy protections also exist for specific kinds of government records on individuals.[11] All seven omnibus privacy statutes exempt criminal investigative records from their provisions, and all differ in their provisions for disclosure of personal information pursuant to compulsory legal process.

[9] See "Privacy Law in the States," Appendix 1 to Report of the Privacy Protection Study Commission, Government Printing Office, Washington, D.C., 1977; and R. E. Smith, "Compilation of State and Federal Privacy Laws," Privacy Journal, Washington, D.C., 1978.

[10] Arkansas, Connecticut, Massachusetts, Minnesota, Ohio, Utah, and Virginia.

[11] For example, California statutes specifically govern criminal-justice information, court records, student records, tax records, welfare records, mental patient records, and the Insurance Commissioner's records; Delaware statutes protect driving records, public assistance records, adoption records, school records, arrest records, and juvenile court records; and Michigan statutes protect tax records, drug abuse treatment records, alcohol treatment records, mental health service information, welfare records, and bank department records.

The following kinds of privately held personal information are also regulated by statute:

- o Consumer-reporting, i.e., fair credit reporting and investigation records (17 states).
- o Financial and credit-granting records (16 states).
- o Arrest records (26 states).
- o Employment records (5 states).
- o Medical records (47 states).
- o School records (32 states).
- o Tax records (30 states).
- o Wiretap records (38 states).

Statutory Law

The major statutory laws that regulate personal information commonly involved in security investigations are summarized below.

The Privacy Act of 1974.^[12] This federal statute limited the collecting, maintenance, use, and dissemination of personal information by federal agencies. It applies to all executive departments, the military, independent regulatory agencies, government corporations, and government-controlled corporations, but not to Congress, the federal courts, the District of Columbia, or the governments of U.S. territories or possessions.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (as amended in 1970, 1971, 1978).^[13] Title III specifically regulated

^[12] 5 U.S.C. Sec. 522 (Supp. V, 1975).

^[13] 18 U.S.C. Sec. 2511 et seq.

wiretapping and electronic eavesdropping, thus affecting the gathering of intelligence information by intercepting oral or wire communications. Such interceptions were prohibited, with certain exceptions, such as interception with the consent of a party to the communication and interception properly authorized by a federal court.[14]

The Family Educational and Privacy Rights Act.[15] This federal act restricted the disclosure of personally identifiable information in education records. If such information is disclosed without parent (or adult student) consent or without legal process of which the parents (or adult student) are given advance notice, federal funding becomes unavailable to the school.

The Tax Reform Act of 1976.[16] This federal statute provided that tax returns and tax return information are confidential, and that disclosure was permitted only to a designee of the taxpayer or to a person (such as a spouse) who has a material interest; to a state tax official to administer state tax laws if there is a state law protecting confidentiality; and, for specified purposes, to Congressional committees, the White House, the Treasury Department, and the Justice Department in civil and criminal tax cases, and to federal agencies in nontax criminal cases (upon grant of an ex parte order by a federal

[14] The law of some states is more stringent than federal law in this area. For example, in California, the consent doctrine (under which an interception would be lawful and the information obtained would be disclosable) requires that all parties to the communication give their consent. Title III provides that when a state statute is so authorized, a competent state court may authorize electronic surveillance when the interception may furnish evidence of one of a broad set of specified crimes. California law does not so authorize.

[15] 20 U.S.C. Sec. 1232g.

[16] 26 U.S.C. Sec. 1 et seq.

judge), and the GAO. Unauthorized disclosure is a felony. Civil remedies are also available.[17]

Right to Financial Privacy Act of 1978.[18] This federal law prohibited the disclosure of personal financial records held by a financial institution to any federal government authority except pursuant to an authorized administrative subpoena or summons, search warrant, judicial subpoena, or formal written request.[19] These mechanisms for obtaining disclosure entail notice to the subject of the records and an opportunity to oppose the disclosure.[20]

Fair Credit Reporting Act of 1970.[21] This federal act imposed various constraints on the preparation and disclosure of consumer reports and investigative consumer reports. For example, a consumer report may not be furnished for other than legitimate business needs except by an order of a competent court. An agency must disclose to the consumer the identity of any recipient of reports on him furnished by the agency within the six-months period preceding the consumer's request for this information. An investigative consumer report cannot be prepared unless the consumer is notified (and the nature and scope of the investigation must be disclosed at the consumer's request).

[17] See Sec. 6103 of the Act.

[18] 12 U.S.C. Sec. 3401 et seq.

[19] The position that under the Fourth Amendment bank records require a search warrant or other judicial process in order to be lawfully obtained by law-enforcement agencies had been rejected by the U.S. Supreme Court in United States v. Miller, 425 U.S. 435 (1976).

[20] The notice may be delayed by an order of an appropriate court if the government authority shows that the records being sought are relevant to a legitimate law-enforcement inquiry and that the notice would likely result in flight from prosecution, intimidation of witnesses, endangering life, etc.

[21] U.S.C. Sec. 1681 et seq.

The Foreign Intelligence Surveillance Act of 1978.[22] This federal statute regulated the electronic surveillance of agents of foreign powers who engage in activities violating U.S. criminal statutes. It also included a provision for handling information concerning a U.S. person acquired from an electronic surveillance conducted under the act. Such information may be used and disclosed by federal officers without the consent of the subject only if specified minimization procedures are used.[23]

California Financial Privacy Act of 1976.[24] This act typifies state laws equivalent to the federal Right to Financial Privacy Act. It requires that an agency seeking financial records from a financial institution must either receive authorization by the consumer or obtain an administrative subpoena, search warrant, or judicial subpoena. The customer to whom the records apply must be notified in advance of the disclosure, unless a court decides that prior notice is not in the public interest.

California Case Law Constraining Access to and Use of Personal Information

California courts were notably active in the 1970s in applying rights to privacy to limit access to and use of personal information.[25] Significant cases are summarized in Rand Note N-1902-DOJ.

[22] 50 U.S.C. Sec. 1801 et seq.

[23] Among other things, "minimization procedures" are "procedures that require that no contents of any communication to which a U.S. person is a party shall be disclosed, disseminated, or used for any purpose or retained longer than 24 hours unless a court order under section 1805 of this title is obtained."

[24] California Government Code Secs. 7460-93.

[25] California is one of nine states that explicitly provide a right to personal privacy in their constitutions.

TECHNIQUES OF INFORMATION GATHERING

Direct Investigatory Controls

The Attorney General's Guidelines imposed severe strictures on the means of obtaining intelligence in preliminary or limited investigations. They specifically proscribed the recruiting and placement of informants within target groups, mail covers, and electronic surveillance. These techniques are permitted in full investigations, but specific approval and review requirements must be met. Furthermore, mail covers must conform to postal regulations, and electronic surveillance must accord with the stringent conditions of Title III. An additional set of guidelines for the use of informants also was promulgated in 1976.

The Seattle Police Intelligence Ordinance forbade the use of informants or infiltrators to collect restricted information about a victim or a witness to a crime. It also limited the use of infiltrators for gathering restricted information from within and about political, religious, and other specified organizations. Informants must be instructed not to participate in unlawful acts of violence, use unlawful techniques to gather information, initiate a plan to commit criminal acts, or participate in criminal activities of persons under investigation, except with specified approval.

The NYPD procedures specified that photographic surveillance had to have prior authorization by high-ranking officers and could be used only to identify persons who are involved in acts of violence or other violations of law; to obtain evidence of such violations of law; or to

identify individuals or groups who may pose a threat to the safety of persons who hold or are candidates for public office. Electronic surveillance could be conducted only in strictest conformity with court-authorized warrants and with the rules and procedures governing the entire NYPD.

The Los Angeles PDID guidelines mandated specific authorizations for photographic or electronic surveillance and limited their use to purposes closely resembling those given in the NYPD procedures.

FBI agents have no formal procedures for the use of trash covers, the conduct of interviews, or the elicitation of third-party or other government-agency records. Under federal law, trash placed out for collection may be seized without a warrant. Interviews are treated in general terms in the FBI Manual of Investigative Operations and Guidelines (MIOG) and in the Attorney General's Guidelines. Historically, the FBI has had access to state motor vehicle records and local law-enforcement records. Access to records of other federal agencies is strictly governed by the federal Privacy Act.

Legal Constraints on Electronic Surveillance

Constraints on the use of electronic surveillance by law-enforcement agencies are diverse and complex. They reflect the attention of the U.S. Supreme Court to the issue of what comprises a "search" under the Fourth Amendment and the reaction of legislatures to its decisions.

Landmarks in federal case law, statutory law, and administrative policy affecting the conduct of electronic surveillance are listed chronologically in Rand Note N-1902-DOJ.

The basic federal statute regulating electronic surveillance is Title III. This statute limits the 1934 Federal Communications Act to radio communications. It forbids, with certain exceptions, all forms of unauthorized wiretapping and eavesdropping, which are felony offenses, and it permits interception of oral or wire communications only by a person acting under color of law who has the prior consent of a party to the communication and by a private person who has the consent of a party and intends no criminal, tortious, or injurious result. There is, however, a foreign intelligence surveillance exception, and the Attorney General (or a specially designated Assistant Attorney General) may authorize application to a federal judge for a court order permitting interceptions in the investigation of certain enumerated federal offenses.

State law pertaining to electronic surveillance follows federal law closely in Kansas, Minnesota, Nebraska, Hew Hampshire, New Mexico, South Dakota, Virginia, and Wisconsin.[26] California law is more stringent than federal law.[27]

Informants and Undercover Agents

Informants and undercover agents have been perhaps the most fruitful source of security intelligence. Legal and administrative constraints on their use have emerged slowly and selectively.

[26] As characterized in "Compilation of State and Federal Privacy Laws," op. cit.

[27] California Penal Code Secs. 630-637.2 forbid wiretapping and electronic eavesdropping except by police where such activity was permitted before enactment of these provisions. All-parties' consent is the general California rule, but with some law-enforcement exceptions. No wiretap warrants can be obtained.

The U.S. Supreme Court has found that under federal Constitutional law, law-enforcement agencies have broad discretion in the use of this technique. The court has concluded that the Fourth Amendment does not prohibit court testimony about a defendant's statements to an informant, howsoever the informant recorded or transmitted the information; and it has decided that informant information will support a finding of probable cause to issue a warrant, but the informant must be found credible and the basis for believing him credible must be shown. Also, the Court has generally upheld the evidentiary rule of most states that police officers need not, except on matters of a suspect's guilt, invariably be required to disclose an informant's identity.[28]

The Court has further held that the Fifth Amendment privilege against self-incrimination is not violated--in the absence of coercive tactics or custodial interrogation--when an informant elicits incriminating verbal information from a suspect. It has rejected the notion that invasion of the attorney-client relationship by an informant violates the right to counsel,[29] unless formal criminal proceedings have commenced and the informant's report relates to the specific charge against the defendant.

[28] Case law in several states leans toward disclosure of informant identity. Generally, a court balances the government's privilege of nondisclosure against the defendant's right to a full and fair opportunity to defend himself. In California, for example, "there is no privilege of nondisclosure if disclosure is relevant and helpful to the defense or essential to a fair determination of the case." (18 Cal. Jur.3d, Sec. 964.)

[29] Some state law differs. In California, for example, mere presence is a constitutional violation. Barber v. Municipal Court, 24 Cal.3d 742 (1979).

Neither the U.S. Supreme Court nor lower courts have yet found an informant's activities to be unconstitutional on federal due process grounds, i.e., as shockingly unfair police practices; nor have remedies against the use of informants been granted on the grounds that they have tainted the administration of justice.

The scope of the protection available under the First Amendment against intelligence gathering and, in particular, against informants has not been clearly articulated by the U.S. Supreme Court. In a leading 1972 case,[30] it held that there was no legal basis for a claim that the mere existence of an intelligence gathering and distributing system created an unconstitutional chilling effect on First Amendment rights, but it refrained from ruling on the propriety or desirability of the type of surveillance at issue.

Entrapment

Entrapment, police conduct that can be a basis for an affirmative legal defense in a criminal proceeding, does not strictly apply to police conduct in a security investigation whose purpose is primarily to gather information and not to prosecute after the fact. But to the extent that criminal prosecutions are at least a by-product of such investigations, entrapment is a relevant consideration.

The majority view of a closely divided U.S. Supreme Court is that entrapment is proved only by a "subjective test": if (1) governmental investigation and inducement overstepped the bounds of permissibility and (2) the defendant did not harbor a preexisting criminal intent. Thus a finding by a jury that the defendant was predisposed to commit

[30] Laird v. Tatus, 408 U.S. 1 (1972).

the offense would defeat the entrapment defense. The minority view holds to an "objective test": that the defendant's conduct is irrelevant, and that the judge alone can decide whether impermissible law-enforcement activity occurred.[31]

The entrapment concept has developed separately in the states. In 1975, California adopted a new and objective test of entrapment,[32] based on whether the law-enforcement agent's conduct was likely to induce a normally law-abiding person to commit the offense. Official conduct that does no more than offer a suspect an opportunity to act unlawfully is permissible, but overbearing conduct is not.

INFORMATION HANDLING

The NYPD procedures provide a good example of direct investigatory constraints on information handling. NYPD Public Security officers must begin by designating the source of all intelligence information (along with a statement of informant reliability when an informant is the source). Then all raw intelligence information must be evaluated by an analysis section before it is reported, recorded, filed, or disseminated. Information deemed to lack substantial relevance to the public security mission is destroyed by the chief analyst or the commanding officer of the Intelligence Division. If retained, the intelligence information is then formally classified according to importance, time priority, source reliability, and content substantiation.

[31] The leading U.S. Supreme Court cases are Sorrells v. United States, 287 U.S. 435 (1932), Sherman v. United States, 356 U.S. 369 (1958), and United States v. Russell, 411 U.S. 423 (1973).

[32] People v. Barraza, 23 Cal.3d 675 (1975).

This evaluation and classification may indicate a need for additional data. Next, all available data on the subject being investigated are assembled and analyzed. The analysis section assesses the causes and significance of past events and projects future developments. The commanding officer of the Intelligence Division decides whether to accept and report the analysis, to require its revision, or to direct further investigation.

Once intelligence has been evaluated and found to meet specified criteria, it is recorded on index cards, color-coded by year to facilitate periodic review. These cards indicate the source of the information and the classification assigned by the analysis section.

The NYPD procedures include criteria for disseminating public security information, distinguishing between intradepartmental and extradepartmental distribution. Information may not be disseminated formally or informally to nongovernmental individuals or agencies. A special, more restrictive set of criteria and procedures are applied to the dissemination of surveillance photographs.

Frequent review by the commanding officer of the Intelligence Division, the Public Security Coordinator, the legal analyst of the division, and the chief analyst is mandated to determine whether the filed information on a specific target should continue to be collected and retained. And every file card must be reviewed within two years of its initial filing to determine whether it should be kept active, placed in a dormant file for reevaluation within two years, or purged and destroyed. Similar procedures obtain for surveillance photographs.

California Criminal Intelligence File Guidelines

The California Department of Justice, Division of Law Enforcement, published in 1978 (and republished in 1980) a comprehensive set of guidelines for the handling of criminal intelligence files maintained by law-enforcement agencies within the state. By its definition, a criminal intelligence file consisted of stored information on the activities and associations of individuals and groups known or suspected to be involved in criminal acts or in the threatening, planning, organizing, or financing of criminal acts.

The guidelines covered the content of these files, criteria for retaining information within them, assessment of source reliability and content validity, classification of information security level, quality control, dissemination, purging, and file security. The guidelines called for the exclusion of criminal-history information, which is subject to specific audit and dissemination constraints, such as California Penal Code Sec. 11105, which deals with state summary criminal-history information prepared by the Attorney General.

Freedom-of-Information and Privacy Laws

Freedom-of-information and privacy laws are the main source of supposed (i.e., putative) constraints on domestic intelligence gathering. The importance of these laws derives from their impact on

- o Access by the public to personal information held by law-enforcement agencies and to information about those agencies.

- o Access by the subject individuals and organizations to personal and organizational information held by law-enforcement agencies.
- o Access by law-enforcement agencies to personal and organizational information held by other government agencies and by private organizations.

These laws are a source of significant uncertainty about access to and disclosure of intelligence information, its sources, and the techniques of gathering it. The uncertainties generate considerable litigation of unpredictable outcome, which exacerbates the impact of the laws on government conduct in general and on domestic security investigations in particular.

The federal Freedom of Information Act (FOIA), [33] enacted in 1966 and amended in 1974, deals with the creation of and the limitations upon the right of the public to obtain access to whatever information federal agencies maintain. The FOIA requires federal agencies to make available all information held by them to any person who requests it, unless the information falls within one of nine narrowly construed exemptions. [34] It further provides that any reasonably segregable portion of a record

[33] The FOIA is found in 5 U.S.C. Sec. 552 (1966), as amended 5 U.S.C. Sec. 552 (Supp. 1976).

[34] The seventh exemption, the one most relevant to law-enforcement information, follows: Exempted from mandatory disclosure are "(7) investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal investigation, or by an agency conducting a lawful national security investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law-enforcement personnel."

shall be provided to any person requesting this record after deletion of the portions that are exempt.

The burden is on a law-enforcement agency to justify its denial of record disclosure if the requestor sues in federal district court, as provided by the FOIA, to compel such disclosure. If the court finds any reasonably segregable portion of the material is not covered by any of the nine exemptions, that portion must be disclosed.[35]

Federal investigatory files for law-enforcement purposes, which generally include files of federal domestic security investigations, are largely exempted from mandatory disclosure under the FOIA by its seventh exemption, provided one of six specific harms is shown. Courts have tended to construe the language of the first of these harms, interference with enforcement proceedings, as meaning ongoing enforcement proceedings or investigations, not closed ones, according to the intent of Congress in enacting the 1974 amendments.

Nearly every state has a freedom-of-information or open-public-records statute that requires state government records to be available for public inspection.[36]

Once a record is determined to be a public record, it must be disclosed to anyone requesting it unless another statutory provision permits or requires that it be withheld. Like the federal FOIA, many

[35] Requests for disclosure of manuals of investigatory techniques and procedures are particularly problematical. Denial of these requests relies mainly on exemption 7(E), i.e., because of the harm of disclosing investigative techniques and procedures. Yet federal case law makes doubtful that a law-enforcement agency can deny disclosure of portions of investigative manuals that do not have national security classification. Litigation is needed to resolve this issue case by case.

[36] "Privacy Law in the States," op. cit.

state open-records statutes include an exemption for records whose disclosure would result in an unwarranted invasion of personal privacy. Another common provision exempts records whose disclosure is otherwise prohibited by law. Typically, open-records statutes exempt specific types of records, often by a permissive exemption. Law-enforcement records, as defined in the state, are customarily given a permissive exemption from disclosure. But courts tend to construe these exemptions narrowly. For example, a California court, in construing Sec. 6254(f) of the California Government Code, a provision granting permissive exemption, held that official files or information not involving a definite prospect of criminal law enforcement were not protected from disclosure or discovery.[37]

Some states have enacted statutes that provide for the confidentiality of specific government-maintained records, e.g., criminal-history information, overriding their open-records statutes. Also, exempt information held by law-enforcement agencies may be open to discovery in a criminal proceeding if the court finds it to be essential to a fair trial. The penalty for nondisclosure in these circumstances can be dismissal of criminal charges. Thus, the shield for domestic security intelligence provided by an exemption from freedom-of-information disclosure can be uncertain and unreliable.

The federal Privacy Act of 1974 is concerned with safeguarding personal privacy by limiting the collection, maintenance, use, and dissemination of personal information by federal agencies.[38] It

[37] State Division of Industrial Safety v. Superior Court, 43 C.A.3d 778 (1974).

[38] The Privacy Act is found in 5 U.S.C. Sec. 552a (Supp. V, 1975). The Act's restrictions apply only to the federal government, covering all executive departments, the military, independent regulator agencies, government corporations, and government-controlled corporations. They do not apply to Congress, the federal courts, the

imposes a variety of requirements on systems of records containing information that is accessed by personal identifiers.[39] Civil and criminal remedies through legal actions in federal district courts are provided to the individual who is improperly denied access to or amendment of his records or who is adversely affected by improper disclosure of records or other agency violations of the Privacy Act.

Three types of exemptions are contained in the Act[40]:

- o Conditions of disclosure, i.e., conditions under each of which an agency may disclose a personal record without prior written consent of the subject.
- o General exemptions, i.e., characteristics of a system of records that enable an agency head to promulgate rules exempting the system from most of the requirements of the Act.
- o Specific exemptions, i.e., characteristics of a system of records that enable an agency head to promulgate rules exempting the system from specified requirements of the Act.

District of Columbia, or the governments of U.S. territories or possessions.

[39] For example, an agency must publish annually a notice of the existence and character of its records systems; must supply specified items of explanatory information to an individual about whom personal information is being collected for its record systems; must store only information relevant and necessary to accomplish a required purpose of the agency and maintain the information with accuracy, timeliness, and completeness; must not disclose information except by written consent or upon request of the subject, except in 11 specified circumstances (for example, to agency employees to perform their duties, when required by the FOIA, for a routine use, and to another agency for a civil or criminal law-enforcement activity, given an appropriate request); must keep an accurate accounting of each disclosure for at least five years, available to the subject of the disclosures.

[40] Contained in subsections (b), (j), and (k), respectively.

The Privacy Act does not erect effective barriers to the transfer without consent of federal law-enforcement information on individuals among federal law-enforcement agencies and to other law-enforcement agencies.

Congress has conferred a broad immunity on federal criminal law-enforcement agencies from the requirements of the Privacy Act, including access by an individual to investigatory records compiled on him for law-enforcement purposes. However, it does contain the following limitation on exemption:

... if any individual is denied any right, privilege, or benefit that he would otherwise be entitled to by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent disclosure of such material would reveal the identity of the source who furnished information to the government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence. (Subsection (k)).

This provision is patently a basis by which the subject of domestic security records could through legal action seek to overturn a denial of access, and is thus a source of uncertainty as to whether security information can be fully and reliably shielded from disclosure.

The impact of freedom-of-information and privacy laws and the uncertainty about their effects on domestic security intelligence data derive largely from the interaction of the two types of laws as they operate concurrently.

The interaction of the Privacy Act of 1974 and the FOIA is indicated in the following excerpt[41]:

[41] "Access to Information? ...," op. cit., p. 140.

The FOIA and the Privacy Act provide two different avenues by which individuals can request information from government agencies. While each has its advantages and disadvantages, the important point is that the FOIA is the parent act and ultimately governs access to information. The Privacy Act is relegated to the backseat when a successful disclosure request is made under the FOIA. Thus, even if a record has been declared exempt under the Privacy Act, access may still be sought under the FOIA with its attendant nine exemptions. If the record is available under the FOIA, access must be granted, the Privacy Act notwithstanding.

Generally, an individual seeking information regarding a third party must proceed under the FOIA, since the Privacy Act blocks access to such information. To obtain access under the FOIA, it is necessary to justify intrusion into the third party's privacy by showing that disclosure is not a clearly unwarranted invasion of personal privacy. If disclosure is not a clearly unwarranted invasion of personal privacy or prohibited by any other FOIA exemption, then the file must be made available pursuant to the FOIA and section (b)(2) of the Privacy Act. Qualifying in this manner renders the Privacy Act ineffectual to impede access to record systems containing information about third parties. (Original footnotes omitted.)

This argument appears to apply not only to third-party access but also to the subject's seeking disclosure, which would not be an invasion of his own privacy. In other words, a law-enforcement agency must rely on an exemption of the FOIA, rather than its record exemptions under the Privacy Act, to avoid disclosure of its investigatory records. At the same time, the courts are constrained to interpret this exemption narrowly.

A contradictory interpretation of the interaction between the Privacy Act and the FOIA is indicated by the following[42]:

Subsection (g) of the Privacy Act expressly prohibits agencies from relying on the exemptions of the FOIA to withhold information otherwise available to the requestor under the Privacy Act. However, neither Act contains any provision

[42] "FOIA-Privacy Act Interface," *op. cit.*, p. 586.

dealing with the situation where an individual requests his or her records under the FOIA when the agency has exempted them from disclosure under the Privacy Act. In addition to claiming that portions of the requested record are exempt under the FOIA, the agency may contend that under the Privacy Act its exemption of the system containing the record renders the entire record "specifically exempted from disclosure by statute" and therefore unavailable under the FOIA's exemption 3. An agency might use this argument to withhold a record from its subject even though none of the other FOIA exemptions applied.

