Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, DC 20463

**VOLUME 1 OF EXHIBITS SUBMITTED IN SUPPORT OF 2012 REQUEST BY THE SOCIALIST WORKERS PARTY, THE SOCIALIST WORKERS NATIONAL CAMPAIGN COMMITTEE, AND COMMITTEES SUPPORTING CANDIDATES OF THE SOCIALIST WORKERS PARTY FOR AN ADVISORY OPINION**

November 7, 2012

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# EXHIBIT A

FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 11, 1997

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-46

Michael Krinsky
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
740 Broadway at Astor Place
New York, NY 10003-9518

Dear Mr. Krinsky:

This responds to your letter dated November 1, 1996, as supplemented by your letter dated January 13, 1997, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the continuation of a partial reporting exemption for the Socialist Workers Party National Campaign Committee and committees supporting candidates of the Socialist Workers Party ("SWP").

The SWP National Campaign Committee and committees supporting SWP candidates were first granted a partial reporting exemption in a consent decree, dated January 2, 1979, that resolved *Socialist Workers 1974 National Campaign Committee v. Federal Election Commission*, Civil Action No. 74-1338 (D.D.C.). In that case, such committees brought an action for declaratory, injunctive and affirmative relief, alleging that specific disclosure sections of the Act operated to deprive them and their supporters of rights guaranteed by the First Amendment to the Constitution because of the likelihood of harassment resulting from such disclosure. The decree required the committees supporting SWP candidates to maintain records in accordance with the Act and to file reports in a timely manner. It also, however, exempted the committees from the provisions requiring the disclosure of the names, addresses, occupations, and principal places of business of contributors to SWP committees; of political committees or candidates supported by SWP committees; of lenders, endorsers or guarantors of loans to the SWP committees; and of persons to whom the SWP committees made expenditures.[1] The decree stated that its provisions would extend to the end of 1984, and set out a procedure for the SWP committees to apply, prior to that date, for a renewal of the exemptions.

On July 24, 1985, the court approved an updated settlement agreement with the same requirements and partial reporting exemption.[2] The court decree extended the exemption until the end of 1988, and again set out a renewal procedure. The SWP missed the deadline for reapplication for the exemption. In lieu of a renewal obtained from the court, the committees, in July 1990, sought a determination from the Commission of entitlement to the partial reporting exemption through the advisory opinion process.

On August 21, 1990, the Commission issued Advisory Opinion 1990-13, which granted the same exemption provided for in the previous consent decrees. The opinion provided that the exemption would last through the next two presidential election cycles, i.e., through December 31, 1996. The SWP committees could seek a renewal of the exemption by submitting an advisory opinion request by November 1, 1996, that would present information as to harassment of the SWP, or persons associated with the SWP, during the 1990-1996 period. Advisory Opinion 1990-13. The Commission received your request for a renewal on that date. You have asked that the exemption period last through the next two presidential election cycles, i.e., until December 31, 2004.

I. *Applicable Law*

The Act requires political committees to file reports with the Commission that identify individuals and other persons who make contributions over $200, or who come within various other disclosure categories listed above in reference to the consent agreements. 2 U.S.C. 434(b)(3), (5), and (6). See also 2 U.S.C. 431(13). The United States Supreme Court, however, in *Buckley v. Valeo*, 424 U.S. 1 (1976), recognized that, under certain circumstances, the Act's disclosure requirements as applied to a minor party would be unconstitutional because the threat to the exercise of First Amendment rights resulting from disclosure would outweigh the insubstantial interest in disclosure by that entity. 424 U.S. at 71-72. Asserting that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim" for a reporting exemption, the Court stated that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74. The Court elaborated on this standard, stating:

The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.
424 U.S. at 74.

The Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982), granting the SWP an exemption from state campaign disclosure requirements. The Court referred to the introduction of proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial in that case. The Court also referred to the long history of Federal governmental surveillance and disruption of the SWP until at least 1976. 459 U.S. at 99-100. Noting the appellants' challenge to

the relevance of evidence of Government harassment "in light of recent efforts to curb official misconduct," the Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility toward the SWP is ingrained and likely to continue." 459 U.S. at 101.

The Court in *