The determination of which view prevails in a court action has not been made.[43] Until case-by-case decisions and legislative amendments clarify the joint effects of these two laws, the risk that certain investigatory records may have to be disclosed at some future time cannot be confidently assessed. This context of uncertainty has been blamed for stifling domestic security investigations by federal law-enforcement agencies. These two laws are said to have prompted the destruction of some existing investigatory files, the purging of others, the revision of purging schedules, and the modification of storage, security, and access practices in handling information files. Files of intelligence information gathered in an investigation undertaken without a clear expectation that criminal proceedings will ensue may be particularly subject to disclosure.

Five of the seven states having omnibus privacy or fair-information-practices acts have attempted to anticipate and resolve conflicts between privacy and freedom-of-information legislation.[44] The

[43] Unless a requester under the Privacy Act also makes a separate request under the FOIA, he may not be able to contest in court the withholding of the requested records, since the agency could have exempted not only the record system but also the court's jurisdiction.

[44] "Privacy Law in the States," *op. cit.*

Arkansas and Utah fair-information-practices acts specify that they shall not be interpreted so as to limit access to information available under their respective open-records statutes. Similarly, the Connecticut and Massachusetts privacy acts state that their provisions limiting disclosure do not apply to information that is otherwise authorized to be disclosed by statute. The Minnesota privacy law establishes a procedure for each state agency to categorize its records on individuals as "confidential," "private," or "public," where "public" records consist of information that is available under the open-records statute. In the absence of explicit statutory authority to categorize a specific record as private or confidential, the agency must categorize it as public.

Criminal Proceedings

Domestic security investigations do not necessarily culminate in criminal proceedings, but law-enforcement agencies generally seek criminal prosecutions following such investigations. Because the handling of security investigation information as evidence is central to these proceedings, it is important to consider factors that limit its utility for this purpose. These factors include:

- o The exclusionary rule fashioned by the U.S. Supreme Court as a sanction against police misbehavior in violation of the Fourth Amendment by unreasonable search and seizure. Difficulties for prosecutors have increased as the courts recognize an ever-widening set of situations in which the police cannot gather admissible evidence without first invoking judicial process,

usually in the form of a warrant issued by a neutral magistrate.

- o Liberal criminal discovery rules, defense-favoring court decisions on criminal discovery, and defense abuses of the discovery process. Motions for disclosure of an informant's or undercover agent's identity can be particularly troublesome, and the unwillingness of the police to reveal this information can cause dismissal of the case. This unwillingness generally reflects agency policy.
- o The defense of discriminatory law enforcement or prosecution. The California Supreme Court, for example, in Murgia v. Municipal Court, 15 Cal.3d 286 (1975), held that on the basis of this defense, criminal defendants may obtain a discovery order directing the prosecutor to produce information relevant to the claim that various penal statutes were discriminately enforced against them.
- o Stringent state laws regarding violation of the attorney-client privilege in criminal proceedings. Under California case law, for example, the mere presence of a government agent at an attorney-defendant conference suffices for dismissal of charges on the grounds that the California constitutional right to counsel embodies the right to communicate in absolute privacy.[45] Under federal law, mere presence does not suffice.
- o Increased state adoption of the objective test of entrapment, which considers police conduct alone, with the defendant's conduct or predisposition being irrelevant.

[45] Barber v. Municipal Court, op. cit.

REPORTING AND CONTROLLING SECURITY INVESTIGATIONS

Several reporting and controlling requirements that affect the conduct of security investigations have been noted above, including

- o The need for police to invoke legal process to obtain third-party-held records, to conduct searches, to intercept communications, etc.
- o Monitoring of the control of communications interceptions by the judge who granted the interception order.
- o The requirements for agency officials to maintain confidentiality of investigatory files under privacy and freedom-of-information laws.
- o Audits of intelligence files imposed by statute or regulation.

Here, we focus expressly on provisions for reporting and controlling of security investigations. We shall use the Seattle Police Intelligence Ordinance as a typical example of direct investigatory control. This ordinance specifies that the police may not collect restricted information without authorization by a commander of specified rank or higher. The authorization may be in response to a written request from a prosecution attorney, a city attorney, or the Attorney General of the state of Washington or of the United States. Conditions for granting the written authorization are given in detail, and the necessary contents of the authorization[46] are specified.

[46] The identity of the subject; the violation of law, past or pending, to which the collection of restricted information is deemed relevant; an explanation of the restricted information sought and its relevance; the basis for reasonable suspicion that the subject has engaged in or is about to engage in unlawful activity; justification for the use of an informant or infiltrator if one is to be used; and an explanation of protective measures to avoid violations of civil rights.

Extensions of the original authorization, for additional periods of 90 days each, may be authorized by the Chief of the Department. The additional authorization must describe the restricted data already collected and justify the need to collect additional information.

This law sets forth conditions that must be met to transmit restricted information to another criminal justice or governmental agency. It prohibits the use of infiltrators except by authorization to collect restricted information and with the written approval of the Chief. Infiltrator use must be reviewed by the Chief or his designee at the end of each authorization period. The ordinance also contains instructions to be given paid informants in carrying out their assignment, and it itemizes the powers and functions of a criminal intelligence section which processes and analyzes investigative information, including restricted information.

The ordinance provides for the appointment of an auditor to conduct audits of department files and records at unscheduled intervals not exceeding 180 days, to ascertain violations of this law. The Chief must immediately investigate violations reported by the auditor. The auditor has the further duty of notifying any person about whom restricted information may have been collected in violation of the ordinance who may have a civil remedy.

Finally, this law sets forth the civil liability of the City of Seattle to persons whose rights were injured by violation of its provisions and specifies minimum damages payable. It mandates an annual report by the Chief on its implementation, to be submitted to the Mayor, the City Council, and the City Controller, and to be filed as a public record.

III. METHODOLOGY

THE BROAD APPROACH

To assess the impacts of the newer intelligence rules on the effectiveness of investigations and prosecutions of terrorist-related conspiracies and crimes, we adopted a conceptually simple dual approach: This analysis attempts (1) to determine how law-enforcement officials, prosecutors, and judges view such impacts--that is, to determine what they perceive the impacts to be--and (2) to collect a relatively complete and representative sample of both older and recent cases that would enable us to draw quantitative conclusions about impacts of the newer intelligence rules. The measures we selected for the analyses are outcomes of cases in the sample. According to our definition, completely successful outcomes include prevention of an incident or crime, and/or the identification and arrest of the suspects and their conviction and sentencing.[1] We tried to determine the basis for the outcomes of cases and also to assess what those outcomes would have been under the "opposite" rules, i.e., how cases that occurred under the older rules would have fared under the newer rules and vice versa. Using the proportion of cases whose original and imputed outcomes hinged on investigative techniques and issues affected by the intelligence rules then in effect, we then evaluated the overall impacts of the newer

[1] Some cases can be viewed as investigative successes (i.e., the police "clear" or solve the case by identifying the perpetrator and arresting him) but prosecution failures (i.e., the prosecutor declines to prosecute, the judge or prosecutor dismisses the case, or the defendant is acquitted). Rather than adopting a rigid view of what constitutes success, we did the analysis both ways (i.e., we analyzed such cases both as successes and as failures) to see what difference it would make.

rules. (This analytical approach is discussed in more detail in Sec. V.)

Comparison of the results of our quantitative analysis of cases with the qualitative results of our interviews reveals the degree of consistency between the perceived impacts and the objectively measured impacts.

THE INTERVIEWEES

The officials we interviewed represented a variety of agencies, as shown in Table 2. The interviewees include current and former officials of federal and local law-enforcement and prosecution agencies who had intimate knowledge of terrorist-related conspiracies or acts and their general geographic areas of operations. We particularly sought "old hands" whose first-hand experience spanned the entire period of interest

Table 2

CURRENT OR PAST AGENCY AFFILIATIONS OF INTERVIEWEES

Agency	Los Angeles	San Francisco/ Oakland	New York	Miami	Chicago
Local police	Los Angeles Police Dept.	San Francisco Police Dept.	N.Y. City Police Dept.	Miami Police Dept.; Dade County Public Safety Dept.	...
Local (county) prosecutor	Los Angeles County DA's Office	San Francisco County DA's Office	Manhattan DA's Office	Dade County State Atty.'s Office	Cook County State Atty.'s Office
Federal prosecutor	U.S. Atty.'s Office	U.S. Atty.'s Office

(1965-1980), because their experience would enable them to make informed judgments about the impacts of the newer intelligence rules. We looked for service in, or direction of, police intelligence units or investigative units that dealt with terrorist-related incidents and crimes and prosecution of such crimes.

Because the radical/activist groups that have been responsible for the majority of terrorist incidents and crimes in the United States over the past 15 years[2] have operated in and about large metropolitan areas, we sought interviews at the local government level in such areas, as well as at the federal level. (Terrorist incidents are investigated and/or prosecuted at one or both levels.) We were unable to interview officials from the Chicago and Miami Beach Police Departments because, for various reasons, they refused to cooperate. But we did conduct interviews with current and/or past officials of the county prosecution agencies in these areas.

From the outset, we attempted to obtain official cooperation from the FBI in collecting case summaries and in interviewing current and former officials who had intimate knowledge of terrorist-related investigations. While awaiting official notice of such cooperation, we interviewed local law-enforcement and prosecution agencies in Los Angeles, San Francisco, and New York. After considerable delay, we were formally notified that the FBI would not cooperate. By this time, we had insufficient time or resources to return to these cities for interviews with federal prosecutors. We did, however, interview a few

[2] Various Cuban anti-Castro groups, Puerto Rican separatist groups, Black Panthers and other Black power groups, the Ku Klux Klan, the Minutemen, the Jewish Defense League, the Weathermen.

former FBI officials, who provided some insight, opinions, and a few cases.

THE CASE SAMPLE

Our case sample comprises incidents and crimes that were partially or wholly motivated by political, social, or racial considerations, rather than by personal gain or other personal motives. Since there is no comprehensive central file of all such cases, we had to rely on interviewees' memories, refreshed sometimes with case materials (when available). Thus, our case sample suffers from several types of bias and, for some cases, possible inaccuracies.

Although we were able to interview a few former FBI agents and officials, the absence of current FBI interviewees introduces several biases. First, the case sample is more heavily weighted toward cases investigated (partially or wholly) and prosecuted at the local level. Second, by the virtual exclusion of FBI cases in which terrorist incidents were prevented,^[3] the case sample is biased toward cases that reached prosecution. Third, the "older" portion of the sample excludes cases in which certain investigative techniques, such as illegal electronic surveillance and break-ins, predominated. Clearly, such techniques could not and would not have been used under the newer intelligence rules.

[3] For example, FBI investigative techniques used against some terrorist groups during certain periods (e.g., "aggressive interviewing techniques" used against the Ku Klux Klan between 1964 and 1971) were largely designed to deter and prevent future violence. See Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Vol. III, GPO, Washington, D.C., 1976, pp. 18-20; and John T. Elliff, The Reform of FBI Operations, Princeton University Press, Princeton, 1979, p. 27 and discussion of Preventive Techniques, pp. 148-151.

Bias was also introduced simply by our collection method--interviewing a limited sample of former and current officials to probe their memories. Because we could not interview some former officials who had left certain agencies, the older portion of the case sample is affected in an unknown way. Reliance on interviewees' memories probably affects the nature of the older rules cases in the sample somewhat more than the newer rules cases, since memories dim and distort with time. Also, because a few local agencies refused to cooperate and because it was not possible to interview all officials, another unknown bias may have been introduced. For example, interviewing local prosecutors but not police officials in the Chicago area may have resulted in the exclusion of certain cases whose outcome was prevention rather than arrest and prosecution.

We tried to elicit factual details sufficient to judge what governed the outcome of each case and whether the outcome would have been different under other intelligence rules. Some interviewees could recall cases in minute detail; others needed to refresh their memories with available case materials; still others could remember only the broad outlines of a case.

Each case was summarized in a common format. The case summaries are reproduced in the Appendix. The year of occurrence, the case identification, and the current or past agency affiliation of each interviewee who discussed the case are shown at the beginning of each summary. The summaries themselves are divided into (1) the case facts and chronology, (2) the case outcome, and (3) comments and conclusions. The latter part discusses whether and why the outcome would have changed under the other intelligence rules.

IV. THE CASE SAMPLE

We examined 51 cases in which politically inspired crimes were prevented or prosecuted; 23 of the cases occurred under the older rules, and 28 under the newer rules.[1] Although this sample is small, our respondents concurred that we had exhausted their memories of cases relevant to this inquiry. Generally speaking, older rules cases occurred before 1975 and newer rules cases between 1975 and 1980 (many of the newer federal rules date from 1975). However, a specific case's categorization by era depends on the applicable intelligence constraints, that is, those intelligence rules that were most relevant to the case outcome. For example, one case's outcome depended mainly on the local police department's administrative guidelines for opening an intelligence investigation. Although the case occurred in 1975, after our general time demarcation line, the applicable newer intelligence rules were not promulgated until the 1976-1977 time period; thus, this case is considered an older rules case.

The universe of cases that could have been examined is, in fact, quite small. Most observers regard the mid- to late 1960s as the beginning of the upsurge in political violence in the United States, although accurate statistics on politically inspired crime are not available for the period of our investigation. Neither the Department of Justice nor the FBI has records systems that provide automatic

[1] As we show in the next section, the 23 older rules cases resulted in 21 apprehensions and prosecutions and two "no prosecutions" (prevention/disruption programs that tainted evidence and precluded prosecution); the 28 newer rules cases resulted in 32 apprehensions and prosecutions, because both state and federal prosecutions ensued in four cases.

retrieval of all politically motivated crimes. And data bases of terrorist events maintained by the Central Intelligence Agency and The Rand Corporation deal only with incidents of international terrorism and thus capture only those incidents in the United States that are carried out by foreign groups or pertain to foreign causes.

Risks International, Inc. (a private firm located in Alexandria, Virginia) has probably the most complete chronology of incidents of U.S. domestic terrorism. This chronology lists 625 acts of terrorism between 1970 and 1980 but lacks some events and deliberately excludes violent demonstrations and riots. On the basis of the Risks chronology and a review of newspapers of the late 1960s, we estimate that between 700 and 800 incidents of political violence occurred in the United States during the period covered by our study. Most of these could not be included in our sample, because they were never solved. For example, bombings, which are the principal form of terrorist activity in the United States, comprise over 80 percent of the incidents in the Risks chronology, and most are unsolved. According to one FBI official, less than 5 percent of all bombings result in arrests. The record is better for politically motivated bombings, but according to Florida officials, of 59 bombings that occurred between 1974 and 1979, only 16 resulted in arrests. None of the members of the New World Liberation Front, a terrorist group responsible for nearly 100 bombings in the San Francisco Bay area, were ever identified or apprehended. (Police later did match the fingerprints of a murder victim with those found on one of the NWLF bombs.) Also, a single investigation or prosecution may represent several bombings; thus, the number of bombing cases is much smaller than the number of bombings. We have estimated that fewer than one-fourth

of the bombing incidents resulted in completed cases that we might have studied.

Few terrorist homicides are ever solved. Florida officials recorded eight such murders between 1974 and 1979, most of which remain unsolved. In contrast, most kidnapers in the United States are caught; but there has been only one known politically motivated kidnapping in the United States--the abduction of Patricia Hearst by members of the Symbionese Liberation Army. The perpetrators were all either killed during a shootout with police in Los Angeles or apprehended and convicted. Politically inspired hijackers and those who take hostages in embassies and consulates often allow themselves to be surrounded by police. Eventually they are compelled to surrender to authorities here or, in the case of airline hijackings, to authorities abroad. Their apprehension does not involve intelligence operations. We estimate that only a few hundred cases of political violence involved intelligence operations during the entire period--possibly fewer than 200.

GEOGRAPHIC LOCATION

Our case studies are drawn primarily from five metropolitan areas: Los Angeles; San Francisco and Oakland; New York; Miami and Dade County; and Chicago. The Risks chronology indicates that 51 percent of all terrorist incidents in the United States between 1970 and 1980 took place in these five areas. Table 3 shows the number of older and newer rules cases examined in each area.

New York accounts for 55 percent of the total number of incidents in the five cities in the Risks chronology, and 37 percent of those in our sample. The Miami and Dade County area has a high level of political violence owing to the activities of anti-Castro Cuban emigres.

Table 3

CASE SAMPLE BY GEOGRAPHIC LOCATION AND TIME PERIOD
(Entries are numbers of cases)

Geographic Location	Older Rules	Newer Rules	All Cases
Los Angeles	2	7	9
San Francisco/Oakland	2	1	3
New York	9	9	18
Miami	6	7	13
Chicago	2	4	6
Other (Baltimore, Jackson, Miss.)	2	-	2
Total	23	28	51

Statistics provided by Florida law-enforcement officials showed a much higher level of political violence than is recorded by the Risks chronology.

NATURE OF CASES

Table 4 shows a cross-tabulation of the sample by time period and nature of the cases. We have defined four broad case categories: (1) bombing, explosives, weapons, and arson cases; (2) individual violent crimes such as murder, assault, robbery, rape, and kidnapping; (3) charges arising from violent demonstrations and riots; and (4) "other," including cases in which prevention or deterrence of criminal acts was paramount.

Bombings and related charges comprise 61 percent of the cases we examined. Cases involving murder, attempted murder, conspiracy to

Table 4

CASE SAMPLE BY NATURE OF CASE AND ERA
(Entries are numbers of cases)

Nature of Case	Older Rules	Newer Rules	All Cases
Bombing, bombing conspiracy, explosives or weapons possession, arson	11	20	31
Murder, attempted murder, conspiracy to murder, assault, robbery, kidnapping rape	7	6	13
Violent demonstrations and riots	3	2	5
Other (including cases in which prevention or deterrence of criminal acts was paramount)	2	-	2
Total	23	28	51

murder, assault, and armed robbery comprise 25 percent.

Assassinations and armed robberies and assaults comprise only 12 percent of the Risks chronology, but the disparity is predictable, owing to the great number of bombings which, because they remain unsolved, are underrepresented in our sample. Counting cases rather than incidents would lower the percentage of bombings and would accordingly raise the percentage of other crimes.

TERRORIST GROUPS

The cases examined involved a wide range of perpetrators. Table 5 is a cross-tabulation of the case sample by time period and groups responsible for incidents. Terrorist organizations are grouped by broad categories (e.g., indigenous radical left, indigenous radical right, and nationalist/separatist). The largest single subcategory is the Black activist groups, with 17 cases, followed by the Cuban anti-Castro groups, with 12 cases; together, these two groups represent over 55 percent of the total sample. The two groups account for 16 cases under the older rules, or 70 percent of that part of the sample. They account for 13 cases under the newer rules, or 46 percent of that part of the sample. The overall decline for the two groups results from the large decline in Black extremist activity, even though Cuban extremist group activity increased.

The groups represented in the case studies include most of the active groups, according to the Risks chronology. However, the left-wing radical groups on the West Coast--the New World Liberation Front, the Symbionese Liberation Army, and the Red Guerrilla Family--do not appear in our sample. On the other hand, the KKK and right-wing paramilitary groups rarely appear in the Risks chronology, probably because right-wing activity peaked in the 1960s and the Risks chronology does not include incidents from before the 1970s.

The balance among the groups roughly matches the Risks statistics. If we set aside bombings, Black extremist groups account for approximately one-third of the assassinations, robberies, thefts, and armed assaults, which Risks groups under the heading "facility attacks."

Table 5

CASE SAMPLE BY TERRORIST GROUP AND ERA
(Entries are numbers of cases)

Terrorist Groups	Older Rules	Newer Rules	All Cases
<hr/>			
Indigenous radical left groups			
Black activist groups	12	5	17
Weather Underground	1	1	2
Brown Berets	-	1	1
Progressive Labor Party	-	2	2
Indigenous radical right groups			
Minutemen and other rightwing paramilitary	2	1	3
KKK	1	1	2
Nationalist/ separatist			
FALN (Puerto Rico)	1	3	4
Cuban Anti/Castro Groups	4	8	12
Croatian/Serbian	-	3	3
Iranian students	1	-	1
Palestinian	1	-	1
Other			
JDL	-	3	3
<hr/>			
Total	23	28	51

Black extremists were primarily shooters; white revolutionaries were primarily bombers. The underrepresentation of bombing among the cases examined (because there are fewer bombing cases) leads to the predominance of Black groups in the sample.

AGENCY SOURCE

Finally, Table 6 presents a cross-tabulation of the sample by time period and agency source. Overall, roughly 40 percent of the cases were collected solely from local police agencies and another 40 percent solely from local prosecution agencies. However, local police agencies accounted for almost half of the cases that occurred under the older rules, while local prosecution agencies accounted for half of the cases that occurred under the newer rules.

Table 6

CASE SAMPLE BY AGENCY SOURCE AND ERA
(Entries are numbers of cases)

Former and Current Agency Affiliation of Interviewees	Older Rules	Newer Rules	All Cases
Local police agency only	12	7	19
Local prosecution agency only	6	14	20
Local police and prosecution agencies	2	4	6
Federal prosecution agency only	-	2	2
Local police and federal prosecu- tion agencies	1	1	2
FBI	2	-	2
Total	23	28	51

Thus, the sample is clearly biased, since a substantial proportion of the politically motivated crimes in the United States were investigated and prosecuted at the federal level (by the FBI and the U.S. Attorney's office).

Nevertheless, our cases are fairly representative of the terrorist activity that occurred in the United States during the late 1960s and 1970s in terms of location, spectrum of terrorist activity, and the kinds of groups responsible.

V. ANALYSIS OF THE CASE SAMPLE

The case summaries given in the Appendix are listed and categorized in Tables 7 and 8. The tables give the assigned geographic location, year of occurrence, identification, outcome, and the basis for the outcome of each case, along with the authors' speculations and comments on whether and why the outcome would have been different if the case had occurred under the "opposite" rules. Table 7 presents older rules cases; Table 8, newer rules cases.

It is sometimes difficult to categorize cases by era. For example, Case N-4 occurred and was investigated under the older rules; and of the 11 arrestees indicted, five had charges dismissed and five were acquitted at trial in the older rules era. But the main defendant fled and was not recaptured until 1977--well into the newer rules era. Because his case was prosecuted and adjudicated under the newer rules and because the outcome probably was affected by some of these rules, we classified this as a newer rules case.

CASE OUTCOME CLASSIFICATION

We classify case outcomes as follows:

- o Failure. Acquittal at trial, pretrial dismissal by the prosecution or by the court, dismissal at trial by the court. Failures may result from inadequate or incomplete investigative techniques (e.g., illegal search and seizure, illegal electronic surveillance, flawed search warrant); a law-enforcement agency's unwillingness to reveal the identity

Table 7
SUMMARY AND CATEGORIZATION OF CASES THAT OCCURRED UNDER OLDER RULES

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Newer Rules? Why?
0-1	Los Angeles/1971	Black Panther shooting of police officer	One acquittal; two dismissals of prosecution (Failure)	FBI claims govt. privilege re informant, and court instructs jury that police suppressed evidence	Probably not. The same investigative technique would be permitted under newer rules
0-2	Los Angeles/1974	Possession of bomb by Black Revolutionaries	Guilty pleas. One probation and one prison sentence (Success)	Police stumbled on the bomb while investigating an auto theft case	No. Intelligence rules not relevant here
0-3	San Francisco/1967-1969	San Francisco State University demonstrations and riots	All cases tried: 65% convicted; 20% pled nolo; remainder acquitted (Success)	Informants, undercover agents, and films by police and media	Possibly, because of different police policy on undercover operation and difficulty of shielding informant's identity in discovery process
0-4	San Francisco/ Mid-late 1960s	Student demonstrations at Iranian consulate	Prosecutions; few convictions, mostly suspended sentences plus probation (Success)	Informants in consulate	Probably no change in investigative success (given informants), but possible change in prosecution phase if defense attempted discovery of informant identity
0-5	Baltimore/1970	Legal wiretap by police which helps avert violence in planned Black Panther demonstration	Averted violence; several arrests on misdemeanor weapons possession (Success)	Wiretap	No, because legal wiretap could be obtained under newer rules
0-6	Jackson, Miss./1972-73	Aggressive interviewing of Palestinian terrorist by FBI	Deterrence of terrorist acts (Success)	"Aggressive interviewing technique," informant, surreptitious entry, wiretaps, and search of premises	Yes, because search would not be authorized under today's climate; use of aggressive interview technique would be doubtful

Table 7 (continued)

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Newer Rules? Why?
* 0-7	New York City/ 1970	Weathermen bombing of banks	Convictions; two prison sentences, one probation (Success)	Undercover officer and photography	No, if undercover operations could have proceeded under new rules
* 0-8	New York City/ 1971	Panther 21 conspiracy case	Investigative success but prosecutorial failure (Success)	Informant and undercover officer	No, if undercover operations could have proceeded under newer rules
0-9	New York City/ 1971	Attempted murder of two policemen by BLA member	Conviction and long prison sentence (Success)	Tips from confederate, eyewitness ID of license plate, and physical evidence	No, because intelligence rules not relevant here
0-10	New York City/ 1971	Murder of two police-men by three BLA members	Convictions and long prison sentences (Success)	Physical evidence, visual ID, and fingerprints	No, because intelligence rules not relevant here
* 0-11	New York City/ Early 1960s	Plan by Black and Puerto Rican activist group to bomb Statue of Liberty	All defendants tried; Some convicted (Success)	Undercover officer	No, if undercover operations could have proceeded under newer rules
0-12	New York City/ Late 1960s	Firing of mortar round at U.N. Headquarters by Cuban terrorists	Convictions and jail sentences (Success)	Passing patrol car happened to see crime	No, because intelligence rules not relevant here
* 0-13	New York City/ Late 1960s or Early 1970s	Plan by Puerto Rican separatists to bomb recruiting station	Conviction (Success)	Undercover officer	No, if undercover operations could have proceeded under newer rules

* Successful cases under older rules that depended mainly or exclusively on evidence gathered by undercover officers.

Table 7 (continued)

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Newer Rules? Why?
* 0-14	New York City Area/1966	Minutemen conspiracy to bomb and commit arson	Investigative success; prosecution failure, due to defective search warrant	Undercover officer, informant, and legal wiretaps	Investigative outcome would not change if undercover operations and use of informant could have proceeded under newer rules; no change in prosecution outcome
* 0-15	New York City 1967	Attempted murder of prominent left-wing figure by right-wing group	Guilty pleas (Success)	Undercover officer, informant, and wiretaps	No, if undercover operations and use of informant could have proceeded under newer rules
0-16	Miami/1968	Firing on Polish freighter by Dr. Bosch/Cuban Power	Convictions, prison sentences (Success)	FBI informant, much physical evidence from legal search	No, because under new rules FBI could open full investigation and plant a new informant
0-17	Miami/1974	Accidental detonation of bomb made by Cuban organization (FLNC)	Conviction and prison (Success)	Evidence at scene; fortuitous event exposes terrorist preparation	No, because intelligence rules not determinative in this case
0-18	Miami/1971	Black Panther conspiracy to kill President	Conviction and prison sentence (Success)	Established informant and undercover officer	Possibly, if defense had pressed issue of disclosing informant's identity or if placing of informant had to await probable cause
0-19	Miami/1972-73	Firebombing of public schools by Black African militant movement (BAMM)	Convictions of 14 defendants (Success)	Undercover officer and two informants	Possibly, because new internal police dept. rules require criminal standard for initiating intelligence investigation and placing undercover agent
* 0-20	Southern Florida/1970s	Prevention of violent KKK activities	Police foment distrust and disagreements among various klaverns (Success)	Informants and undercover agents	No, if undercover and informant operations could have proceeded under newer rules

* Successful cases under older rules that depended mainly or exclusively on evidence gathered by undercover officers.

Table 7 (continued)

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Newer Rules? Why?
0-21	Miami/1975	Murder of Nieves by Pragmatistas revolutionary group	Convictions with one life sentence (Success)	Informants mainly, but also partial ID by eyewitness, and various physical evidence	No, because traditional police investigative techniques used, conforming to both older and newer rules
0-22	Chicago/1969	Black Panther ambush of two policemen	One convicted, one killed, one escaped (Success)	Witnesses to police-defendants shootout	No, because intelligence rules not relevant here
0-23	Chicago/1969	Police raid on Black Panther headquarters (the "Fred Hampton affair")	Dismissed by prosecutor (Failure)	Arrest based on intelligence information; prosecution based on ballistics evidence, police witnesses	No, given failure and more restrictive intelligence rules

* Successful cases under older rules that depended mainly or exclusively on evidence gathered by undercover agent.

Table 8

SUMMARY AND CATEGORIZATION OF CASES THAT OCCURRED UNDER NEWER RULES

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Older Rules? Why?
N-1	Los Angeles County/1977-78	Hiding of arms and explosives cache by right-wing group	Guilty pleas; one probation and one jail sentence (Success)	Chance discovery of cache by children and straightforward police work	No, because intelligence rules not relevant here
N-2	Los Angeles/1978	JDL bombing of movie theater	Conviction and probation/jail sentence (Success)	Fortuitous encounter with police patrol officers	No, because intelligence rules not relevant here
N-3	Los Angeles/1977	KKK plot to kill wrong JDL leader	Convictions and prison or jail sentences (Success)	Undercover officer	No, because similar undercover operations allowed under older rules
N-4	Los Angeles/1969 crime, 1979 trial	Setting of hotel fire by Brown Berets (Carlos Montes case)	Acquittal (investigative success but prosecutorial failure) (Failure)	Undercover officer and civilian witness to sale of flares	Possibly, because witnesses' memories would be fresh, police intelligence files would not have been shredded, and the defense of discriminatory law enforcement would not have had vitality given by 1975 Murguia case (Cal. Supreme Court)
N-5	Los Angeles/1998-1979	Weather Underground conspiracy to bomb State Senator's office	Guilty pleas; minimum state prison sentences (Success)	FBI undercover agents	No, because similar undercover operations allowed under old rules. But, had case occurred after 1979 Arno decision (Cal. Supreme Court), evidence gathered by binocular surveillance might have tainted the case
N-6	Los Angeles/1978	Progressive Labor Party demonstration (PLP#1)	Case dismissed in pretrial phase (Failure)	Undercover officers	Probably, since 1979 Barber case (Cal. Supreme Court) held furtive agent's presence at privileged conversation between attorneys and clients required dismissal of case

Table 8 (continued)

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Older Rules? Why?
N-7	Los Angeles/ 1978	Progressive Labor Party demonstration (PLP#2)	Case dismissed in pretrial phase (Failure)	Undercover officers and informants	Probably, since old discovery rules more favorable to prosecution
N-8	San Francisco/ 1975-76, crime 1979, trial	Murders by members of revolutionary prison gang	Conviction and life sentence (Success)	FBI informant, informant in prison, and murder gun	No, because similar use of informants allowed under older rules
N-9	New York City/ 1976	Hijacking of airliner and planting of bomb in train station locker by Croation group	Convictions and prison sentences in federal court and state court (Success)	Straightforward police work (physical evidence, eyewitnesses)	No, because intelligence rules not relevant here
N-10	New York City/ 1977	FALN bombing of Mobil Oil building	Conviction and life sentence (Success)	Fingerprints, straightforward police work	Not under older rules; but under even more recent rules police could not maintain list of persons suspected of association with FALN
N-11	New York City/ 1979	Injury of FALN bomber by his own bomb	Conviction and prison sentence (Success)	Arrest was result of accidental explosion	No, because intelligence rules not relevant here.
N-12	New York City/ 1976	Revolutionary group plot to commit murder, kidnapping, robbery	Case dismissed (Failure)	Co-conspirator turned informant when arrested on weapons charge (informant refused to testify)	No, because intelligence rules not relevant here
N-13	New York City/ 1978	Shooting of uniformed policeman by radicals	Convictions and long prison sentences (Success)	Fortuitous encounter with police	No, because intelligence rules not relevant here
N-14	New York City/	Bomb watch at Cuban ballet performance	Conviction and sentence (Success)	Analysis of past intelligence information prevented serious crime	No, because under older rules would have had similar intelligence

Table 8 (continued)

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Older Rules? Why?
N-15	New York City/ 1975	Possession of handgun by Black activist	Case dismissed in pretrial phase (Failure)	Undercover officer, flawed search warrant, and undercover operations that violated First Amendment	No, on basis of flawed search warrant. Possibly on older prevailing standards for initiating undercover operations
N-16	New York City/ 1975-76	JDL threats and actions against Soviet mission to U.N.	Guilty pleas and prison sentences (Success)	Fortuitous tip from out-of-jurisdiction undercover operation policeman and legal wiretap	No, because undercover operation and wiretap legal under older rules
N-17	New York City/ 1978	JDL firebombing of homes of Egyptian diplomats	Convictions and prison sentences (Success)	Informant, surveillance, other unspecified intelligence techniques	Not for this case, but possibly for subsequent cases, because newer FBI internal guidelines prevented earlier initiation of a full-fledged investigation that might have prevented some later bombings
N-18	Miami/1975	Cuban terrorist (Otero) bombings	Acquitted on federal charges; convicted on only one charge in state prosecution; received long prison sentence (Partial success)	Fingerprints, voice ID by airport employee, and FBI informant who was unavailable as a witness	No, because intelligence rules not determinative in this case
N-19	Miami/1974-76	Donestavez case: extortion and weapons possession	Conviction and prison sentence. (Defendant later murdered) (Success)	Extortion victim becomes undercover agent; intelligence information on hand re Cuban community valuable; legal wiretaps and tape recordings	No, on basis of tape recordings, wiretaps, and victim-undercover agent.

Table 8 (continued)

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Older Rules? Why?
N-20	Miami/1980	Anti-Castro Cuban terrorism and countersurveillance	Conviction and prison sentence. Case on appeal (Success)	Surveillance of terrorist based on intelligence information. Trial court denied discovery of intelligence files	No, if case is not reversed on appeal
N-21	Miami/1976	Adult bookstore bombing by anti-Castro youths	Convictions and long prison sentences (Success)	FBI informant	No, because similar use of informants allowed under older rules
N-22	Miami/1977	Planned attack on Cuban naval base by Cuban terrorists (Estrada)	Acquittals of all defendants (Failure)	U.S. Customs informant and consent search of defendants' boats. Defense used prior Congressional Resolution and claim of CIA involvement as defense	No, since verdict probably turned on matters not pertaining to domestic security intelligence rules
N-23	Miami/1976	Barnes/Fast sale of stolen dynamite	Convictions (Success)	Established police informant and undercover policeman	No, because similar use of informants and undercover agents allowed under older rules
N-24	Miami/1976	Anti-Angela Davis bombing at university	Acquittal of one defendant; plea bargain by second who turned informant (Partial Failure)	Co-defendant who turned informant	No, because intelligence rules not relevant here
N-25	Chicago/1970/79	Black Panther rape and shooting of two victims	Conviction and very long prison sentences (Success)	FBI informant	No, because under old and new rules FBI could use informant, given past criminal acts by Panthers

Table 8 (continued)

Case No.	Location/Year	Incident	Outcome	Basis	Would Outcome Change Under Older Rules? Why?
N-26	Chicago/1978	Serbian group conspiracy to bomb gathering of Yugoslav diplomats	Convictions of all six defendants and long prison sentences (Success)	FBI informant	No, because similar investigation and informant operations allowed under older rules
N-27	Chicago/1978	Croatian group conspiracy to bomb West German consulate	Convictions of both defendants and short prison sentence (Success)	Law enforcement notified after defendants took over consulate	Possibly, because law enforcement was surprised. Under old rules defendants could have been under investigation and criminal act might have been prevented
N-28	Chicago area/1980	Arrest of 11 FALN members after armed robbery of truck rental agency	Two defendants convicted; long prison sentences. Eight defendants convicted; moderate prison terms (Success)	Routine police work produced arrests; intelligence information enabled identification of terrorists	No, because intelligence rules were not relevant to arrests. Under older rules, intelligence information would have produced similar identification

of an informant or an undercover agent or to have him/her testify at trial; inept prosecution; and various other reasons.

- o Success. Prevention or deterrence of incidents or crimes by law enforcement, or identification, arrest, and successful prosecution of the perpetrators.
- o Partial success or failure. Successful prosecution of some defendants and unsuccessful prosecution of others in a multidefendant case, or cases that are clearly investigative successes but prosecutorial failures (e.g., Cases 0-8 and 0-14). In the analysis that follows, we treated the latter class of cases as basically prosecution failures, but we also did an analysis assuming that they were successes, to see what difference it would make.

Our analysis has two components. First we examined and compared how the cases in our sample actually fared. Then we performed a more speculative analysis by asking how each case would have or might have fared under the opposite rules--i.e., how older rules cases would have fared under the newer rules and vice versa. Together, these two parts of the analysis serve as the quantitative basis for the general conclusions we draw.

Some caveats are in order, however. As discussed previously, there are inevitable sources of bias in our sample. Moreover, the sample is small and the analysis is performed separately for the (still smaller) sets of older rules and newer rules cases. Thus, clear and substantial changes in outcomes between older and newer rules cases are required if we are to conclude that the rules changes have had a significant effect.

HOW CASES ACTUALLY FARED

As our interviews clearly indicate (see Sec. VI), most law-enforcement officials believe that the newer rules significantly reduced proactive measures aimed at deterrence and prevention of violence. Such measures include recruiting and planting informants and inserting undercover police officers before criminal standards are met in initiating investigations. We tested this proposition in our case sample analysis by comparing the incidence and effects of preventive intelligence in terrorist-related cases during the older rules and newer rules eras. The results, given in Table 9, show that the rate of successful preventive intelligence applications has clearly declined, resulting in a shift from proactive to reactive investigative work. Fifty-six percent (13 of 23) of the older rules cases involved preventive intelligence, often gathered by informants or undercover officers, whereas only 36 percent (10 of 28) of the newer rules cases involved such measures. All 13 of the older rules cases were successful preventions, but only eight were prosecution successes (three were prosecution failures, and in two, no attempt was made to prosecute, because there was evidence of investigative misconduct or illegal investigative acts by law enforcement personnel). All but one of the ten newer rules cases were successful preventions, and nine of 11 prosecutions were successful.

Table 10 summarizes the outcomes of all of the cases in each time period and identifies what each outcome hinged on. All cases are assigned to one of two major categories: those whose outcomes hinged on the use of investigative techniques or issues affected by the newer

Table 9

INCIDENCE AND EFFECTS OF PREVENTIVE INTELLIGENCE
IN TERRORIST-RELATED CASES, BY TIME PERIOD

Newer Rule			Older Rules			Cases			Newer Rules			Cases		
Case #	Prevention	Prosecution	Case #	Prevention	Prosecution	Case #	Prevention	Prosecution	Case #	Prevention	Prosecution	Case #	Prevention	Prosecution
0-4a	S	S	N-3a	S	S	0-5a	S	S	N-4a	F	F	0-6	S	n.a.
0-7a	S	S	N-14a	S	S	0-8a	S	F	N-16b	S	S	0-11a	S	S
0-13a	S	S	N-19a	S	S	0-14a	S	F	N-21a	S	S	0-15a	S	S
0-16b	S	S	N-21b	S	S	0-18b	S	S	N-22b	S	F	0-20	S	n.a.
0-23a	S	F	N-23a	S	S	0-20	S	n.a.	N-26b	S	S	0-23a	S	F
Totals: 13 successful preventions			9 successful, 1 unsuccessful			8 successful, 3 unsuccessful			9 successful, 2 unsuccessful			2 no attempts to prosecute		

Note: S = success
F = failure
a = state prosecution
b = federal prosecution
Cases 0-6 and 0-20 were "no prosecutions."

intelligence rules, and those whose outcomes did not. The latter category includes outcomes based on chance or on the use of conventional investigative techniques, such as the collection of crucial physical evidence (e.g., fingerprints) and visual identification of suspects or auto license plates by witnesses. The first category is further subdivided into cases whose outcomes are based mainly or largely on evidence gathered by undercover agents or informants and cases whose

Table 10
HOW PROSECUTIONS FARED UNDER OLDER AND NEWER INTELLIGENCE RULES

Case Category	Outcomes Under Older Rules		Outcomes Under Newer Rules	
	Failures	Successes	Failures	Successes
Outcomes based on investigative techniques affected by newer intelligence rules				
Outcome based mainly on use of undercover agent and/or informant	3 (0-1a, 8a*, 14a*)	10 (0-3a, 4a, 7a, 11a, 13a, 15a, 16b, 18b, 19a, 21a)	6 (N-4a, 6a, 7a, 15a, 18b, 22b)	14 (N-3a, 5a, 8a, 14a, 16b, 18a, 19a, 20a, 21a, 21b, 23a, 25a, 26b)
Outcome based mainly on other investigative techniques	---	1 (0-5a)	---	---
Outcomes based on chance or the use of investigative techniques not affected by newer intelligence rules.	1 (0-23a)	6 (0-2a, 9a, 10a, 12a, 17a, 22a)	2 (N-12a, 24a)	10 (N-1a, 2a, 9a, 9b, 10b, 11a, 11b, 13a, 27b, 28a)
Totals	4	17	8	24

Note: a denotes state prosecution.
 b denotes federal prosecution.
 * denotes prosecution failure, but investigative success.

outcomes were largely influenced by evidence gathered by other techniques, such as wiretaps and other electronic surveillance.

Only four of the 21 prosecutions under the older rules (19 percent) were failures, and two of these were investigative successes but prosecution failures. (The high proportion of successes is not surprising, since we asked interviewees to focus on successful cases.) Eight of the 32 prosecutions under the newer rules (25 percent) were failures. In both eras, three-quarters of the prosecution failures were cases whose outcomes hinged mainly on evidence gathered by informants or undercover police agents.

Overall, the role played by investigative techniques affected by the newer intelligence rules did not change significantly over the two time periods: 67 percent of the prosecution outcomes under the older rules (14 of 21) were based mainly on such techniques, compared with 62 percent (20 of 32) of the newer rules case outcomes; virtually all of these outcomes hinged on evidence provided by informants or undercover agents. Likewise, the success rate of cases in which undercover agents or informants played a crucial role did not change much between periods: 77 percent (10 of 13) in the older rules period, compared with 70 percent (14 of 20) in the newer rules period. All of this suggests that the rules themselves had little effect on prosecution outcomes and that investigators and prosecutors adapted fairly well to the newer rules.

Would results change materially if cases 0-8a and 0-14a, the two investigative successes but prosecution failures, were counted as successes? Transferring these cases to the success column increases the overall older rules success rate to 90 percent (from 81 percent), compared with a newer rules success rate of 75 percent, and increases

the success rate of older rules informant/undercover prosecutions to 92 percent (from 77 percent), compared with 70 percent for newer rules prosecutions. This illustrates how a different interpretation of a few cases from a small sample can lead to a conclusion that the changes produced large effects. But such a conclusion is illusory.

HOW CASES MIGHT FARE UNDER OPPOSITE RULES

Table 11 summarizes the analysis of how prosecutions might have fared under the opposite rules.

Older Rules Cases

How would the prosecutions of older rules cases have fared under the newer rules? As would be expected, failures would remain failures and successes would remain successes in those cases whose outcomes did not hinge on investigative techniques affected by the newer rules. The case whose outcome depended importantly on evidence gathered by electronic surveillance techniques (Case 0-5a) would remain a success, because the crucial wiretap information could have been obtained legally under the newer rules.

Three of the 11 successes that depended importantly on undercover/informant work plus a legal wiretap (Cases 0-3a, 0-18b, 0-19a) probably would have failed under the newer rules. The requirement of applying a criminal standard for initiating undercover/informant operations and the difficulty of shielding the identities of agents in the discovery process would probably have resulted in failures.

Table 11
HOW PROSECUTIONS MIGHT FARE UNDER OPPOSITE INTELLIGENCE RULES

Case Category	Possible Outcomes of Older Rules Prosecutions Under Older Rules				Possible Outcomes of Newer Rules Prosecutions Under Older Rules			
	F-F	F-S	S-S	S-F	F-F	F-S	S-S	S-F
Outcomes based mainly on investigative techniques affected by newer intelligence rules								
Outcome based mainly on use of undercover agent and/or informant	3 (0-1a, 8a*, 14a*)	---	7** (0-4a, 7a, 11a, 13a, 15a, 16b, 21a)	3 (0-3a, 18b, 19a)	2 (N-18b, 22b)	4 (N-4a, 6a, 7a, 15a)	14 (N-3a, 5a, 8a, 14a, 16b, 17b, 18a, 19a, 20a, 21b, 23a, 25a, 26b)	---
Outcome based mainly on other investigative techniques	---	---	1 (0-5a)	---	---	---	---	---
Outcomes based on chance or the use of investigative techniques not affected by newer intelligence rules	1 (0-23a)	---	6 (0-2a, 9a, 10a, 12a, 17a, 22a)	---	2 (N-12a, 24a)	7 ---	10 (N-1a, 2a, 9a, 9b, 10b, 11a, 11b, 13a, 27b, 28a)	---
Totals	4	---	14	3	4	4	24	---

Legend: F-F denotes failures that remain failures
 F-S denotes failures that could be successes
 S-S denotes successes that remain successes
 S-F denotes successes that could be failures
 a denotes state prosecution
 b denotes federal prosecution

*Prosecution failures, but investigative successes.
 **Five cases (0-4a, 7a, 11a, 13a, 15a) would remain successes under the newer rules, provided that the undercover operations or use of informants could have proceeded under the newer rules.

Of the remaining eight older rules successes, only three would certainly have been successes under the newer rules: In Case 0-5a, a legal wiretap could also have been obtained under the newer rules; the outcome of Case 0-16b hinged on information provided by FBI informants, who could also have been used under the newer rules; and in Case 0-21a, the placing of an informant, whose testimony really made the case, would have been allowed under the newer internal police department guidelines.

The fate of the remaining five older successes (Cases 0-4a, 7a, 11a, 13a, 15a) is uncertain. All hinged on information provided by informants or undercover agents. If these sources could have been used under the newer rules, the cases would remain successes. But because some of the newer police department internal guidelines are ambiguous, and because the basis on which an undercover agent or informant was inserted was not known to us, we cannot confidently judge whether some or all of these outcomes might have changed under the newer rules. We can only show the results of this portion of the analysis in terms of a range with upper and lower bounds: At one extreme, it is possible that only three of 11 successful prosecutions (27 percent) would remain successes; at the other extreme, eight of 11 prosecutions (about 73 percent) might remain successes. Thus, between 27 and 73 percent of the older rules successes might have been failures under the newer rules.

Newer Rules Cases

How would the prosecutions of the newer rules cases have fared under the older rules? Again, as expected, failures would remain failures and successes would remain successes in those cases whose outcomes did not hinge on investigative techniques affected by the newer

rules. Such cases comprised 37 percent of the sample (two were prosecution failures and 10 were successes).

Six of the failures depended importantly on undercover/informant use; only two of these (Cases N-18b and N-22b) would clearly have also been failures under the older rules. Four (Cases N-4a,N-6a,N-7a,N-15a) would probably have been successes under the older rules. Case N-4a involved a 1969 crime and a 1979 trial whose outcome was unfavorably influenced by the shredding of police intelligence files and a successful defense of discriminatory law enforcement, which had been given vitality under recent state case law. In Case N-6a, a successful defense invoked recent state case law requiring dismissal because of a police agent's presence at privileged conversations between attorney and clients. Case N-7a was dismissed because of law enforcement's reluctance to reveal the identities of undercover agents and informants under adverse court discovery decisions. All three of these cases probably would have been successes under the older rules.

The fourth failure (Case N-15a) was due to a flawed search warrant and an undercover operation that violated the First Amendment, according to the trial court. Except for the flawed search warrant, this case might have succeeded under the older standards for initiating undercover operations. Thus, two-thirds of the newer rules failures involving undercover/informant operations might have been successes under the more relaxed older rules.

As expected, the 14 newer rules successes that depended heavily on informant/undercover operations would also have been successes under the older rules. But there is an interesting side note to one of these cases: Case N-10b occurred in 1977 under the newer rules. But the

police maintain that their even newer (more recent) guidelines would have prohibited them from collecting information from which they constructed and maintained a file of persons suspected of having some involvement with the terrorist group involved in the case. This file was crucial to the identification of the defendant.

Comparing the Projections Under Opposite Rules

All of the cases whose outcomes were based on chance or investigative techniques not affected by the newer intelligence rules would, by definition, have the same outcomes under the opposite rules. In both eras, roughly the same proportion of cases are in this category (33 percent of older rules prosecutions, and 37 percent of newer rules prosecutions). The proportions of these cases that were failures are also roughly the same (5 percent of the older rules prosecutions, 6 percent of the newer rules prosecutions).

For cases whose outcomes hinged on investigative techniques affected by the newer intelligence rules, the projected outcomes under the opposite rules showed a different pattern from era to era. All of the original failures under the older rules would remain failures under the newer rules, but only one-third (2 of 6) of the failures under the newer rules might have been failures under the more relaxed older rules.

Depending on how one categorizes the two cases that were prosecutorial failures but investigative successes (Cases 0-8a and 0-14a), 25 or 30 percent (3 of 12 vs. 3 of 10) of the older rules successes involving informant/undercover operations might have been failures under the newer rules. Of the remaining seven older rules successes that might have remained successes under the newer rules, five are uncertain in that their outcomes would have remained unchanged only

if it were possible to proceed with the same informant/undercover operations under the newer rules. Otherwise, 75 to 80 percent could be failures.

As expected, no newer rules successes would be failures under the older rules; all those outcomes would remain unchanged under the more relaxed rules.

CONCLUSIONS

The data from the analysis of the case samples support the conclusion that there has been a reduction in preventive intelligence applications (particularly the use of intrusive intelligence techniques such as informants and undercover agents), because of the requirement that the criminal standard must be met to emplace agents within terrorist groups. This standard appears to have delayed or denied warnings from informant intelligence that under the older rules could have been used to prevent acts of violence.

Second, the evidence suggests no significant change in the rate of success in prosecutions, both for cases whose outcomes hinged on investigative techniques affected by the newer intelligence rules and for cases whose outcomes did not depend on such techniques. Moreover, the prevalence of such investigative techniques, particularly the use of informants and undercover agents, did not change significantly, although the timing did. This further suggests that investigators and prosecutors adapted fairly well to the newer rules.

Third, projection of outcomes of prosecutions under the opposite rules--certainly a more speculative kind of analysis--produces a somewhat different pattern. Most of the prosecution failures under the more stringent newer intelligence rules might have been successes under

the more relaxed older rules. And many, if not most, of the prosecution successes under the older intelligence rules might have been failures under the newer rules. The proportion of older rules successes that might have been newer rules failures depends on whether the timing and nature of informant or undercover operations could have been the same in both eras. (Failures under the older rules certainly would remain failures under the newer rules, and successes under the newer rules certainly would remain successes under the older rules.)

How should such speculative analysis be weighted in relation to the findings that emerge from the analysis of the actual case outcomes? In our view, the speculative statistics should be accorded less weight than the actual outcome statistics. We therefore conclude that the newer intelligence rules had little or no effect on prosecution success rates, but that preventive intelligence applications decreased during the newer rules era.

VI. THE INTERVIEWS

We interviewed law-enforcement officials in the five cities in which most of the terrorist activity in this country has occurred: New York, Chicago, Miami, San Francisco, and Los Angeles. These officials included retired and active police officers, FBI agents, state and federal prosecutors, and judges. We also spoke with Department of Justice and FBI officials in Washington, D.C., although none of our case studies are drawn from the Washington area.

The interviews helped us to choose the cases in our sample and were essential in identifying the investigative techniques used in each case. They also enabled us to identify problems that law-enforcement officials have encountered as a result of the new rules, but that would not necessarily have shown up in the case studies themselves. For example, many investigators felt that the FOIA has made informants reluctant to come forward with information out of fear that they could ultimately be identified. Our case studies indicate that informants appear to be critical to such investigations and that it has become more difficult to shield informants' identities; but the case studies in themselves do not reflect the influence of the FOIA on the recruiting of informants. That judgment could only emerge from the perceptions of those interviewed.

The respondents agreed that the new rules had hampered their effectiveness in preventing terrorist activity, investigating terrorist crimes, and prosecuting offenders. At the same time, they were not in agreement about the importance of this loss.

Some of the interviewees asserted that there had been a significant decline in preventive intelligence, claiming that in the past, informants and undercover agents had penetrated groups likely to engage in violence, allowing police to prevent or at least minimize potential bombings. However, other interviewees observed that the 1960s and early 1970s, which were the heyday of police intelligence activity, were also the heyday of domestic terrorist activity, implying that intelligence efforts had not significantly reduced the level of terrorism, and that the decline in intelligence operations after the mid-1970s produced no corresponding increase in terrorist crimes.

Some of the interviewees, particularly prosecutors, pointed out that many of the serious terrorist-related crimes were never solved, and many of those that were solved produced insufficient evidence to prosecute. Two major bombings--of the Park District Police Station in San Francisco and LaGuardia Airport--were never solved; nor were most of the terrorist homicides in the Miami area during the 1970s. Also, as mentioned previously, none of the members of the New World Liberation Front, a terrorist group active in the Bay area of Northern California in the mid-1970s, were ever identified or apprehended.

The interviews led us to conclude that collecting intelligence about terrorist groups, even in an environment with few restrictions, is extremely difficult, that some of the intelligence activities are perhaps a waste of time, and that sometimes there are abuses.

INTELLIGENCE FILES

What police know about individuals or groups resides in files, since investigators come and go. The new rules hit those files hard. During the 1970s, police intelligence files were purged repeatedly, and tighter rules for starting new files were imposed. Limitations were also placed on the kinds of information that could be kept in files, and the length of time the information could be kept.

Police intelligence files on political activities have always been much broader in scope than files pertaining to active criminal investigations. Domestic security intelligence is not always a matter of preventing or investigating crimes; it can also be a matter of knowing what is going on. Prior to the 1970s, the criteria for inclusion in the files were fuzzy. The files included information on known and suspected members of terrorist groups, their friends and associates, and suspected sympathizers. They included information on protest groups that might support the aims of terrorist groups, if not their methods, and might thus provide recruits. The files also included information on groups that were not "subversive" but that might engage in major demonstrations. Possible criminal activity was not a prerequisite. One police officer said, "Some group says tomorrow it's going to have ten thousand members march on some diplomatic mission. That many people create a crowd control problem. Do we mobilize? We look at files and find the group has six members, so we don't get too excited."

Years ago, the files were like an attic storeroom. Nothing was thrown out. In one police department, files contained cards that went back to the 1940s and reflected the changing focus of police

intelligence. They contained information on suspected Nazis, the concern of the 1940s; Communist Party membership rosters, the concern of the 1950s; Black militants, right-wing extremists, and anti-war demonstrators, the concern of the 1960s.

The purges of the files began in the 1970s and were not invariably for the purpose of imposing limits on police intelligence activities. In New York, files were initially purged for reasons of efficiency. But imposition of limits on police intelligence was certainly the primary reason, and the purges reflected fundamental changes in philosophy regarding police intelligence files. As one senior police official framed the issue, "Is there an onus [to having one's name in a police intelligence file], or is a file neutral, just a file, with no sinister meaning?" Law-enforcement officials feel that sinister meanings were perceived by a growing number of critics in the 1970s. That attitude was manifested in stricter requirements. Files were limited more specifically to law-enforcement concerns. A well-articulated basis was required for starting a file, a history of violent threats--"perhaps less than a probability, but more than a possibility." The requirements applied to persons who could be investigated as well. Contact with someone under investigation was not enough to justify initiating a new investigation.

Some of the officials interviewed felt that purging the files caused no great loss, suggesting that the old files were of little value anyway, having grown too large or unwieldy. Some even implied that with the volume reduced, the files were more useful. Other respondents took the opposite view, arguing that under the newer rules the files were of little utility. They believe that the identity of the people doing the

bombing is rarely known; the bombers are the inner circle. Even members might not know who the bombers are. The only way to find out is to keep broad information bases, watching the "outer rim" people moving in.

To illustrate the point, New York officials cited the bombing of the Mobil Oil building in 1977 (Case N-10), for which Puerto Rican separatists claimed credit. A woman had been seen fleeing the scene just before the bomb went off, and the police found a single fingerprint, but a single print alone cannot be traced. However, the NYPD had a list of persons suspected of being associated with the terrorist group. Using the list, they narrowed the search to the names of 12 female suspects and eventually made a positive identification. The perpetrator was convicted in federal court. Today the police cannot keep lists of persons who may be associated with suspected terrorists or who have participated in demonstrations. Yet the NYPD claims that without such a list, the Mobil bomber would not have been identified.

UNDERCOVER OPERATIONS

Our respondents consider the use of undercover officers and informants to be the two most important techniques of prevention and investigation of terrorist activities. Undercover officers were employed in nine of the older rule cases we examined and in seven of the newer rule cases. Law-enforcement agencies appear to have clear-cut preferences between informants and undercover officers. The New York police, for example, prefer to rely on undercover officers, because they "are in the organization, under control, and disciplined." Protecting the identities of undercover officers is less problematical than shielding informants. When prosecutors are ready to go to court, the undercover officer simply surfaces. Undercover officers also make

better witnesses than informants, whose background or motives for informing sometimes make them less credible in a courtroom.

Undercover officers are also used by the Miami, Los Angeles, and San Francisco Police Departments. San Francisco law-enforcement officials said that they had penetrated a number of groups, using both undercover officers and informants. Respondents in Miami said that they had solved several cases involving anti-Castro Cubans and had disrupted Klan activities in Florida through the use of undercover officers and informants. The FBI, on the other hand, mainly used informants as a matter of policy during the 1960s and 1970s. (A notable exception was a case involving the Weather Underground (Case N-5).)

All of the respondents asserted that undercover officers are being used far less now than they had been in the past. An officer cannot simply go undercover and penetrate a group overnight. It may take years for the officer to establish his credentials, but the newer rules required greater probability of certain crimes being committed before infiltration could begin. Prior to the newer rules, an officer would be put "in an area" even before any criminal activity had occurred in order to establish his credibility so that he could infiltrate a group if one emerged. One officer said that kind of thing could no longer be done: "It would be viewed as fishing."

New York police cited the Collier case (Case N-15), in which an undercover detective had posed as a resident with an interest in community affairs, as a further constraint on undercover activity. The trial judge dismissed the charges in the case, ruling that the undercover operation violated the Constitutionally protected expectation of privacy. Essentially, the judge ruled that a group may be

infiltrated only when the police have articulable reasons to suspect criminal activity. The police objected strongly to the judge's observation that the undercover agent inappropriately cultivated friendship and trust. They argued that building up close relationships was part and parcel of undercover operations. The Collier case was not appealed to higher courts because prosecutors feared a ruling that would become a judicial precedent.

Changing attitudes toward intelligence operations in general, along with reductions in the available resources for such activities, further limit undercover operations. The five or even ten years required for an undercover officer to establish credentials and infiltrate a group represents a costly investment of manpower, especially when there are many areas to cover. The investment may not be worth the sentences imposed even when convictions are obtained. As one police officer noted, "Five years undercover for one year in jail [on a conviction] is not cost efficient." A former FBI official noted that the light sentences imposed on the defendants in the Weather Underground case probably were not worth the four years and seven years spent by the two agents who got into the group. (Of course, time undercover agents spend underground versus time criminals spend in jail is a very imperfect criterion of effectiveness.)

Although the respondents claimed a high degree of success in the use of undercover operations, they were also candid in discussing the difficulties. One police officer noted, "To get undercover in the JDL [Jewish Defense League], you have to be 14 or 15 years old." Another officer observed, "Undercover doesn't work with [another ethnic group]. They know their [each other's] grandfathers."

A former FBI official noted that "in the forties, fifties, and sixties, we were dealing with large structured organizations [such as the Communist Party]. They had headquarters; people attended meetings. [Through such techniques as undercover operations, informants, and surreptitious entries], we could gain information." In the 1960s and 1970s it became more difficult. The new groups "were small, they had no formal headquarters, they carried out acts of terrorism, they claimed credit by communique."

A local police official agreed that the "groups have gotten slicker. Credentials mean a lot ... A close undercover [today] is only a fringe cover." And penetrating the support groups is not adequate. "They don't bring their underground activities into the surface groups," said one respondent. Another stated that "the bombers and shooters don't discuss anything with their sympathizers."

INFORMANTS

Informants appear to be the most commonly used means of keeping track of underground groups. Informants were employed in 13 of the older rule cases we examined and in seven of the newer rule cases. Police and prosecutors in all five cities cited cases in which informants had been used. The FBI considers an agent too valuable to put underground for the time necessary to establish credentials, but one agent can run eight to ten informants. One local police official also pointed out that the strict entry requirements of the Bureau virtually precluded undercover operations: FBI agents were too easily spotted as FBI agents. Moreover, the Bureau is concerned that an agent left too long underground might incorporate the attitudes and lifestyle of his cover as his own.

It is more difficult to recruit informants in the political underground than in the criminal underworld, particularly in communities such as the Cuban neighborhoods in Florida where anti-Castro Cuban terrorists could count on a measure of popular support for their activities.

"Revolutionaries" are less likely to run afoul of the law for minor infractions, are less likely to have criminal records, are less motivated by money, and hence are less likely to become informants if arrested, although sometimes it does happen. As stated earlier, informants are not always reliable and often make poor witnesses, but this was a minor concern when police intelligence was primarily concerned with proactive measures to achieve deterrence, prevention, or disruption.

The planting of informants before criminal standards were met, under the old rules, was particularly effective against the Ku Klux Klan. One retired FBI official recalled that following the murder of three civil rights workers in Mississippi, the FBI started "aggressively interviewing" every Klan member. Old and new members were warned that while it was not illegal to belong to the Klan, if any trouble occurred, the FBI would go after them first. The FBI official admitted that many of these interviews were confrontations. "KKK members didn't like to be interviewed." But the practice served two objectives: First, letting Klansmen know that the FBI knew they were members who could be promptly identified had a deterrent effect on their activities. Second, the aggressive interviewing program allowed the FBI to recruit additional informants among those members who were against violence or who simply wanted to avoid harassment.

It has become more difficult to recruit informants. For one thing, the kind of aggressive interviewing directed at the Klan in the 1960s would not be tolerated against any other legal organization today, and probably not even against the Klan. "Under current thinking," said a former FBI official, "such a program would be considered as an invasion of privacy." The prohibition of intelligence operations without an articulable likelihood of criminal activity virtually rules out recruiting informants among members of aboveground sympathizers or support groups.

The FOIA, several respondents asserted, also makes recruiting informants more difficult even in cases where the newer rules would permit recruiting. People have heard about the FOIA and know that their identities cannot be protected, that criminal groups have, through FOIA requests, identified and eliminated informants. It is not so much a matter of what the FOIA actually does, but rather how it is perceived.

Our respondents argued that it has in fact become increasingly difficult to shield the identities of informants during prosecution. Increasingly liberal discovery laws make it difficult for prosecutors to shield the informant's identity. Law-enforcement officials, particularly in California, said that it is much more difficult now "to make the case and not give up the informant." They cited several cases in which police claimed privilege in withholding the identity of an informant or information that could enable the defendants to figure out who the informant was, thereby compelling the prosecutors to drop the case.

Further problems were inadvertently created by the closing of the civil jail in New York, which was formerly used to house and protect material witnesses. Informants testifying at trials must now be protected and housed by the Corrections Department, and very little money is available to put them into hotels. Sometimes they are put in the regular prison system, where they are not safe unless they are in solitary confinement.

It is difficult to assess how much these developments have reduced the flow of information from informants. One former FBI agent asserted that the Bureau's emphasis on informants had led to quotas--each agent had to recruit a certain number of informants within a specified time period. Meeting the quota sometimes involved fabricating informants, using names taken from the phone book. On the other hand, law-enforcement officials revealed that information that was claimed to have been developed using other investigative techniques was in fact often provided by informants. Said one prosecutor, "No self-respecting, talented detective would ever admit in writing [in official investigative papers] that snitches provided good leads. Rather, acting on informants' information, the detective finds other sources of corroborating evidence, which is then used to make the case."

While the net effect of the new rules may be difficult to assess, there is clearly a consensus among investigators and prosecutors that it is now more difficult to recruit informants and effectively utilize the information they provide in prosecutions.

OTHER LIMITING FACTORS

Several respondents said that the FOIA had reduced the flow of information from local police departments to federal investigators. "The amount of information shared with the feds is almost nil," said one local police official.

Police investigators also mentioned increased difficulty in obtaining permission for electronic surveillance. "Ten to 15 years ago, wiretaps were much easier to get," said one New York investigator. "Now they are being used less." Police in New York have substituted increased interviews and physical surveillance.

Changes in the rules governing surreptitious entries were cited as another constraint. Surreptitious entries were always under tight control, said one former FBI agent, but in 1976 the Attorney General forbade their use in domestic security investigations. Federal investigators were required to obtain a search warrant.

At the local level, a Florida police official was criticized for surreptitiously entering a premises to plant a "bug." The police had a warrant to plant the bug, but the warrant did not explicitly authorize a break-in to plant it. Police maintained, and eventually were supported in the claim, that since it was absurd to implant a listening device in the presence of the targeted individual, authorization for a surreptitious entry was implied in the original warrant.

Another problem results from the difficulty of drawing a line between domestic investigations and foreign counterintelligence investigations. Investigations of terrorist groups may fall into both areas. A former official in the U.S. Attorney's office in Florida told

us that local investigations had been "frustrated by the foreign intelligence guidelines in obtaining information needed for the prosecution of Cuban terrorists." A Los Angeles Police Department official said the distinction caused difficulties in obtaining information to compare local bombings by Croatian extremists with bombings by Croatian terrorists that had occurred outside of the country.

Many of the respondents complained about the emergence of the so-called "cause lawyers," politically committed attorneys who specialized in the defense of those accused of politically inspired crimes. The "cause lawyers" were seen as having been effective in shaping and exploiting the new rules. Favorable court decisions, our respondents said, were transmitted across the country overnight to be used in arguing other cases. This same loose network was, in their view, behind the barrage of complaints and civil suits designed to harass, constrain, and ultimately dismantle all domestic intelligence activities.

BEYOND THE RULES

"Climate is extremely important," one former FBI official told us. Police intelligence activities do not pursue a course independent of public attitudes and political pressure. Public attitudes incorporated in legislation, in orders from the White House, or in federal and local government departmental directives determine the degree and direction of intelligence efforts.

Attitudes change over time. Nazis were the principal targets of police intelligence efforts in the early and middle 1940s. Communists were the focus of national concern in the early 1950s. In the early

1960s, it was the Ku Klux Klan. The murder of three civil rights workers in Mississippi in 1964 outraged the public and led to increased FBI pressure on the Klan. President Johnson ordered the FBI to open an office in Jackson, Mississippi, and the Bureau began the "aggressive interviewing" of Klan members. "Someone might have legitimately questioned why the FBI was harassing 5,000 members of the Klan; it was not illegal to belong to the Klan," a former FBI official wryly observed. "But the ACLU did not raise the issue."

The assassinations and riots of the sixties provoked concern about the adequacy of domestic intelligence. Following the assassination of John F. Kennedy, the Warren Commission saw the need for more intelligence about defectors, malcontents, and others who might threaten the life of the president.[1] The Eisenhower Commission, created after the assassination of Senator Robert Kennedy in 1968, recommended that "police departments throughout the nation improve their preparations for anticipating, preventing, and controlling group disorders." [2] Following the killing of four students by National Guardsmen at Kent State University in 1970, the Scranton Commission observed that "bombing and arson have increased alarmingly on campuses. This sort of covert and terrorist crime by individuals or small groups presents an extremely difficult police problem.... The problem ... necessarily involves police in extensive intelligence-gathering activities." [3] The Scranton

[1] Report of the President's Commission on the Assassination of President John F. Kennedy, Chief Justice Earl Warren, Chairman, U.S. Government Printing Office, Washington, D.C., 1964, pp. 461-465.

[2] To Establish Justice, to Insure Domestic Tranquility, Final Report of the National Commission on the Causes and Prevention of Violence, Dr. Milton S. Eisenhower, Chairman, U.S. Government Printing Office, Washington, D.C., 1969, p. 275.

[3] Campus Unrest, The Report of the President's Commission on Campus Unrest, William Scranton, Chairman, U.S. Government Printing Office, Washington, D.C., 1970, pp. 171-172.

Commission report went on to say that "if the police are to do their job of law enforcement on the campus properly, they need accurate up-to-date information. Only if they are well-informed can the police know how and when to react and, equally important, when not to react."

As long as intelligence activities were directed against aliens or groups that had little community support, police intelligence activities were not closely questioned. But, as several respondents observed, the civil rights movement and, to a greater extent, the anti-war movement introduced a different class of perpetrators, whose causes engendered widespread sympathy.

The exposure of abuses by the government further shifted public opinion. The Army was found to be maintaining files on anti-war activists, including elected officials. The FBI's COINTELPRO efforts were exposed as a proactive effort not merely to sow discord among self-proclaimed revolutionaries but also as a covert campaign to malign the reputations of legitimate civil rights leaders and sympathizers. The Watergate affair cast a long shadow over all domestic intelligence activities in the political area and contributed to the atmosphere that led to increased constraints.

Although all of the respondents remarked on this change in attitude, not all attributed it to political developments. One observer considered it simply part of the general trend toward increasing the rights of the accused and the convicted. Another mentioned purely local reasons: The Knapp Commission in New York recommended changes to reduce the amount of discretion and independence previously exercised by individual investigators within the NYPD Detective Bureau.

The changes in attitude and philosophy appear to have had as profound an effect on intelligence operations as did the rules themselves. The constraints embodied in the newer rules created a new atmosphere that had "a chilling effect" on police intelligence operations.

The newer rules confused, shocked, and scared investigators. Hastily drafted in many cases, the rules were often imprecise, subject to interpretation, complicated, contradictory, and hard to understand. The rules created a minefield in the midst of what was a murky business anyway. One of our respondents remarked that you had to be a lawyer to interpret whether or not an intelligence operation was legal.

Higher officials were also uncertain and thus tended to interpret the rules conservatively. If a decision fell anywhere in a grey area, they vetoed it to be on the safe side. A former FBI official recalled that FBI headquarters was so uncertain about the legality of investigative techniques that it wanted to collapse the single successful undercover operation directed against the Weather Underground, even though the guidelines did not prohibit undercover operations (see Case N-4). This official spent four hours persuading the Deputy Attorney General to keep the operation going.

Under the newer rules, a wrong decision could mean criminal prosecution. Previously, such matters were handled administratively (within the law-enforcement agency). Even an operation approved by superiors might subsequently be ruled illegal, and the investigators would be prosecuted.

Uncertainty and fear provoked overreaction. Investigators no longer did things they in fact were allowed to do. An investigator described one example of what he thought could no longer be done under the newer rules. We then asked him to tell us exactly how those rules would have affected the case. He thought further, discussed the issue with some colleagues, and concluded that in fact nothing in the newer rules would have adversely affected the investigation or prosecution of the case.

In several cases, investigators believed the newer rules precluded certain activities. For example, New York investigators told us that because of the FOIA, other police departments could not share information with the NYPD. "The FOIA prohibits the gratuitous dissemination of information unless there is an active investigation," said one respondent. Another agreed, saying that the rule applies to federally funded agencies, and since many local police departments receive some federal funds, the rule has great effect. Investigators in Florida noted that their state's Public Records Law caused their department to decline intelligence information from other law-enforcement agencies because such information became a public record and was thus vulnerable to release under the Public Records Law of Florida, or conceivably under the FOIA.

It is not merely a matter of error or overreaction on the part of investigators. The atmosphere affected everyone. By legislation and by attitude, private corporations were no longer the ready allies of police investigators. Fearing bad publicity and possibly legal action, companies that in the past informally cooperated with investigators now

demanded warrants. Police could no longer obtain easy or rapid access to telephone records, billing records, credit records, and bank records which had often been used in the past to quickly track down suspects. This change was not the result of statutes or court decisions, said one New York prosecutor, but rather of policy changes by the corporations.

Getting warrants became more difficult. Judges required more evidence before granting authority for wiretaps or surveillance operations. Prosecutors too were sensitive to the shifts in public attitudes. Some District Attorneys became reluctant to prosecute political cases. At a minimum, they wanted more evidence before going to court. Others complained that the city would not assign its own attorneys to defend police on spying charges. Police intelligence had become unpopular.

Almost every department we talked to was in the midst of lawsuits concerning police intelligence operations in political cases. A lawsuit in progress prevented us from interviewing officials of the Chicago Police Department.[4] Police commissions and police chiefs felt that intelligence operations only brought lawsuits. Budgets for intelligence operations were cut. Operations were reduced, and the little intelligence they did produce was worthless.

[4] The Chicago Police Department declined our request for interviews because of a court order that required that the National Lawyers' Guild, the plaintiff in a legal action against the department, be informed of any outside contacts that the department had concerning intelligence matters. The department did not want to create a situation in which the guild would be approaching The Rand Corporation for access to this study while the legal action was still in progress. We did interview officials in the U.S. and State Attorneys' Offices.

GETTING AROUND THE RESTRICTIONS

Organizations that see restrictions or requirements as unreasonably constraining often find ways of getting around them. To avoid tight restrictions on police intelligence files and the loss of memory when files are purged, investigators have created "soft files" that are outside the official police files. These may be carried in an investigator's notebook, in the trunk of a car, or even in a home computer.[5] Considered a necessary evil by some investigators, police officials also recognize that "soft files" are inefficient. Retirement or rotation often spells the end of memory.

To avoid the problem of obtaining a warrant to examine credit card records and other financial information that is routinely available for commercial purposes but not available to police, police have simply recruited informants within credit checking firms.

Private investigating agencies have been used for some time to gather information that police, for lack of resources or because of legal constraints, cannot obtain. With growing restrictions on what they may ask or find out about their employees, or their foes, private corporations increasingly have turned to private firms for information. In some cases, police themselves may be increasingly relying on private organizations to gather information and to create and store data bases, and on developing their own private networks for the exchange of information. The extent and nature of these private operations, their

[5] Other ways of getting around restrictions recently came to light in an investigation of the activities of the Los Angeles PDID: Intelligence files had been offered to other governmental entities (the local school district, the U.S. Army), and other official files were stored in a police officer's residence.

relationship with police intelligence, and the broader implications of this practice are not well understood and merit further research.

CONCLUSIONS

The people we interviewed generally agreed that the newer rules hampered investigations--they particularly diminished the perceived ability to use informants and undercover operations. These perceptions are compatible with our sample of cases indicating an actual reduction in the frequency of informant intelligence for preventive purposes.

The people we interviewed also generally perceived that the newer rules reduced prosecutorial effectiveness. In this regard, our findings, tentative because of the small sample size, do not agree. The sample rate of prosecutorial success remained about 70 percent under both the older and the newer rules.

The respondents blamed the FOIA for making investigators reluctant to create hard files, for scaring off informants, for reducing the flow of information from local police departments to federal investigators, and, possibly, for cutting down the exchange of intelligence among police departments. But, at the same time, they also cited other reasons for purging their files--efficiency, fear of discovery under a court order--and some thought that informants were merely reacting to alarming stories they had read in the press. Investigators were not certain that the federal government could not protect intelligence information passed on to it, and their interpretation of the FOIA's stricture against the exchange of information between departments may not be correct.

With the exception of the FOIA, the newer rules were discussed in an unspecific and generic way in most of the police and prosecutorial agencies. In only two or three agencies did respondents cite specific court cases or pieces of legislation, e.g., a liberal discovery law. The bulk of the constraints seemed to derive less from legislation at the federal or state level ("black letter law") than from "judge-made" case law or from rules imposed by administrative policy, and the interpretation of that policy. Of course, departmental directives are in many cases merely interpretations of the law, but how the law is interpreted is important. If that perception is correct, then swings in the pendulum of public opinion can substantially alter how the constraints are applied.

In the eyes of police and prosecutors, the constraints are very much a matter of climate, atmosphere, and public attitude. This has, in their view, resulted not only in increased restrictions on intelligence operations but in lack of community cooperation, more lawsuits, unfavorable court decisions, declining resources, unnecessary conservatism, and loss of morale.

VII. CONCLUDING REMARKS

Although we were able to examine only 51 relevant cases (which eventuated in 53 prosecutions and two "no prosecutions"), not all of which involved intelligence operations, we were able to draw some important conclusions. These conclusions apply only to the period 1964-1980; they do not reflect the impacts of the intelligence rules of the 1980s, because our data base is limited to the earlier periods.

First, it appears that intelligence operations are more important than other investigative techniques such as gathering physical evidence or seeking eyewitness identification of suspects in terrorist-related cases. Well over 60 percent of the cases in our data base involved intelligence operatives.

Second, the impacts of the newer rules seem to have been limited largely to the timing and availability of preventive intelligence, a finding that is consistent with the perceptions of investigators and prosecutors we interviewed. Preventive intelligence is gathered mainly by informants and undercover police, although electronic surveillance also plays a role. Although the proportion of cases in which such techniques were used is roughly the same in the older and newer rules periods, the proportion of cases in which violence or other crimes were prevented declined under the newer rules.

The law-enforcement officials we interviewed asserted that the newer rules reduced the acquisition of advance knowledge of crimes about to be committed, so that operations to prevent them from being carried out--operations sometimes as simple as letting the conspirators

know that police are aware of their plans--likewise decreased. Under the newer rules, intelligence became more reactive, supporting apprehension and prosecution, not prevention. Investigators had to apply criminal standards (i.e., they had to have evidence of the commission of a crime or the imminent commission of one, which is difficult to prove) for emplacement of informants or undercover agents within terrorist groups. Although our interviewees were able to cite newer rules cases illustrating prevention, the total effect of the shift from preventive intelligence to reactive intelligence cannot be measured. We have no way of knowing how many groups were deterred; how many terrorist operations were aborted; how many bombings, murders, or violent demonstrations were prevented; or how much more political violence would have occurred. Our respondents asserted that intelligence operations were always very difficult, even under the older, more permissive rules and that, in fact, most terrorist crimes remain unsolved.

But terrorist activity did not increase with the implementation of the newer rules; it did not even continue at the same level as in the late 1960s and early 1970s. Terrorist activity in the United States declined in the late 1970s, primarily for reasons that had nothing to do with intelligence operations. Some of the previously active groups had been destroyed, and, perhaps more important, some of the causes that inspired political violence--notably, American involvement in the war in Vietnam--no longer existed.

The political turmoil of the 1960s and early 1970s demanded an expansion of domestic intelligence activities. The decline in political violence after that time permitted the reduction of such activities. Had the country faced a growing terrorist threat, some of the newer

rules might never have been imposed, or if they had been, their effect might have been reduced. But an angry public, outraged by abuses in areas other than the prevention of terrorism, demanded tighter controls on all intelligence operations. Had the public felt threatened and in need of protection against terrorism, increased constraints on domestic intelligence would probably not have been tolerated.

Finally, it appears that investigative and prosecutorial law-enforcement entities adapted successfully to the newer rules, as evidenced by the fact that the rate of criminal conviction did not change appreciably over the two time periods.

Appendix

CASE SUMMARIES

This appendix contains the individual case summaries, beginning with the older rules cases. Within each subsample (i.e., older cases and newer), cases are organized by geographic location.

CASE SUMMARY

YEAR: 1971

LOCATION: Los Angeles

CASE IDENTIFICATION: Shooting of LAPD Officer by Black Panther Members

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

The background to this case goes back two years. In 1969 the Black Panthers in Los Angeles had been stockpiling illegal weapons. In a celebrated 1969 case, called the "LA 18" and subsequently known as the "LA 13", the LAPD, in attempting to serve a search warrant, entered a gun battle with Panther members. The connection between the "LA 13" case and the Taylor case summarized below is that a paid FBI informant in the former case surfaced in the latter case.

After the schism occurred between the Eldridge Cleaver and Huey Newton factions of the Black Panther Party, there was mounting fear and suspicion of infiltration by the FBI and local police. In San Francisco ten people had proceeded to a police station, murdered one policeman and wounded a stenographer. Three of these suspects fled to the Los Angeles area. While there, they received a telephone call notifying them of an upcoming meeting of the Newton faction. At the same time, the local police received an anonymous phone tip of the same meeting. (NOTE: A theory of defense for the three in their subsequent trial was that the *same* person made both phone calls and that he was, in fact, the paid FBI informant in the "LA 18" case.)

The three suspects went to the meeting. (The alleged informant wasn't there.) Officers from LAPD's Criminal Conspiracy Section (CCS) arrived at the meeting site at the same time. When the three suspects left in a car, CCS personnel on the scene contacted a patrol car and advised the uniformed officers that the three suspects might be armed and that they should be stopped. (In the ensuing trial, CCS officers testified that they had also told the patrol car officers that the suspects were dangerous.) The uniformed officers, with the car carrying CCS personnel following, stopped the suspects. When one officer approached the suspects' car, one defendant shot first and wounded the officer seriously. CCS officers entered the melee, pulled the wounded officer away, and fired over 200 shots. All three suspects were wounded seriously. They were arrested and charged with many counts of assault with intent to murder, ADW, and assault on a peace officer.

- 111 -

The suspects spent several years in pretrial custody. During this time a defense motion to declare the method of jury selection illegal was pursued as far as a petition to the U.S. Supreme Court which denied *certiorari*. (Essentially, the basis for the motion was that the voter rolls were not representative; rather, drivers' license and welfare rolls should be added to the pool of potential jurors.) After bail was reduced in the Superior Court, the defendants made bail and then fled the area. They were apprehended in New Orleans over four years after the original crime took place. One defendant made certain admissions to the New Orleans police. In a pretrial hearing, the court decided to suppress these statements on the ground that they were coerced and thus they could not be admitted into evidence at trial.

During the four year interim, the defendants' bullet-riddled car was given to one of their friends by the Los Angeles Police. This friend then sold it for junk, whereupon it was subsequently smashed. There were four months of various pretrial motions for discovery of wiretap information, informants' identity, and so on--all of which were denied. Jury selection and trial consumed five months.

The defense (one public defender, two appointed counsel) presented two theories at trial: that the FBI set up the confrontation between the police and defendants and that LAPD's CCS really wanted to execute the defendants, while using the uniformed officers in the patrol car as sacrificial lambs. The defense was helped by its attempts to link the alleged FBI informant to the FBI's COINTELPRO. At trial, the FBI, claiming government privilege, refused to answer whether they were paying the alleged informant. At conclusion of trial, the jury was instructed by the court that the police had suppressed evidence by making the defendant's car unavailable. The judge instructed the jury that the FBI's refusal to answer could be regarded as an admission. Although the prosecution denied that the defendants were the targets of COINTELPRO, its case was hurt further because the author of the U.S. Senate report on COINTELPRO was a witness in the case and described the excesses characteristic of that program.

CASE OUTCOME

One defendant (Taylor, who fired the first shot) was acquitted by jury. The charges against the other two defendants were dismissed by the prosecution because of the Taylor acquittal (the strongest of the three cases) and because all three already were serving time elsewhere in the state.

COMMENTS/CONCLUSIONS

Given the facts of this case, an acquittal on these charges would be no less likely to ensue if the case occurred today. Under the current guidelines for domestic security investigations and for the use of informants promulgated by the Attorney General, the FBI could now place an organization such as the Panthers were in the late 60's and early 70's under full investigation. But, since the facts of whether or not the same paid FBI informant set up the confrontation between the defendants and the police never emerged at trial, it is idle to speculate whether the events would have occurred in the same way. Therefore, this case seems unrevealing for the purposes of our study.

CASE SUMMARY

YEAR: 1974

LOCATION: Los Angeles Area

CASE IDENTIFICATION: Two Black Revolutionaries Possess Bomb

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

A woman took her car to a garage to be repaired but the car was never returned to her. She did not report this to the police, but two months later saw it parked on the premises of a school run by a small black revolutionary group. She notified police and a patrol car was dispatched to the school, which was now defunct and used as a private residence. The police inquired at the house but a woman (one of the defendants) would not admit the officers. A young girl came out of the house and police said they noticed a gun (later determined to be loaded) in her purse. The girl turned out to be a fugitive. The police, after arresting the fugitive, saw the car on private property, and went into the house. During a search a bomb was found in a drawer. Two suspects (a man and a woman) were arrested on charges of bomb possession and harboring a fugitive.

CASE OUTCOME

The woman defendant pled guilty to one count of possession of a bomb and received a misdemeanor sentence of four years probation. The male defendant fled to another state while awaiting a preliminary hearing. He was arrested by the FBI elsewhere for an unrelated federal crime, then returned to Los Angeles. He pled guilty to possession of a bomb and received a state prison sentence with the condition that he was to serve time first in a federal prison on the federal charge.

COMMENTS/CONCLUSIONS

- o Although LAPD's Criminal Conspiracy Section knew about the small revolutionary group, this case is one in which uniformed police uncovered the bomb while investigating an auto theft. Therefore, the outcome would not have been affected by intelligence rule changes.
- o Search and seizure were central issues in the case, but defendants finally pled guilty.

CASE SUMMARY

YEAR: 1967-69

LOCATION: San Francisco

CASE IDENTIFICATION: S. F. State University Demonstrations and Riots

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: San Francisco Police Department

CASE FACTS AND CHRONOLOGY

Between 1967 and 1969 a series of demonstrations and riots occurred at San Francisco State College (now known as San Francisco State University). Over time the ostensible issues that sparked the riots changed. The early demonstrations centered on opposition to the ROTC program. Some eight months later, members of the Black Students Union (BSU) broke into the student newspaper and assaulted several people. The police obtained five arrest warrants and waited for the perpetrators to surrender. They did. The next incident centered on the issue of changing admissions policy to permit entry of underprivileged low-achievers. Led by a faculty member, students (including members of the BSU) broke into the administration building. With film taken by police photographers and film subpoenaed from the media (who were present during most of the riots), the police were able to identify the perpetrators; these films were used as a basis for obtaining 12 arrest warrants. The students refused to surrender, however, remained on campus, and dared the police to arrest them there. The police wanted to avoid a confrontation on campus because a confrontation with the police was desired by the militants. Finally, the students and the faculty member surrendered one or two at a time. They were charged with trespass and malicious mischief, tried, and received minimal sentences.

The next series of incidents--strikes, demonstrations, riots--were centered around the issue of a black studies program. The BSU negotiated with the faculty and administration and a program was instituted using student funds. During this 7-8 month period there were many incidents, including a break-in of the bookstore, student strikes and interruptions of ongoing classes, and several small bombings (resulting in only one injury to a student who set off one of the bombs). In the bombing incident the police conducted a search for bomb paraphernalia at the home of a friend of the injured student. This search generated an illegal search case that was eventually taken to the U.S. Supreme Court. But the search, in which the door was knocked down, was upheld because of the "exigencies of the moment." In this series of incidents some 681 arrests involving 613 people

were made over a ten-month period. (Interestingly enough, only 52 percent of those arrested were students.) Most of the arrest charges were misdemeanors, such as disturbing the peace, trespassing, unlawful assembly and refusing to disperse. Most misdemeanor prosecutions were handled in groups. Some 20 were charged with felonies (such as assault on an officer) and these were handled separately. Again, most of the misdemeanor cases were built on film evidence taken by police and media photographers.

CASE OUTCOMES

All of the cases were tried. Excluding juvenile arrestees, roughly 65 percent were convicted, 20 percent pled *nolo contendere* and the remainder were acquitted. Sentences were light; very few received more than ten days' jail time and some defendants received credit for time served awaiting trial.

COMMENTS/CONCLUSIONS

The police had excellent intelligence and early warning throughout the months and years of unrest and demonstrations. They had several information sources: the school administration, informants in the student ranks, and undercover police officers. The latter were only part-timers, because they were regular students attending the college at the time the unrest began.

Our interviewee believes that if the demonstrations and riots occurred today two of the major sources of intelligence probably would disappear: (1) given current department policy, the police would not use undercover personnel today; (2) because of the difficulty of shielding informants' identities in discovery, it would be extremely difficult to recruit them. Thus, the outcomes (in terms of identifying and prosecuting rioters) might be different today.

CASE SUMMARY

YEAR: Mid to Late 1960s
LOCATION: San Francisco
CASE IDENTIFICATION: Demonstrations at Iranian Consulate
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: San Francisco Police Department

CASE FACTS AND CHRONOLOGY

During the mid to late 1960s a series of student demonstrations occurred at the Iranian Consulate, which was also the residence of the Consul General. Generally, the purpose of these demonstrations was to protest certain of the Shah's policies, such as agrarian land reform. The SFPD had developed good working relationships with certain consular personnel. In some of these demonstrations, SFPD intelligence personnel received advance notice and the police were able to make appropriate preparations. In one demonstration, 15 police held off about 300 demonstrators until help arrived. In another case, in 1970, a police guard was requested by the Consulate but was turned down by police authorities. The Consulate was subsequently bombed and extensive damage to it and surrounding residences was incurred.

Generally, in the process of restoring public order several demonstrators would be arrested and charged with misdemeanors such as disturbing the peace and unlawful assembly. In some cases there was violence and some arrestees were charged with assault on a peace officer. (The police never identified the perpetrators in the bombing case.)

CASE OUTCOME

Prosecution resulted in a few convictions. The outcome was generally a suspended sentence plus relatively short probation. No Iranian students were deported for any of these actions.

COMMENTS/CONCLUSIONS

Whatever success was achieved in some of these cases was primarily due to the presence of one or more informants in the Consulate who were consular officials. (They would translate pamphlets printed in Persian that announced the demonstrations.) Had these cases occurred today, the defense could have taken advantage of the new discovery rules and asked for information on informants. However, assuming that relationships and information flow between consular officials and police intelligence personnel would have remained at the status quo, such defense actions might have affected only the prosecution phase of these cases. If advance intelligence information had continued to flow, the police would have been able to take the preparatory measures they did take in some of these cases.

CASE SUMMARY

YEAR: 1970
LOCATION: Baltimore
CASE IDENTIFICATION: Legal Wiretap Helps Police Plan to Meet
Violent Demonstration
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Federal Bureau of Investigation

CASE FACTS AND CHRONOLOGY

A legal wiretap under Title III of the Safe Streets Act warned state and local police of a planned demonstration by the Black Panther Party at which there might be violence. Wiretap information also revealed which persons would be carrying weapons.

CASE OUTCOME

The police were able to plan carefully and as a result averted the violence and arrested several people on misdemeanor violations of weapons possession.

COMMENTS/CONCLUSIONS

This is a case in which the newer rules would not have had an effect. The crucial investigative technique was information obtained from a legal wiretap--one which could also be obtained today under the same rules.

CASE SUMMARY

YEAR: 1972-73

LOCATION: Jackson, Mississippi

CASE IDENTIFICATION: FBI Aggressive Interviewing of Palestinian Terrorist

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Federal Bureau of Investigation

CASE FACTS AND CHRONOLOGY

After the 1972 Lod airport massacre by the Japanese Red Army Group and the murder of Israeli athletes in Munich by the Black September Group, the FBI learned that a leader of a Palestinian terrorist group was in Dallas. The FBI conducted a surreptitious entry ("black-bag job") of the terrorist leader's premises, placing a telephone tap and a bug, and also searching the premises for papers. They found a list of 28 cadre members of the terrorist organization, one of whom was in Jackson, Mississippi. From foreign intelligence sources corroborative information was received that the resident alien in Jackson was a terrorist. Through these sources the FBI learned that the job of the Jackson terrorist was to recruit members of white hate-groups. An informant was recruited by the FBI, who was then sent by the terrorist group to the Libyan desert to be trained in terrorist techniques. The objective was then to return to the United States and carry out terrorist acts against Jews in the U.S.

CASE OUTCOME

During the last half of the 1960s and first half of the 1970s the FBI conducted a proactive program of "aggressive interviews" of all KKK members in the south. Each interviewee would be warned that klansmen were known to the FBI and would be held responsible if violence occurred. This technique of "aggressive interviewing" was used against the Jackson terrorist and credited with deterring his terrorist acts.

COMMENTS/CONCLUSIONS

On balance, the outcome of this older-rules case probably would have been very different had it occurred under the newer rules. Today, the FBI could obtain authority to place a telephone tap and a bug in the home of a terrorist if the basis for the request came from foreign intelligence (the 1972 *Keith* case: *United States vs. United States District Court*, 407 U.S. 297). Under the current Attorney General's Guidelines for Domestic Security Investigations, electronic surveillance is permitted within a full, rather than preliminary, investigation. But agents would not have been permitted to search for papers (which in the case of the terrorist leader in Dallas, yielded the names of

28 cadre members). Also, under current guidelines the FBI would be allowed to recruit an informant only for a full investigation.

Under the current climate it is doubtful, according to our interviewee, that the program of "aggressive" or "deterrent" interviewing would even be initiated. He felt that it is probably an invasion of First Amendment rights.

CASE SUMMARY

YEAR: 1970
LOCATION: New York City
CASE IDENTIFICATION: Weathermen Bombing of New York Banks
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

An undercover NYPD officer joined a group of radicals who were supporters, but not members, of the Weathermen. After about a year, he heard about a Weathermen cell at New York University and was able to infiltrate. During a period of eight months there was considerable talk of plans to bomb a number of targets, including the Stock Exchange, President Nixon's former law firm, and the Rockefeller yacht, and to roll grenades under a police patrol car. Some of these conversations were recorded by the undercover officer using a legal body mike. The police had early on solicited the prosecutor's office for guidance. They were advised to wait, even though the early actions were legally a crime (of conspiracy), since the goals of the group had not yet become specific or discrete enough.

The suspects next practiced detonations of the bombs in dry-run fashion at a location upstate; these activities were photographed legally by the police. One suspect left the conspiracy and went to Boston; another took her place. Then the suspects made plans to bomb five particular banks. At a subsequent meeting they experimented with chemical incendiaries. When they lit an incendiary device at one bank, they were arrested.

CASE OUTCOME

All defendants were convicted. Two received 12 year sentences and one young (19 years) defendant received probation.

COMMENTS/CONCLUSIONS

Under the newer rules the police would have been justified in placing an undercover officer in the group, since the Weathermen were known to be criminals. Thus, the outcome would have been unchanged under the newer rules. But the crucial question is: How could the police have known whether *this cell* was really Weathermen or only sympathizers *without the preceding year's work undercover in the marginal support groups*, and would the undercover agent have been able to infiltrate the cell *without having first established his credentials in another radical group*? This case is an example of the need for undercover work

in marginal groups prior to targeting one truly terrorist group for infiltration. (One interviewee recalled the case differently. He said that the undercover agent did not actually get in the cell but got close, and he asserted that police probably could do the same today.)

CASE SUMMARY

YEAR: 1971

LOCATION: New York City

CASE IDENTIFICATION: Panther 21 Conspiracy Case

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Manhattan District Attorney's Office

CASE FACTS AND CHRONOLOGY

An NYPD undercover officer and an NYPD informant infiltrated the Black Panthers early on. The group planned to commit a number of criminal acts including bombing police stations, shooting policemen, and bombing department stores and Board of Education buildings. Adequate warning from the informants led to the arrest of the group the day before the bombs were to explode and to the seizure of the dynamite.

CASE OUTCOME

This case has been characterized as a police (investigative) success but a prosecutorial failure. There was adequate evidence on some of the bomb possession charges, but the prosecutor attempted to prove a grand conspiracy case, and in so doing failed. The trial was lengthy, but the jury acquitted all of the defendants of all charges after deliberating only a few hours. One view is that jury selection was flawed because the prosecutor (who is now in private practice) failed to ascertain and challenge potential jurors who were prejudiced against the notion of police working undercover or who were receptive to political rhetoric (which the defense used to its advantage).

COMMENTS/CONCLUSIONS

In the opinion of the interviewee, this older-rules case might not have been an investigative success had it occurred in today's environment, because the police would not have attempted to infiltrate such an organization so early.

CASE SUMMARY

YEAR: 1971

LOCATION: New York City

CASE IDENTIFICATION: Attempted Murder of Two Policemen by BLA Member
Richard Moore

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Manhattan District Attorney's Office

CASE FACTS AND CHRONOLOGY

Near the home of the then District Attorney of Manhattan two patrolmen in a patrol car were wounded by machine gun fire from a passing auto. The police received a tip from a woman who claimed she knew who did the shooting. In talking with her, the police determined that her apartment was used as a base to plan and stage such crimes. But she was unwilling to identify the persons. Soon after, two similar packages, containing a New York license plate, a 45-caliber bullet, and a letter were sent to the New York Times and to a radio station. On the wrapper of the package sent to the Times were two sets of fingerprints, one of which was identified as Richard Moore's--a defendant in the Panther 21 case who had jumped bail and supposedly fled to Algeria. The license plate matched a partial plate identification given to the police by an eyewitness to the shooting. Then the police received another call from the earlier informant saying she had seen the same license plates in her apartment and that Moore had talked about planning to kill the wounded policemen who were in the hospital. Moore was arrested and the machine gun was seized.

CASE OUTCOME

The crucial pieces of evidence offered in the trial were the machine gun and the (partial) eyewitness identification of the license plate. Moore was convicted of attempted murder and received a sentence of 25 years to life.

COMMENTS/CONCLUSIONS

Given that the crucial evidence was obtained through tips from a confederate and (partial) eyewitness identification of a license plate, it is likely that the outcome of this case would have been unaffected by the newer intelligence rules.

CASE SUMMARY

YEAR: 1971

LOCATION: New York City

CASE IDENTIFICATION: Murder of Two Policemen by Three BLA Members

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Manhattan District Attorney's Office

CASE FACTS AND CHRONOLOGY

A few days after the machine gunning of two policemen (see Case #0-9), two other policemen were ambushed from behind and killed with handguns outside of a housing project. These two patrolmen were apparently lured to the scene by an (unfounded) domestic disturbance call from the housing project. The murderers fled, taking with them the policemen's guns. Two young female eyewitnesses told police that they saw men leaning on a parked car who then shot the patrolmen. They were able to describe one perpetrator well and one poorly. Fingerprints of the perpetrators were found on the parked car.

Three months later, two men were captured in San Francisco after a shoot-out with police. Two guns were recovered; one turned out to be the murder weapon used in the New York killing and one turned out to be the weapon of one of the murdered policemen. One of the suspects was charged with attempted murder in San Francisco and was identified by one of the young eyewitnesses in the New York housing project as the man she had seen clearly. Meanwhile, New York police had interviewed various women friends of the BLA revolutionaries and some had cooperated. A photograph (from the California driver's license) of the second suspect captured in San Francisco was identified by these women as the second murderer. His fingerprints were sent to New York and found to match those found on the car close to the place where the patrolmen were killed.

However, one of the murdered policemen's guns was still missing. Two years later the third perpetrator was arrested in New Orleans after police there received a tip from another criminal picked up on a robbery charge. This informant told police that the third perpetrator had buried the policeman's gun on a Mississippi farm. The gun was recovered.

CASE OUTCOME

All three defendants were convicted of murder and received sentences of 25 years to life.

COMMENTS/CONCLUSIONS

This case involved straightforward police work. The crucial pieces of evidence were the murdered policemen's guns, the visual identification of one of the perpetrators, and the partial visual identification and fingerprints of the other perpetrator on the car. It is likely that the outcome of this case would have been unaffected by the newer intelligence rules.

CASE SUMMARY

YEAR: Early 1960s
LOCATION: New York City
CASE IDENTIFICATION: Black and Puerto Rican Activist Group
Plans to Bomb the Statue of Liberty
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

An undercover NYPD officer managed to join a black/Puerto Rican activist group. The group obtained dynamite and planned to blow up the Statue of Liberty. Eleven to 14 suspects were arrested for possession of explosives.

CASE OUTCOME

All defendants were tried. Some were convicted (including the leader, Robert Collier) of possession of explosives.

COMMENTS/CONCLUSIONS

If the activities of such a group justified the placement of an undercover officer under present guidelines, the case outcome would most likely be the same. However, interviewees maintain that infiltration of such groups is difficult without having previously placed undercover agents in the area, which they can no longer do.

CASE SUMMARY

YEAR: Late 1960s
LOCATION: New York City
CASE IDENTIFICATION: Cuban Terrorists Fire Mortar Round at U.N. Headquarters
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

Two Cuban terrorists (the Novo brothers) managed to obtain and emplace a mortar on the Queens side of the East River. They were able to fire one round aimed at U.N. Headquarters. The round fell short into the river. A police patrol car happened to pass by just when the mortar was fired. The two terrorists were arrested. (One of them is presently in jail for the assassination bombing of former Chilean official Orlando Letelier in Washington, D.C.)

CASE OUTCOME

The defendants were tried, convicted, and received jail sentences.

COMMENTS/CONCLUSIONS

This case would not have been affected by the newer intelligence rules, since it was by chance that the police happened on the crime scene.

CASE SUMMARY

YEAR: Late 1960s or Early 1970s

LOCATION: New York City

CASE IDENTIFICATION: Puerto Rican Separatist Plans to Bomb
Recruiting Station

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

Based on undercover information, the police placed a member of MIRA under surveillance. The plan was to bomb a recruiting facility. The surveillance led to the suspect's capture with the bomb (in a loaf of bread) in his possession.

CASE OUTCOME

The defendant was tried and convicted of possessing a bomb.

COMMENTS/CONCLUSIONS

If an undercover officer could be placed in such a group today in the newer-rules environment, the case outcome would most likely be the same.

CASE SUMMARY

YEAR: 1966

LOCATION: New York City Area

CASE IDENTIFICATION: Minutemen Conspiracy to Bomb and Commit Arson

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY:

This case involves the Minutemen, a right-wing paramilitary organization whose avowed purpose was to train and prepare its members to fight as an underground guerilla army in the event of a Communist takeover of the United States.

In 1966 the group(s) in the New York City area conspired to destroy left-wing-owned buildings and installations in upstate New York by fire and explosives. The groups conducted training and guerilla exercises and were detonating various explosive devices, engaging in target practice with firearms, and stockpiling various weapons (rifles, ammunition, grenades, machine guns, mortars, bazookas).

Originally, NYPD received information from a police officer in another jurisdiction (who was also related to some of the Minutemen) that the groups possessed machine guns. Subsequent investigation determined that their weapons were obtained from Army surplus supplies. Explosives components were bought from chemical supply houses or removed illegally from school chemistry labs.

The NYPD investigation employed several techniques, including surveillance of individuals, a then-legal (court-ordered) wiretap, and an undercover NYPD officer who was planted in the Long Island group. The FBI was also involved. When the police received information that the groups were to meet in a diner, the final staging point, they obtained search and arrest warrants. Nineteen Minutemen were arrested there; five bombs and a large collection of weapons, ammunition, and explosive components were seized. The arrestees were charged with conspiracy to commit arson and possession of bombs and other weapons.

After the arrest, the New York State Attorney General's Office began an investigation into the Minutemen activities and recommended that legislation be passed to ban paramilitary groups in the future.

CASE OUTCOME

Although convinced that there had been a Minutemen conspiracy at the time of arrest, the Queens County District Attorney's Office dropped the charges against the Minutemen because the original search warrants were defective on their face, under the test set forth by a 1964 U.S. Supreme Court decision. That decision--Aguilar v. Texas--did not require disclosure of an informant's name, but did require establishing the basis for his reliability. The prosecutor felt that the police had not established the basis for the undercover officer's reliability.

After these arrests the Minutemen organization in New York State was disbanded.

COMMENTS/CONCLUSIONS

Aside from the deficient search warrants, the basic investigation could be viewed as a success. But one of the crucial investigative techniques used--the undercover officer--probably would not meet today's NYPD criteria, according to the former deputy who was interviewed. He feels that under today's rules, inserting an undercover officer under the same circumstances that then existed would be viewed as a fishing expedition.

CASE SUMMARY

YEAR: 1967

LOCATION: New York City

CASE IDENTIFICATION: Right-Wing Group Attempts Murder of Prominent Left-Wing Figure

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

A right-wing group conspired to murder Herbert Aptheker, a prominent left-wing figure, on the premises of a Bronx community and social club. The group exploded a pipe bomb on the roof of the building.

Initial information was provided to the NYPD by an informant for the U.S. Treasury's BATF. The NYPD investigation employed legal court-ordered wiretaps and an undercover officer fitted with a body mike. It turned out that the 1966 Minutemen conspiracy case and the present case were related, in that the NYPD undercover officer in the Minutemen case noticed that an individual's name that surfaced in the present case was known to him from the previous case.

Search and arrest warrants were obtained. Five persons were arrested and the searches yielded bombs, grenades, dynamite, a large quantity of black powder and bomb components. Charges were conspiracy to commit murder and arson and possession of dangerous weapons and explosives. The dynamite had been stolen from a construction site and the black powder and bomb components had been purchased illegally from sporting goods stores.

CASE OUTCOME

Three defendants pled guilty to bombing charges and two pled guilty to weapons law violations.

COMMENTS/CONCLUSIONS

The detective interviewed felt that had the case occurred today, the outcome would have been unchanged, because the crucial investigative techniques (legal wiretaps, informant, undercover officer) could have been used under the newer rules.

CASE SUMMARY

YEAR: 1968

LOCATION: Miami

CASE IDENTIFICATION: Dr. Bosch/Cuban Power Fires on Polish Freighter

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Miami Police Department
U. S. Attorney's Office, Miami

CASE FACTS AND CHRONOLOGY

Dr. Orlando Bosch was the leader of one of the several anti-Castro groups known as "Cuban Power" (later "Cuban Action"). This case covers one period of an extended history of terrorism by the group. In 1967 it numbered nine individuals, who increased to ten by the entry of an established FBI informant. (This informant later became a professional informant for various intelligence agencies in the United States, Chile and Venezuela.) The group had been bombing foreign ships that traded with Cuba, typically by placing a bomb aboard when the ship was in harbor--in Miami and in New Orleans. (Cuban Power was also active in New York and Los Angeles, involving other terrorists.) In particular, the Bosch group fired on a Polish freighter, using a 57-mm recoilless rifle, while the ship was tied up in the Port of Miami.

The informant was wired and produced many incriminating tapes. Furthermore, he provided the Bosch group dummy dynamite that became evidence against them. Investigation of the Polish ship attack produced an abundance of physical evidence incriminating the Cuban Power group--the recoilless rifle, its sight, fingerprints and palmprints on newspaper wrappings, etc.--all the fruits of warrants served in the apartments of the suspects.

Bosch and others were arrested and tried.

CASE OUTCOME

The informant testified at trial. The defense claimed entrapment because of the dummy dynamite and sight provided by the informant. However, Bosch was convicted and received a ten-year prison sentence. He was paroled in 1971 and became a fugitive. (The infamous airplane bombing in the Caribbean attributed to Bosch occurred later.)

COMMENTS/CONCLUSIONS

The FBI informant was the key element in the case, both during the investigation and at trial as a witness. At the time he was introduced into the Cuban Power group, there was evidently enough information about the group to justify opening a full investigation and planting a new informant in terms of the Attorney General's Guidelines of 1976. So the outcome would not have been changed under the newer rules.

CASE SUMMARY

YEAR: 1974

LOCATION: Miami

CASE IDENTIFICATION: FLNC Bomb Maker/Accidental Bomb Detonation

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Miami Police Department
Dade County Public Safety Department
Dade County State Attorney's Office

CASE FACTS AND CHRONOLOGY

An explosion occurred at the headquarters of a Cuban terrorist organization known as FLNC on March 20, 1974. It was an accidental detonation of a book bomb under construction. One individual had his hand blown off. Four FLNC members were arrested at the scene.

CASE OUTCOME

The injured terrorist (and possibly also the other three defendants) was convicted on the basis of evidence at the scene. He was sentenced to and served a prison term; he is now at liberty and again involved in anti-Castro activities.

COMMENTS/CONCLUSIONS

This case resulted from a fortuitous event that exposed terrorist preparations. Changes in rules on intelligence information gathering have no bearing on the outcome.

CASE SUMMARY

YEAR: 1971

LOCATION: Miami

CASE IDENTIFICATION: Black Panther Conspires to Kill President

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Miami Police Department

CASE FACTS AND CHRONOLOGY

In 1971 Jesse Lee Marshall, alleged to be a New York Black Panther, planned to kill President Nixon at Key Biscayne by the use of explosives. A white female narcotics street informant, who learned of this plan, introduced our interviewee, who was then an undercover officer, to Marshall as an underwater demolition expert. The police undercover officer introduced a Secret Service agent as his partner. Incriminating conversations were taped. The group was arrested, by prearrangement, while on their way to the undercover officer's garage. The Miami Police Department and the Secret Service performed the arrest. Marshall was subjected to federal prosecution for conspiring to murder the President.

CASE OUTCOME

Marshall was convicted and sentenced to prison. He is now on parole.

COMMENTS/CONCLUSIONS

This case might have had ramifications if defense counsel had pursued the issue of disclosing the informant's identity, but he did not. So, it mainly illustrates the value of having established informants pass intelligence information to the police when crime preliminaries arise. If the placing of an informant had to await probable cause, this case might have developed differently.

CASE SUMMARY

YEAR: 1972-73

LOCATION: Miami

CASE IDENTIFICATION: BAMM (Black Afro Militant Movement)
Firebombs Public Schools

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Dade County Public Safety Department
Miami Police Department

CASE FACTS AND CHRONOLOGY

The beginnings of BAMM have been traced to a protest-gathering around a grocery store in a black neighborhood, objecting to high prices; and a repetition of this crowd action two days later (all in the late 1960s). Leftist organizers began building BAMM on this foundation. The Dade Public Safety Department proactively injected an undercover officer to learn what was brewing in what appeared to be a paramilitary Marxist-Leninist group under a known radical leader, Al Featherstone. Two informants (one associated with the Miami Police Department) also became active. BAMM became involved in the 1968 Republican Convention riots. The police watched BAMM for several years as it became ever more militant. BAMM was believed to have conducted schools on terrorism and to have extorted "donations" from the community. There was some indication of a tie with the Black Panthers.

Finally, BAMM engaged in fire-bombings of public schools, ostensibly to protest sub-standard conditions for Black children. The police closed in and arrested 14 suspects, who were indicted on possession of explosives, conspiracy to firebomb, and fire-bombings. The prior intelligence provided by the undercover agent and the two informants helped to make a strong case. One witness informant for the state was shot during the trial but survived.

CASE OUTCOME

Convictions.

COMMENTS/CONCLUSIONS

The intelligence-gathering and the placement of an undercover agent in this older rules case was initiated on a weaker-than-criminal standard. BAMM originally could claim to be a political organization, against which police surveillance was improper as a violation of First Amendment rights. Conceivably, the ultimate outcome of the fire-bombing incidents might have been different if the proactive police

work had not been conducted. In 1976-77 internal guidelines were introduced by the Dade Public Safety Department to impose a criminal standard for initiating an intelligence investigation.

CASE SUMMARY

YEAR: 1970s
LOCATION: Southern Florida
CASE IDENTIFICATION: Violent KKK Activities Prevented
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Dade County Public Safety Department

CASE FACTS AND CHRONOLOGY

This is not a case as much as it is an anti-KKK police program. Five "klaverns" existed in Dade County and adjoining Broward County. The Dade County Public Safety Department fomented distrust and disagreement among the klaverns through the use of undercover agents and informants over a period of several years. The informants were seldom paid in money, but were given assistance on minor police problems. The Florida "no hoods in public" law greatly assisted in frustrating violence-prone KKK rallies, since Klan members could not maintain anonymity. (This hood law also worked against Iranian students desiring to demonstrate against the Shah.)

CASE OUTCOME

The KKK was unable to create significant public disorder.

COMMENTS/CONCLUSIONS

The KKK situation illustrates how proactive police measures can dissipate a domestic security threat. We do not know whether a substantial claim that First Amendment rights were violated here could be made. If undercover agents and informants could be used under the newer rules, a similar success could be anticipated.

CASE SUMMARY

YEAR: 1975

LOCATION: Miami

CASE IDENTIFICATION: Nieves Murder by Pragmatistas Revolutionary Group

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Dade County State Attorney's Office
Dade County Public Safety Department

CASE FACTS AND CHRONOLOGY

Background for the terrorist murder of Nieves is the development of the Pragmatistas. Following the Bay of Pigs, the Pragmatistas emerged as a small (about 20 individuals), loosely organized, militant Cuban splinter group. They chose to commit political murders and to do whatever was necessary to fund their activities, e.g., they committed robberies, they hired out as arsonists in Puerto Rico and as bombers. The group laid grandiose plans.

Nieves was a moderate who espoused an open dialogue with Castro. The Pragmatistas decided to assassinate him. There was an attempt on his life by shooting, which failed.

Nieves' murder occurred on February 21, 1975, in the parking lot of Children's Hospital (where both Nieves' son and a son of one of the Pragmatistas were patients). Two of the terrorists intended to confront Nieves in the parking lot, kidnap him, and then force information from him before disposing of him. However, his violent resistance precipitated the fatal shooting in the lot. The killers fled and hid.

Through evidence at the scene and a partial ID of one terrorist by a witness, together with prior knowledge of the friction between Nieves and the Pragmatistas, the police linked the murder to the Pragmatistas. The police also succeeded in developing a Pragmatistas informant, an individual who was on probation from an earlier union bombing conviction. After being arrested for carrying a gun, he "flipped" and disclosed everything about the Pragmatistas, which led to the arrest of the defendants.

Some defendants were tried first on the conspiracy to kill Nieves and one was tried for the actual killing. The informant, who was placed in a U.S. witness protection program and given immunity from past crimes, was a witness in both cases.

In addition to the informant's testimony, the evidence included: 1) the partial ID by a 15-year-old girl in the parking lot; 2) identification of the terrorists' automobile; 3) disguises (eyeglasses, hairpiece, etc.) and cartridge shells dropped at the scene; and 4) a public threat of death by one terrorist after he had been tried for an earlier fracas with Nieves in a restaurant.

CASE OUTCOMES

Terrorists were convicted and in the murder case the defendant was sentenced to a life term. One defendant, who had fled from the country, was apprehended while attempting to re-enter through Puerto Rico.

COMMENTS/CONCLUSIONS

While the other evidence was substantial, the testimony by the informant made the cases. Police investigatory methods appeared to be traditional, conforming to both the older and newer rules. Undoubtedly, available police intelligence information about the principals in this affair facilitated the exploitation of the informant and the full solution of the crime.

CASE SUMMARY

YEAR: 1969
LOCATION: Chicago
CASE IDENTIFICATION: Black Panther Ambush of Two Policemen
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Cook County State's Attorney's Office

CASE FACTS AND CHRONOLOGY

A few weeks prior to the raid on the Black Panther headquarters (described in a companion case) two Chicago police responded to a call on the west side of Chicago. Three Black Panthers were waiting in ambush. One policeman was killed in the shootout. One Panther member (who was known to police) was killed, one was arrested on the scene, and one escaped and was never found.

CASE OUTCOME

The case involving the one perpetrator who was arrested did not come to trial for three years. He was convicted of a lesser charge.

COMMENTS/CONCLUSIONS

This is another example of a case that would be unaffected by the changes in intelligence rules. In the first place, the arrest and subsequent prosecution resulted from an encounter initiated by perpetrators. Second, investigations of the Panthers could be initiated under today's guidelines, because of previous crimes by Black Panthers all over the country.

CASE SUMMARY

YEAR: 1969

LOCATION: Chicago Area

CASE IDENTIFICATION: Police Raid on Black Panther Headquarters/
The Fred Hampton Affair

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Cook County State's Attorney's Office

CASE FACTS AND CHRONOLOGY

Until six months or so earlier, the Black Panthers, which numbered only 15-20 individuals at maximum strength, were not the object of serious attention by the police. Black Panther headquarters was set up in suburban Maywood only 6-7 months prior to the raid. During the preceding six-month period, there had been three incidents: one a shooting incident with Chicago police, another with the FBI, and a third (cited as a companion case to the present case) involving an ambush by the Panthers of two policemen. Based on these activities the Chicago Police Department's "Red Squad" and the Maywood police kept the Panthers under surveillance.

Three months before the raid, Panther leader Fred Hampton had been arrested for armed robbery of an ice cream vendor. He had been convicted but at the time of the raid was out of jail on an appeal bond. As part of the nationwide effort against the Black Panthers, an FBI informant reported a weapons cache of unregistered weapons, including a stolen police shotgun, at a secondary Panther living location. The FBI turned over this information to the Chicago police "Red Squad," which refused involvement. They next took the information to the special investigation unit in the State's Attorney's Office, a unit comprised of prosecutors and various police investigators. This unit then maintained a stake-out for several days. The raid was conducted by 13 officers, apparently in ignorance that there were nine Panthers and 19 guns in the house. (Had the police known this, they would have entered with larger forces.)

There is general agreement that a Panther fired one slug from a shotgun as the police forced open the door. A hail of shots (100 or more, possibly all by police) followed. Two Panthers (including Hampton) were killed, four were wounded, and three others were arrested. The area was not sealed off by the Coroner, as should have been done, allowing the evidence at the premises to become tainted.

Then followed a public show: there were television interviews and reenactments by police; there were press conferences by the Panthers. Rationalizations of police and prosecutorial actions were widely publicized.

CASE OUTCOME

After indictment of the defendants and assignment to trial court, the State's Attorney's Office dismissed this criminal case. The legal basis for this was conflicting police lab ballistics reports: a preliminary report said that several Panther weapons had been fired; a subsequent test of police weapons showed that all of the weapons fired after the first shot had been police weapons.

Within the following year several of the police officers involved in the raid were indicted for obstruction of justice. This resulted from widely contended claims that the raid was the result of an assassination conspiracy by local and federal law enforcement. A bench trial resulted in a directed verdict by the court in favor of the police defendants. The decisive element was a revelation by the special prosecutor of statements by Panthers in earlier interviews with their counsel, admitting they fired shots at police. These records turned up fortuitously.

The officers and prosecutors in the State's Attorney's Office involved in the raid by this special unit faced federal civil trial later in 1975, which lasted 18 months and resulted in a hung jury and a judgment for the defense by the court. Retrial is imminent after reversal by the U.S. Supreme Court.

COMMENTS/CONCLUSIONS

Since FBI informant information was responsible for initiating law enforcement actions in the case, it is reasonable to conclude that the outcome of the criminal court proceedings would be unchanged had the case occurred today. Under today's guidelines regarding FBI use of informants, it would be possible to use informants operating in an organization such as the Black Panthers, given the group's previous actions.

CASE SUMMARY

YEAR: 1977-78

LOCATION: High Desert of Los Angeles County

CASE IDENTIFICATION: Right-Wing Group Hides Arms and Explosives Cache

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

In 1977 several youths chanced upon some dangerous arms (such as hand grenades) in a field near Lancaster. Sheriff's deputies searched the area and discovered a large collection of weapons, explosives, and destructive devices in several areas. It was later determined that the cache was assembled during the late 1960s and early 1970s. One defendant, who owned the properties on which the arms and explosives were stored, was arrested and charged with possession of explosives, machine guns, silencers, and tear-gas weapons. After negotiation with the prosecutor, the defendant identified the second perpetrator.

CASE OUTCOME

The first defendant pled guilty to one count of possession of explosives in June 1977. But sentencing was deferred until he testified against the second defendant. The second defendant agreed to a court trial and was convicted of lesser charges, since the judge did not want to sentence him to state prison.

The second defendant was committed for 90-day psychiatric examination and then received probation. The first defendant's proceedings were suspended and he was granted three years' probation on condition he serve 90 days in county jail.

COMMENTS/CONCLUSIONS

This case was unaffected by changes in intelligence rules. It basically involved a chance discovery of the arms cache, followed by straightforward investigative work of the Sheriff's Arson and Explosives Detail.

CASE SUMMARY

YEAR: 1978
LOCATION: Los Angeles Area
CASE IDENTIFICATION: JDL Bombing of Movie Theater
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

Defendant and a juvenile, both members of the Jewish Defense League (JDL), built a crude pipe bomb with a simple pyrotechnic fuse. They rented a car and drove to a movie theater that was scheduled to show the film "The Palestinians", whose star was a well-known actress who supported the cause of the PLO. They placed the bomb, lighted the fuse, and sped away with no lights. The bomb exploded shortly thereafter and police in a nearby patrol car, hearing the explosion, noticed the speeding auto with no lights. Their suspicions aroused, they stopped the car and arrested the suspects. Later, the police obtained a search warrant, went to the defendant's home and found bomb paraphernalia. The defendant was charged with the explosion of a destructive device in built-up areas--a felony that carries a mandatory prison sentence.

CASE OUTCOME

The defendant opted for a court trial. The judge, believing that it was not appropriate to sentence the defendant to state prison, found him guilty of a lesser included felony and sentenced him to five years probation with the condition that he serve six months in county jail.

COMMENTS/CONCLUSIONS:

This is a case that was not affected by the new rules. It involved only a fortuitous encounter with uniformed patrol officers and a subsequent legal search and seizure.

CASE SUMMARY

YEAR: 1977

LOCATION: Los Angeles Area

CASE IDENTIFICATION: KKK Plot to Kill the Wrong Irv Rubin

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

The LAPD became concerned about possible violence that might result from the school busing issue and recruited an officer from the Police Academy to work undercover in a white racist organization in Los Angeles. The undercover officer attended a national convention of Klan organizations in the south and then joined the North Hollywood chapter of the KKK, remaining undercover for about one year. Three defendants, members of this chapter, hatched a plot to kill Irv Rubin, a leader of the local Jewish Defense League (JDL). Rubin was suspected of kidnapping a contributor to right-wing causes. The plan was to shoot Rubin with an AK-22. One of the defendants looked up the address and phone number of an Irv Rubin, who it turned out, was the wrong Irv Rubin. Rubin's business premises were surveilled by the defendants together with the undercover officer. Officers from LAPD's CCS, informed of the imminent murder attempt, were also present. When one of the defendants entered Rubin's place of business, he was arrested together with the other two defendants and undercover officer who were outside.

The prosecution (for conspiracy to commit murder) relied mainly on the testimony of the undercover officer.

CASE OUTCOME

All defendants convicted by jury.
One defendant received life sentence and sent to prison.
One defendant received life sentence suspended on condition he serve 200 days (already served awaiting trial) in the county jail.
One defendant granted motion for new trial, then pled guilty to a lesser offense and received a state prison sentence suspended plus time in county jail.

COMMENTS/CONCLUSIONS

- o This case was not affected by the new rules. The crucial investigative technique was an undercover agent, a technique not denied by statute, case law, or administrative regulations or policies at the local LAPD level.
- o The defense might have tried to use, but *did not*, two defenses which were unpromising in this case, namely:

entrapment - The California test for entrapment was different in 1977 than it is now (case law changed in January 1979)

discriminatory law enforcement - This defense was expanded in 1975.

CASE SUMMARY

YEAR: 1969/1979

LOCATION: Los Angeles

CASE IDENTIFICATION: Brown Berets Set Hotel Fire (Carlos Montes Case)

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

This is originally a 1969 case in which the main defendant fled and was finally re-arrested eight years later and eventually tried.

In the late 1960s ferment, disruption and violence among "brown power" groups prompted the LAPD to recruit and place an undercover officer in the Brown Berets. During a meeting in 1969, the group's minister of information (Montes) proposed action to disrupt a convention on bilingual education to be held at a large downtown hotel at which the keynote speaker was to be the Governor. It was planned to throw several flares into the room where the keynote speech was to be given. The undercover officer alerted the police and fire departments.

On the way to the hotel the group (including the undercover agent) purchased several road flares. When the group entered the hotel, the undercover agent lost contact with Montes. Nine fires were set, eight of which were discovered quickly and extinguished. The ninth caused much damage. Many people were arrested. Eleven were indicted on arson and arson-related charges. In the 1969 court proceedings, five defendants received dismissals of charges and five were acquitted at trial. The main defendant (Montes) fled and was not recaptured until 1977 when he returned to Los Angeles.

Then began two years of pretrial motions by the defense. Many pretrial discovery motions were made to gain access to intelligence records of the FBI, California Department of Justice and LAPD's Public Disorder Intelligence Division (PDID). These were denied by the court. There were other pretrial motions to dismiss, claiming discriminatory law enforcement; these too were denied.

In the trial a claim of law enforcement bias--sort of an informal defense of discriminatory law enforcement--was used as a defense and the court allowed it to be presented to the jury. The prosecution was hampered in two ways. First, because of the ten-year lag between the incident and the trial, key witnesses' memories were vague on points that had not been recorded on paper. These included the undercover agent, whose testimony was crucial to the case, as well

as a civilian witness who had witnessed the sale of the flares to Montes. Second, in accordance with the Los Angeles Police Commission's guidelines regarding intelligence records, PDID's records on the Brown Berets had been shredded in the interim because the rules mandated this destruction if no entry had been made in the files for a five-year period. (These guidelines neglected to provide exceptions if the subject was a fugitive or if the case was pending.)

CASE OUTCOME

Acquittal.

COMMENTS/CONCLUSIONS

This is an older-rules case that was adjudicated during the newer-rules era. A relevant question is: Would the outcome have been different had the trial taken place in 1969? The prosecutors close to this case feel it would have been different and that a conviction would have been likely, for three reasons. First, witnesses' memories would have been fresher, closer in time. This reason clearly has nothing to do with the rules. But the other two would have been affected by the absence of certain rules. The intelligence files would not have been shredded because the LAPD Commission's new guidelines did not then exist. The defense of discriminatory law enforcement as a basis for discovery, as spelled out in 1975 by the California Supreme Court in *Murguia v. Municipal Court*, 15 Cal. 3d 286, would not have had the vitality that it has been given by *Murguia*. However, in 1969 the defense could have used the same defense at trial contending law enforcement bias against defendant, his relatives, and friends, as was done in 1979.

CASE SUMMARY

YEAR: 1978-79

LOCATION: Los Angeles Area

CASE IDENTIFICATION: Weather Underground Members Conspire to Bomb State Senator's Office

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office
Federal Bureau of Investigation

CASE FACTS AND CHRONOLOGY

The FBI placed two agents undercover in the Weather Underground group in the Los Angeles area. One agent spent seven years undercover and the other, four years, prior to the arrest of the suspects. Members of the group possessed 96 pounds of dynamite and a bomb which they planned to detonate at the office of a state senator in September 1977. In addition, they planned to disrupt a women's movement convention in Houston and to bomb the offices of a Los Angeles judge. Fearing imminent action, FBI personnel met with prosecutors in the Los Angeles District Attorney's office where applications were drafted for warrants to search the house where the bomb was being built and the shed where the supplies were kept. In a joint operation, personnel from the LAPD and the FBI searched these premises, recovered the bomb, and arrested several suspects. At the same time, the FBI arrested one of the leaders who was in Houston. The five suspects were charged with conspiracy to bomb, possession of explosives and a destructive device, and possession of materials with intent to make a destructive device.

CASE OUTCOME

After the arrest there began a series of pretrial hearings that consumed one-and-a-half years. Many discovery motions were made by the defense. The two undercover FBI agents testified at various hearings. In December 1978, four of the five defendants pleaded guilty as charged. The fifth pleaded guilty in May 1979. All suspects received the minimum sentence of three years in state prison. With credit for about one-and-a-half years already served in jail awaiting trial and with good time credits, the defendants had to serve only nine months.

COMMENTS/CONCLUSIONS

The major investigative technique used to provide evidence of conspiracy to bomb was infiltration of the group by FBI agents, a legal technique. Although this technique is generally not illegal, the FBI, as a matter of policy, quite recently abandoned it.

Evidence was gathered on numerous occasions by an undercover agent wearing tape-recording equipment, when meeting Weather Underground leaders away from the house. This technique, too, is lawful. FBI agents on occasion used binoculars to observe various activities of the group. According to a knowledgeable prosecutor, had the court proceedings occurred after the recent *Armo* decision (*People v. Armo*, 90 Cal. App.3d 505 (1979)), the evidence gathered that way might have tainted the case. Finally, had the court proceedings occurred after the recent *Barraza* decision (*People v. Barraza*, 23 Cal.3d 675 (1979)), the defense of claiming that the undercover police agents were "agents provocateur" would likely have been used. But this defense probably would not have prevailed, according to the prosecutor involved in the case.

CASE SUMMARY

YEAR: 1978

LOCATION: Los Angeles Area

CASE IDENTIFICATION: Progressive Labor Party Demonstration (PLP#1)

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

The LAPD placed two officers undercover in the PLP, a Maoist-oriented organization. One officer became the photographer for the group and was present at all the demonstrations, but maintained a passive role. In June 1977 the group marched in a demonstration to rally workers in the garment industry. The police had previously photographed the group's activity and had film records of PLP members training to use heavy sticks (used to carry placards) as offensive weapons. However, the police believed that this march would be peaceful and warned the group to obey all traffic laws and not to use bullhorns. The marchers disregarded these laws, forced people off sidewalks, blocked traffic and used bullhorns. The police warned the bullhorn users and when ignored, arrested a person with the bullhorn. Some PLP members grabbed the man from lawful custody (technically a felony, known as lynching). Then a general melee ensued. Marchers ripped signs off and attacked police. Since police had planned on merely monitoring what they thought would be a peaceful demonstration, they were not equipped for combat. As a result some officers were injured seriously. Some marchers were arrested and charged with various felonies (lynching, assault with a deadly weapon, assault on a police officer) and many more were arrested and charged with various misdemeanors. The undercover officers were also arrested.

Later, the undercover officers, who were out on bail, attended a meeting with the other defendants and their attorneys. The purpose of the meeting, according to the undercover officers, was simply to meet the several "cause" lawyers and have attorneys assigned to various defendants. According to the other PLP defendants, the purpose of the meeting was to plan a joint defense strategy.

CASE OUTCOME

The case was never tried. There were many defense motions for discovery, for dismissal due to discriminatory law enforcement, for dismissal because of denial of discovery due to the shredding of police personnel records, and for dismissal for invasion of the attorney-client privilege. Such proceedings as these were reached the point

only of a hearing on a motion to dismiss because of invasion of the attorney-client privilege (because of the undercover agents' attendance at the meeting of defendants and attorneys). The case was dismissed as a sanction against the government for the refusal of the LAPD to identify the person who had posted bail for an undercover agent. The prosecution appealed without avail. The appellate court, citing the *Barber* case (*Barber v. Municipal Court*, 24 Cal.3d 742 (1979)) held that a furtive agent's attendance at the meeting and presence during privileged conversation between attorneys and clients required a dismissal of the case.

COMMENTS/CONCLUSIONS

This case illustrates the effects of new state case law on the effectiveness of investigation and prosecution. The defense exploited the newer rules regarding discovery, discriminatory law enforcement and prosecution, intelligence record keeping, and invasion of the defense camp. Here is an example of a case that probably would not have been dismissed at that early stage if it had occurred before the newer rules.

CASE SUMMARY

YEAR: 1978

LOCATION: Los Angeles Area

CASE IDENTIFICATION: Progressive Labor Party Demonstration (PLP #2)

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Los Angeles County District Attorney's Office

CASE FACTS AND CHRONOLOGY

This case is similar to the PLP#1 case. The demonstration took place in February 1978. This time the police were combat-ready. One demonstrator struck a policeman on the helmet with the heavy placard stick, whereupon a general fight ensued. Officers suffered few injuries, but many demonstrators were seriously injured. Twelve demonstrators were arrested. After five weeks of preliminary hearings at the lower court level, seven of the twelve defendants were held to answer (i.e., the case was committed to Superior Court). The other five were dismissed because of problems with identifying them as participants.

CASE OUTCOME

The prosecution, in anticipation of the defense's tactics, supplied each defendant with a great deal of discovery materials at the outset. Nevertheless, the defense used similar tactics as in the previous PLP case. At the preliminary hearing, it made a motion to dismiss due to discriminatory law enforcement; this was denied. The defense asked for virtually unlimited discovery during the preliminary hearing, saying they wanted to put on a defense. They asked for all intelligence materials, saying that without them they couldn't know what questions to ask when cross-examining prosecution witnesses. The court denied most of the motions. The police department brought many files to court and showed them to the judge. Some documents were ruled to be privileged (those that named informants) to protect life. The court ordered others to be given to the defense. LAPD agreed. But the defense wanted the judge to keep all the documents (including the privileged ones) in his possession, and the judge refused. The defense also asked the judge to mark documents that he ruled were privileged. The judge refused and told the LAPD to hold them in specie. A *Biggs* hearing was held concurrent with the lengthy preliminary hearing. The privilege holder (LAPD) stated why the documents were privileged. The judge also made specific findings that the privileged documents, if revealed, would endanger the lives of informants and undercover police officers.

In Superior Court the defense sought dismissal on a PC 995 motion. The defense claimed that at their preliminary hearing in Municipal Court their right to present a defense and their right to discovery were denied. Additionally, the defense claimed that the preliminary hearing magistrate erred when he refused to allow a court reporter to transcribe the discussions, in chambers, between the privilege holder, LAPD, and himself. These discussions involved the substance of the documents later held to be privileged. (Note: Evidence Code Section 915 allows this very procedure.) The defense also claimed that the judge should have retained custody of the documents in question. The Superior Court judge then ruled in favor of the defense and granted a dismissal on the motion. The ruling was appealed by the prosecution. Recently, the appellate court upheld the dismissal in Superior Court (C.A. 2nd, March 25, 1980).

COMMENTS/CONCLUSIONS

According to the prosecution, this illustrates the true motives of the defense in cases that involve such organizations: The name of the game is for the defense to obtain as much intelligence information as possible. Their emphasis is not so much on how particular defendants fare in particular cases, but on learning as much as possible concerning group members that might be informants and undercover officers.

As with the PLP#1, this case probably would not have been dismissed at that early stage had it occurred before the newer rules.

CASE SUMMARY

YEAR: 1975-76
LOCATION: San Francisco
CASE IDENTIFICATION: Murders by Members of a Revolutionary Prison Gang
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: San Francisco County District Attorney's Office

CASE FACTS AND CHRONOLOGY

This is a complex case that occurred in the mid-1970s and was not solved and concluded until 1979. It involved several law-enforcement agencies and crucial intelligence was gathered from two important informants: one in prison and one paid by the FBI.

Two members of the Tribal Thumb, a revolutionary prison gang that was related to the Black Guerilla Family, conspired to murder the head of the United Prisoners Union (UPU). The UPU is an organization of ex-cons, parolees, and incarcerated inmates that is hostile to law enforcement and makes demands to better the life of prisoners (e.g., apply the minimum wage law to convicts, conjugal visiting privileges). The head of the UPU and a female friend were shot and killed in a car. One of the weapons used was a 9mm pistol. Soon after the murders, one of the perpetrators turned over the pistol to a paid FBI informant. This informant was an "armorer" and taught weapons tactics and disguise to members of revolutionary groups. Not knowing that this was a murder weapon, he turned it over to the FBI. Thus, its ballistic characteristics were on file with the FBI. The case remained unsolved for some time.

Then another informant, who was serving time in prison, provided information about the ideology and weaponry activities of the Tribal Thumb. In investigating the Tribal Thumb, the DA's office discovered that the gang had had various contacts with law enforcement prior to the killings. In Menlo Park blasting caps had been discovered in a raid. There had been other raids in Los Gatos, San Jose, and Napa in which weapons had escaped convicts had been discovered. All of the guns discovered (including the murder weapon) had come from a prior burglary of a gun enthusiast in Contra Costa County. The FBI then notified all local law enforcement agencies to submit ballistics information on all 9mm guns in their possession. (This was the result of the SLA bank holdup in Carmichael, CA.) A match was then made between the markings on the bullet taken from the murdered man and the gun in the FBI's possession. The FBI informant, wearing a concealed (legal) bug, had recorded conversations in which the perpetrator talked about weapons and revolution. The perpetrator was then arrested in Napa on various warrants and charged with two counts of first degree murder and felony possession of firearms, after a San Francisco Grand Jury indictment.

Then began a series of pretrial motions by the defense. After the defense's discovery motions to gain information about the two informants, the prosecution agreed to produce the FBI informant (who was not a criminal), but only on the telephone, in order to protect his life. The prosecution also had to reveal the prison in which the non-FBI informant was incarcerated. This resulted in two attempts on his life. The defense received material on all members of Tribal Thumb through a series of FOIA requests. They also received similar material through normal discovery channels in the case. The intent was to compare the materials from both sources for discrepancies, and if they did exist, to use them to the defense's advantage at trial. But through cooperation between the prosecution and FBI's FOIA Office, discrepancies in the materials were avoided. The defense also moved to dismiss, claiming selective (or discriminatory) prosecution, but the court denied the motion because the case involved a homicide. There was also a motion to suppress evidence gathered in the other five counties from previous law-enforcement contacts because of illegal search and seizure. This motion was denied. The defense appealed the denial. The California Supreme Court upheld the ruling.

CASE OUTCOME

Defendant convicted as charged and received life sentence with the possibility of parole.

COMMENTS/CONCLUSIONS

This is an example of a successful newer rules case that was successful for two reasons: (1) the prosecution carefully abided by, and picked its way through, the new intelligence rules, using them properly but to its advantage, (2) it was a major homicide case. The latter reason was important in denying the defense motion to dismiss because of selective prosecution; had it been a less serious charge the outcome could have been different.

CASE SUMMARY

YEAR: 1976

LOCATION: New York City Area

CASE IDENTIFICATION: Croatian Group Hijacks Airliner and Plants Bomb in Train Station Locker

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Manhattan District Attorney's Office
New York City Police Department

CASE FACTS AND CHRONOLOGY

Five members of a Croatian terrorist group hijacked a TWA plane bound from New York to Chicago. The plane was diverted to Montreal, thence to Gander (Newfoundland) and finally to Paris. The perpetrator claimed there was a bomb on the airplane and another one in a locker in Grand Central Station. The French police blew out the tires of the plane after it landed near Paris and captured the terrorist. It turned out that no bomb was on the airplane. The bomb in the locker was located by the police and taken to the police range for dismantling. A policeman was killed in attempting to dismantle the bomb.

CASE OUTCOME

The defendants were prosecuted in federal court (Eastern District of New York) for air piracy, convicted, and sentenced to life. They were also prosecuted in state court for felony murder and kidnapping and pled guilty.

COMMENTS/CONCLUSIONS

Given the nature of the case and the evidence (passengers who were eyewitnesses to the hijacking, the bomb), it is evident that the newer intelligence rules played no role in the outcome. The outcome would have been unchanged had the incident occurred before the newer rules were implemented. But it is also interesting to speculate. According to police officials, under the newer NYPD rules the Croatian group's activities did not meet the criteria for inclusion in the NYPD's intelligence files before the hijacking and bombing. Under the older rules, the police probably would have kept closer tabs on the group. But could the hijacking and bombing have been prevented?

CASE SUMMARY

YEAR: 1977

LOCATION: New York City

CASE IDENTIFICATION: FALN BOMBING OF MOBIL OIL BUILDING

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Manhattan District Attorney's Office

CASE FACTS AND CHRONOLOGY

This case concerns one of the 60-odd bombings attributed to the FALN--the Puerto Rican Separatist group. The perpetrator entered the Mobil Oil building for the ostensible purpose of applying for employment. She carried an umbrella in which a bomb was secreted. While actually applying for employment, the perpetrator became alarmed and fled, leaving the umbrella behind. The bomb exploded, killing a visitor and causing extensive damage. The FALN claimed credit for the bombing in a subsequent communique. Since she left a set of latent fingerprints on the employment form, the FBI was able to match the latent prints with a set in a group of file prints of known or suspected FALN members. She was arrested. The case was developed for prosecution in the District Attorney's Office, but as a matter of policy was turned over to the U.S. Attorney's Office for prosecution.

CASE OUTCOME

Federal prosecution resulted in a murder conviction and a life sentence. State prosecution on a murder charge was barred under the state's double jeopardy statute (Article 40.20 of the Criminal Procedure Laws).

COMMENTS/CONCLUSIONS

Although the conviction was based on a crucial piece of evidence--the latent fingerprints--the prints probably could not have been matched with the millions of prints on file unless police were able to provide some lead. The communique from the FALN provided a clue, but the search was sharply narrowed by a list of persons suspected by New York police of having some involvement with the FALN. There were people who had participated in demonstrations or who were associates of suspected FALN members. Police provided the FBI with the names of a dozen or so female suspects from this list, and a match was made. New York police assert that without being able to narrow the search, the prints could not have been matched. They further believe that under current rules, they could no longer keep such a list, since the criteria for inclusion were too vague. This is a case where newer rules would have adversely affected the investigation and prosecution.

CASE SUMMARY

YEAR: 1979

LOCATION: New York City

CASE IDENTIFICATION: FALN Bomber Injured by Own Bomb

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Manhattan District Attorney's Office

CASE FACTS AND CHRONOLOGY

An FALN member was constructing a bomb in his apartment when it exploded, blowing off his fingers and a portion of his jaw. He was arrested when the police responded.

CASE OUTCOME

The defendant was convicted in both state and federal court and received a sentence of 10 years in prison. While being fitted for artificial hands in Bellevue Hospital, the prisoner escaped through a window.

COMMENTS/CONCLUSIONS

This case was unaffected by changes in intelligence rules. The arrest came about as a result of the accidental explosion.

CASE SUMMARY

YEAR: 1976

LOCATION: New York City

CASE IDENTIFICATION: Revolutionary Group Plots Murder, Kidnapping, Robbery

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Manhattan District Attorney's Office

CASE FACTS AND CHRONOLOGY

An ex-convict on parole was arrested for gun possession (a felony). In return for an offer from the prosecutor to reduce the charge to a misdemeanor the arrestee turned informant, claiming that he was a member of a cell whose purpose was to become part of "The Movement"--supposedly a coalition of blacks and members of the FALN that was anti-establishment and professed violence. He claimed that the cell was conspiring to commit several criminal acts--to murder a policeman, to kidnap a corporation president, and to rob a bank. The arrestee identified the leader of the cell, who was then arrested. The cell leader was found also to be in violation of his parole.

CASE OUTCOME

The informant refused to testify against the cell leader even though as a matter of law, he was an accomplice. Without his testimony, the conspiracy case could not be made. All that the prosecution could prove against the cell leader was a parole violation.

COMMENTS/CONCLUSIONS

The prosecutor in the case felt that there would probably have been no difference in case outcome had the incident occurred under the older rules.

CASE SUMMARY

YEAR: 1978

LOCATION: New York City

CASE IDENTIFICATION: Shooting of a Uniformed Policeman by Black Radicals

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Manhattan District Attorney's Office

CASE FACTS AND CHRONOLOGY

Two ex-convicts, one on parole and the other serving a sentence in a halfway house, intended to rob a bank. One of the men had a radical background and radical friends. While driving, they happened to pass a policeman on duty near the Israeli Ambassador's residence. The policeman noticed the absence of an inspection sticker on the car. (In fact, the auto had a New Jersey sticker and stolen New York license plates--the real plates were in the trunk--and the driver's license was from a third state.) The ex-convicts became alarmed; one pulled out a gun and shot the policeman, whereupon they drove off. While fleeing, they shot at pursuing police. Then they ran into a building where they held a nurse and her son as hostages. The man who did the shooting called the FBI and arranged a surrender (presumably fearing street retribution by the police).

CASE OUTCOME

Both were convicted of attempted murder of the first policeman, shooting at several other officers and kidnapping. The defendant who did the shooting received a sentence of 25 years to life on each charge and the other defendant received a sentence of 15 years to life.

COMMENTS/CONCLUSIONS

This case involved a fortuitous encounter with police in which intelligence played no role. The outcome would have been unaffected had the case occurred before the newer rules were implemented.

CASE SUMMARY

YEAR: 1976
LOCATION: New York City
CASE IDENTIFICATION: Bomb Watch at Cuban Ballet Performance
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

Just after relations with Cuba were relaxed, the Cuban Ballet was to make its first appearance at the Academy of Music. Based on analysis of the past *modus operandi* of Cuban terrorist organizations the police felt that it was probable that the Cuban Ballet would be a target. Consequently, police set up a bomb watch (surveillance). Three terrorists were arrested for possession of dynamite while emplacing the bombs. One had a brother involved in Omega 7.

CASE OUTCOME

The defendants were tried and convicted of possession of dynamite.

COMMENTS/CONCLUSIONS

This is an example of a successful, newer rules case in which *analysis* of past intelligence information was instrumental in preventing a serious crime.

CASE SUMMARY

YEAR: 1975

LOCATION: New York City

CASE IDENTIFICATION: Black Activist Robert Collier Possesses a Handgun

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

An NYPD undercover detective was planted in a neighborhood community on the lower East Side for two years prior to this case. The infiltration occurred immediately after the Panther 21 acquittal. He attended many meetings (public and private) of various groups. (Near the end of the two-year period of infiltration, the Police Commissioner promulgated new guidelines concerning undercover operatives, which required some probability of certain crimes being committed before such an infiltration could be undertaken.) Throughout, the undercover officer reported on the activities of various groups and individuals.

The defendant in this case had been a defendant in the Panther 21 acquittal and also a defendant in the earlier case in which it was planned to bomb the Statue of Liberty. With information from the undercover officer, a warrant application was prepared to search the defendant's home for a handgun. The first application was rejected by a magistrate; a second application was granted and the search yielded a handgun, projector, mimeograph machine, speaker, and a notebook containing addresses.

The defendant was arrested and indicted in state court for possession of a handgun, misdemeanor possession of stolen property, and misdemeanor conspiracy.

CASE OUTCOME

Defendant filed a motion to suppress physical evidence seized in the search of the apartment and to dismiss the indictments. The trial judge granted the motion, citing two major reasons: (1) that the search was flawed because there was no basis for officers to seize items in the apartment other than the handgun described in the warrant (i.e., officers had no probable cause to believe that the other items were stolen property); (2) the undercover operation violated the First Amendment, in that the constitutionally protected expectation of privacy was violated by an undercover detective posing as a resident with an interest in community affairs. Essentially, the trial judge reasoned that an infiltrator may be planted in a group *only* when the police have articulable reasons to believe or suspect that criminal activity is afoot.

COMMENTS/CONCLUSIONS

Because this case was never appealed to higher court levels, it is not case law in New York State. But the trial judge's view is representative of one of the major recent trends in intelligence rules that address the circumstances under which law enforcement may initiate the use of informants or undercover operatives.

- 164 -

CASE SUMMARY

YEAR: 1975-76

LOCATION: New York City

CASE IDENTIFICATION: JDL Threats and Actions Against Soviet Mission to U.N.

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

During the 1975-76 period the JDL was very active in opposing certain facets of Soviet policy. Several JDL members (including one 16-year-old) were responsible for firing a shot at the Soviet Mission. In addition, they publicly threatened to kidnap Russian diplomats and family members and to explode several pipe bombs. Through an undercover policeman from a small police department in New Jersey, it was learned that someone was selling dynamite. The FBI obtained legal wiretaps, traced the conspirators down, and arrested them.

CASE OUTCOME

The defendants pled guilty to conspiracy in federal court. Some were given prison sentences, including the group's leader who had previously threatened to kill the PLO leader, Yassir Arafat.

COMMENTS/CONCLUSIONS

This is an example of a successful newer rules case that turned on chance (the initial lead to the dynamite provided by an undercover officer in another state) and legal wiretaps.

CASE SUMMARY

YEAR: 1978

LOCATION: New York City

CASE IDENTIFICATION: Firebombing of Egyptian Diplomats by JDL

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: New York City Police Department

CASE FACTS AND CHRONOLOGY

Beginning in February 1978, a series of firebombings were directed against the homes of Egyptian diplomats in New York. Credit was claimed by the Jewish Committee of Concern. Further bombings occurred in October, November, and December. Because the victims were foreign diplomats assigned to the Egyptian Mission to the United Nations, the case came under federal jurisdiction. The FBI opened a preliminary investigation, and two suspects were identified, but because of the Bureau's internal guidelines, it could not open a full investigation involving surveillance, wiretaps, etc., and develop the information to move on the two suspects until late fall. Shortly after, a full investigation was opened and sufficient evidence was developed to arrest the two.

CASE OUTCOME

Both suspects, former JDL members, were found guilty on three counts of conspiracy to bomb Egyptian installations and were sentenced to federal prison.

COMMENTS/CONCLUSIONS

The case was made under the new rules, although one of the interviewees implied that if the FBI's internal guidelines had not delayed the opening of a full investigation, some of the later bombings might have been prevented. On the other hand, prosecution might have been more difficult. The case provides an example of the evolution from preventive intelligence to prosecutorial intelligence.

CASE SUMMARY

YEAR: 1975

LOCATION: Miami

CASE IDENTIFICATION: Cuban Terrorist (Otero) Bombings

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Miami Police Department
Dade County Public Safety Department
Dade County State Attorney's Office

CASE FACTS AND CHRONOLOGY

Rolando Otero was an experienced bomber who was linked to a bombing in a locker at the Miami Airport by means of a fingerprint found on a locker door. This latent print was matched against those of 100 known terrorists, including Otero. Later, on December 3, 1975, seven bombings occurred in a 24-hr period, damaging buildings of the Miami Police Department, the FBI, the Social Security Administration, the State Attorney, the Post Office, and banks. Otero sent communiques, claiming credit under the name El Condor. They were attributed to him because his fingerprint was found on one copy and the set of copies was tied to a public photocopy machine/near Otero's residence. But no direct evidence of his committing the airport bombings was found. An FBI informant accused Otero of the multiple bombings. (A complex international situation existed here, with Otero being returned to the U.S. from a Chilean jail where he was being held as a Venezuelan spy.) The informant subsequently fled to Spain and was not available as a witness.

Otero was prosecuted first on federal charges. He was acquitted on all counts of the indictment. There is no reliable explanation of the jury's verdict, which presumably reflected reasonable doubt derived from the paucity of direct evidence and the absence of the informant. Otero was then subjected to state prosecution.

CASE OUTCOME

Otero was acquitted of all charges except the airport bombing. He received a prison sentence of 40 years for the latter. He is now at liberty on a \$200,000 appeal bond.

COMMENTS/CONCLUSIONS

The instrumental elements of the conviction were apparently the locker-door fingerprint, contradicting Otero's denial of being at the airport, and a voice identification by an airport employee

of a pre-explosion warning telephone call. The state prosecutors had the advantage also of the prior cross-examination of Otero at the federal trial. And they minimized the role of the informant, who was felt to be a weakness in the unsuccessful federal prosecution.

In short, direct evidence provided by straightforward police investigation was productive. Indirect evidence, especially that contributed by an unavailable FBI informant, was not. Of course, the initial identification of Otero's fingerprint left at the airport was facilitated by a special file of terrorist prints available at that time.

This is an older-rules case which would have likely been a failure but for a few items of direct evidence. It does not seem to be instructive in distinguishing effects of older and newer rules.

CASE SUMMARY

YEAR: 1976

LOCATION: Miami

CASE IDENTIFICATION: Donestevez Case: Extortion and Weapons Possession

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Dade County Public Safety Department
Dade County State Attorney's Office

CASE FACTS AND CHRONOLOGY

This case has a long history. Ramon Donestevez came to the U.S. from Cuba in 1961, where his family had a boat-building business. He founded the Piranha Boat Co. in Miami and used Cuban employees to build big boats intended to attack Castro resources. Donestevez held himself out as a Cuban patriot. However, rumors spread in 1972-73 that he was a double-agent close to Castro himself. He was notable for his ability to accomplish deliveries to Cuba. Moreover, evidence appeared that he was extorting money from the Cuban community in Miami ostensibly for the anti-Castro militia. The police were aware of the situation since intelligence officers normally watched alleged double-agents. In 1974, a victim complained to the police about Donestevez's extortion demand to which he had responded with a partial payment. This victim agreed to become an undercover agent and was equipped with a recorder for his return meeting with Donestevez to make the final payment. The police also gained evidence by legal wiretaps.

A search warrant to enter the boat factory was obtained. State and federal officers found that these premises harbored an arsenal of illegal weapons, including a cannon, rocket-launchers, automatic-fire weapons, etc. Donestevez was arrested and subjected to state prosecution for extortion and weapons possession.

CASE OUTCOME

Donestevez was convicted and sentenced to a five-year term. An appeal was filed and he was released on bond. Meanwhile a federal case was being readied by the Treasury's BATF for possession of machine guns.

Several weeks after his release, Donestevez phoned the police to report a bomb planted in his warehouse. Police found the bomb but noted its placement would have caused little damage. Dade County Public Safety Department developed intelligence that Donestevez then began building a large boat, allegedly to transport medicines to Cuba, but probably to return older Cubans to their homeland in return for large payments. Later, federal agents stopped and

boarded a small Donestevez-built boat with returning Cubans as passengers. Still later, PSD located a new large boat, boarded it in company with Customs agents, and found a hollow bottom, presumably creating a secret compartment in which to hide returning Cubans. Concomitantly, complaints were heard from the Miami Cuban community that many had paid for return passage to Cuba via a Donestevez boat, but to no avail. Donestevez was murdered by gunfire at his place of business, Piranha Boats, on April 13, 1976. The case remains open, but there is some belief in PSD that the Pragmatistas were responsible. But there are also indications that Cuban agents or pro-Castro people committed the murder.

COMMENTS/CONCLUSIONS

This is a case in which intelligence information at hand when the case opened proved valuable. Specifically, the information that PSD and other agencies had gathered about activities in the Miami Cuban community assisted in verifying the extortion victim's story and in obtaining the subsequent search warrant to enter Donestevez's boat factory. Whether or not general "crime prevention" intelligence gathering is wrongful in the context of the new rules is problematical--it would surely depend on specific circumstances.

In other respects, police techniques here seem consistent with the newer rules as well as the older. A victim was converted to an undercover agent. Tape-recording and wiretaps, legally conducted, were used to obtain evidence to support an affidavit for a search warrant, which led to the discovery of contraband.

CASE SUMMARY

YEAR: 1980

LOCATION: Miami

CASE IDENTIFICATION: Anti-Castro Cuban Terrorist/Counter-Surveillance

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Miami Police Department

CASE FACTS AND CHRONOLOGY

This is a recent case involving a known anti-Castro Cuban terrorist. This man became aware of his being followed, but attributed the surveillance to Cuban agents rather than the police. In a surprise counter-surveillance move, he trapped the police "tail" in the latter's car and threatened him with a weapon. Meanwhile, the officer had called for assistance, which resulted in the arrest of the terrorist. He was prosecuted on charges of having a concealed weapon and threatening a police officer. The defense sought discovery of all relevant intelligence files. The court conducted an *in camera* examination of these files, decided not to disclose them, then sealed and held them against the possibility of appeal.

CASE OUTCOME

Defendant was convicted and sentenced to a term of ten years. He is currently at liberty on an appeal bond.

COMMENTS/CONCLUSIONS

While active intelligence files are now exempted from disclosure under the 1979 amendments to the Florida Public Records Law, they may be discoverable if relevant, for example, as "witness statements." Presumably, the trial judge in this case did not find them to be relevant to the defense. Whether or not he is upheld in the unusual facts of this prosecution remains to be seen. If he is not and his judgment is reversed, then Florida's liberal discovery law is responsible.

CASE SUMMARY

YEAR: 1976

LOCATION: Miami

CASE IDENTIFICATION: Adult Bookstore Bombing by Anti-Castro Youths

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Miami Police Department
Dade County Public Safety Department
Dade County State Attorney's Office

CASE FACTS AND CHRONOLOGY

On May 6, 1976, a group of anti-Castro youths planted a bomb in front of an adult bookstore in the Little Havana section of Miami, ostensibly as a protest against a supposed Communist plot to corrupt Cuban youth. Three youths were arrested by a team from the Miami Police Department, the FBI, and the O.C.B. Terrorist Squad of Dade County Public Safety Department, which was at the scene because of information from an FBI informant who had associated himself with the arrestees. The bomb was defused before exploding, and the informant was allowed to escape when the police closed in. The three defendants were first prosecuted in federal court on related charges of possessing and placing explosives, a destructive device, etc. A defense contention was that the bookstore was a CIA front. They were then prosecuted in a state criminal proceeding on similar charges, with a fire-bombing incident added.

CASE OUTCOME

The three defendants were convicted in state court and eventually received sentences of 55, 25, and 5 years in prison, respectively. The defendant who received a 5-year sentence is now at liberty after serving 4 years.

COMMENTS/CONCLUSIONS

An established FBI informant was the key element in aborting the terrorist act and in arresting the perpetrators. It is not clear whether the FBI was engaged in a preliminary or a full investigation of this group and when the investigation started. (Note: The Attorney General's Guidelines on Domestic Security became effective in March 1976, and the Guidelines on the Use of Informants in December 1976.) Under the Guidelines, only previously established informants may be employed in a preliminary investigation. Resolving all doubts in favor of law enforcement, we can view this case as a successful example of terrorist crime prevention based on legitimate proactive police techniques under the newer rules.

CASE SUMMARY

YEAR: 1977

LOCATION: Miami

CASE IDENTIFICATION: Cuban Terrorists (Estrada) Plan Attack on Cuban Naval Base

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: U.S. Attorney's Office, Miami
Dade County Public Safety Department

CASE FACTS AND CHRONOLOGY

Estrada and others of the 2506 Brigade were planning an attack on a Cuban naval base. The U.S. Customs Bureau had an informant in the operation, which was allowed to develop for about two months. Terrorists made training runs, but their boats were unreliable. Finally, Customs hit the boats, conducted a consent search, and discovered a huge arsenal (20mm cannon, hundreds of automatic and semi-automatic weapons, thousands of rounds of ammunition, and other military paraphernalia). This joint investigation by Customs, the FBI, and the Dade County Public Safety Department culminated in the indictment of four men, including Estrada, on charges of possessing illegal weapons and violating the U.S. Neutrality Act. Shortly before trial, defense counsel moved to dismiss on the grounds of a prior Congressional resolution in support of anti-Castro activity and a claim that a CIA case officer had facilitated the acquisition of the illegal weapons (by providing a map to a weapons cache on a Caribbean island). The court denied the motion but admitted the information therein as evidence.

CASE OUTCOME

Acquittal of all defendants on all counts.

COMMENTS/CONCLUSIONS

Lacking information on how the Customs informant was created and when, relative to other events, we cannot assess his legitimacy under the new rules (say, the FBI guidelines, had he been an FBI informant). Presumably, the consent search was valid, since we were told of no motion to exclude the fruits of the search. The verdict seems to reflect some persuasive political considerations in the jury's deliberations. Thus, we assume that this case also would have been a failure under the older rules.

CASE SUMMARY

YEAR: 1976
LOCATION: Miami
CASE IDENTIFICATION: Barnes/Fast Sale of Stolen Dynamite
INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Dade County State Attorney's Office
Dade County Public Safety Department

CASE FACTS AND CHRONOLOGY

An established informant came to the Dade County Public Safety Department and reported that a woman, Janet Barnes, was in possession of a large quantity of dynamite and blasting caps and was seeking buyers. Dynamite thefts had occurred earlier. PSD directed the informant to introduce a Latin undercover officer to Barnes as a revolutionary. Then negotiations began among Barnes, the informant, and the undercover officer for purchase of 50 cases of dynamite. Meanwhile, officers from the U.S. Treasury's Bureau of Alcohol, Tobacco, and Firearms and from the State Fire Marshall's Office joined the case. The individual who appeared to collect the money for the explosives turned out to be Sidney Fast. Fast was a burglar and armed robber who had been sent to prison in 1967 on a 20-year term after an arrest by one of our interviewees. The upshot was that Barnes and Fast were arrested and charged with conspiracy to distribute explosives and possession of explosives. Recovery was made of 3,250 lbs. of dynamite.

CASE OUTCOME

Barnes and Fast were both convicted.

COMMENTS/CONCLUSIONS

This case actually involved a crime for profit rather than for political or social ends. The police used legitimate investigative techniques by today's standards. An established informant was the key ingredient. The newer intelligence rules were inconsequential.

CASE SUMMARY

YEAR: 1976

LOCATION: Miami

CASE IDENTIFICATION: Anti-Angela Davis Bombing at University of Miami

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Dade County Public Safety Department

CASE FACTS AND CHRONOLOGY

On April 3, 1976, during a speaking engagement by Angela Davis, a pipe bomb exploded at the Student Union building at the University of Miami. A participant in the crime, who was fearful of his crime partner, the Cuban terrorist Gustavo Castillo, turned informant against Castillo. The informant, in return for producing Castillo's arrest, was favored with a negotiated guilty plea. He testified against Castillo in the latter's trial, but proved to be a poor, not credible witness.

CASE OUTCOME

Castillo was acquitted by a jury, which failed to accept the informant's testimony.

COMMENTS/CONCLUSIONS

As is commonplace in terrorism cases, the "solution" derived from an informant. This case also suggests that where a conviction hinges on the testimony of a co-criminal who gains leniency in return, a jury may end up with reasonable doubt. The newer rules are inconsequential in this instance.

CASE SUMMARY

YEAR: 1970
LOCATION: Chicago
CASE IDENTIFICATION: Black Panther Rapes and Shoots Two Victims
INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: Cook County State's Attorney's Office

CASE FACTS AND CHRONOLOGY

In 1970 a member of the Black Panthers raped and shot two victims in Chicago's John Hancock Building. He was not captured by police but became a fugitive for six years. His identity was established by an FBI informant. He was found in Sweden and extradited to the U.S. At trial in state court in 1977, his defense was that the FBI informant (a Black Panther also) was the actual perpetrator. When the defense asked for information on the informant, the federal prosecutor would not produce him. The informant had been placed in the federal witness protection program.

CASE OUTCOME

The defendant was convicted of rape and attempted murder, largely on the basis of identification by the victims. He received a sentence of 75-150 years in state prison.

COMMENTS/CONCLUSIONS

Intelligence information from an FBI informant provided the initial identification of the perpetrator (although the victims' ID provided the basis of the case in court). Had the case occurred today, it is likely to have resulted in the same outcome, since an informant could have been used under the current FBI guidelines for use of informants.

CASE SUMMARY

YEAR: 1978

LOCATION: Chicago

CASE IDENTIFICATION: Serbian Group Conspires to Bomb Gathering
of Yugoslav Diplomats

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: U.S. Attorney's Office, Chicago

CASE FACTS AND CHRONOLOGY

A fringe group of Serbian immigrants, who were anti-Tito and anti-Communist, claimed to be engaged in a running conflict with the Yugoslav secret police. They had earlier been involved in a series of incidents in various U.S. cities and in other countries, such as Canada and West Germany. They had earlier bombed the home of the Yugoslav consul in Morton Grove, Illinois.

Because of the ongoing criminal activity the FBI had been able to initiate an investigation. In addition, the FBI had been able to turn a member of the group into an informant. (The informant cooperated as a protest in the belief that the group was responsible for the earlier murder of a friend.) From this informant the FBI learned of the group's plans to plant a bomb at a large gathering of Yugoslav diplomats, and to kill Marshall Tito on his visit to the U.S. The group was under constant outside and inside surveillance by the FBI. Six persons were arrested in possession of dynamite and bomb paraphernalia in Chicago and on the east coast where they were picking up additional explosives to be moved to Chicago. They were charged with conspiring to bomb and possession of explosives. The count citing the plot to kill Tito was dismissed to protect CIA information sources.

CASE OUTCOME

All defendants were convicted. One defendant, who had hijacked a plane while on bond, received a 40-year sentence. The bomb-maker, a priest, received 14 years.

COMMENTS/CONCLUSIONS

This is an example of a newer rules case whose outcome was successful because the FBI was able to initiate and sustain an investigation under the newer rules based on previous criminal activity of the group.

CASE SUMMARY

YEAR: 1978

LOCATION: Chicago

CASE IDENTIFICATION: Croatian Group Conspires to Bomb West German Consulate

INTERVIEWEES' CURRENT OR
PAST AGENCY AFFILIATION: U.S. Attorney's Office, Chicago

CASE FACTS AND CHRONOLOGY

Two Croatians, one from Chicago and one from Los Angeles, had earlier been involved in activities against the Yugoslav secret police, who they claimed were out to kill them. Their current offense was an effort to obtain freedom for their relative who was imprisoned in West Germany. The two suspects obtained guns and plotted to bomb the West German consulate. They went to the consulate but found it closed. They returned the next day and took it over. They held the vice-consul prisoner under gun point, planted a fake bomb under his chair and held 9 or 10 other people hostage, demanding that their kin in West Germany be released. The FBI communicated with their relative in West Germany and persuaded him to talk with the two Croats; he did so and persuaded them to surrender. They were arrested and charged with kidnapping.

CASE OUTCOME

Defendants were ultimately convicted of the lesser included offense of unarmed imprisonment of foreign officials (after erroneous jury instructions led to appeals court reversal on armed imprisonment as a lesser included offense).

They received a 3-year sentence.

COMMENTS/CONCLUSIONS

This is a newer rules case in which law enforcement was surprised, because there had been no investigation under way, although the two defendants had been previously interviewed by the FBI. Under the older rules, there could have been an ongoing investigation and this might have led to a different outcome--possibly prevention of the criminal act.

CASE SUMMARY

YEAR: 1980

LOCATION Chicago Area

CASE IDENTIFICATION: Eleven FALN Members Arrested After Armed Robbery of Truck Rental Agency

INTERVIEWEES' CURRENT OR PAST AGENCY AFFILIATION: Cook County State's Attorney's Office

CASE FACTS AND CHRONOLOGY

Between March and April of 1980 several members of the FALN assembled in Milwaukee and then came to Evanston, Illinois. On Good Friday two individuals entered a rental agency. One (a female) inquired about the rental of a truck. Then the two stole the truck at gunpoint, and one drove it to a parking lot on the Northwestern University campus. After being alerted by police radio, the campus police noticed the stolen truck and notified the Evanston police. The latter staked out the stolen truck. Shortly after, two other stolen vans drove into the lot and a man and a woman began loading weapons into the stolen truck. Police converged on the scene and arrests were made. But at this time, police had no knowledge as to who the arrestees were.

Half a mile away, joggers were observed periodically to enter a van parked on a residential street. An Evanston citizen's suspicions were aroused by these actions, especially because a "jogger" was smoking. She called the police. Police surrounded the van, arrested nine people, and confiscated a sawed-off shotgun and several loaded hand weapons. The arrestees were wearing multiple layers of clothing, false mustaches, and so on, as part of their efforts to disguise their identities.

After the arrests, the FBI was called in and they identified several suspects, including Carlos Torres (the FBI's Most Wanted Man) and his wife Maria (who subsequently was extradited to New York to stand trial for murder arising out of a bombing of the Mobil Oil office building). Several suspects were traced to houses in Milwaukee and New Jersey, where large quantities of FALN literature, equipment used in producing their communiques, and bomb materials were found in FBI raids. These were FALN "safe houses."

CASE OUTCOME

The two defendants arrested in the stolen truck were prosecuted for armed robbery and conspiracy to commit armed robbery, convicted, and received 30-year sentences.

The eight defendants arrested in the van were prosecuted on weapons possession charges, convicted and sentenced to eight years.

COMMENTS/CONCLUSIONS

The arrests for armed robbery were based on good, routine police work. The arrests in the van were a stroke of luck--a call from a citizen whose suspicions were aroused. In neither case did intelligence information play a role. *However*, without the aid of the FBI in identifying some of the suspects (in which intelligence information was instrumental), the police would not have known *who* the suspects were. Nevertheless, the FBI did not disclose their information about the FALN operation that was being attempted (possibly a kidnapping for profit). All in all, this case is an example of one that has not been affected by the newer intelligence rules. Routine police work and chance produced the arrests and intelligence information gathered under the newer rules enabled identification of the suspects as FALN terrorists.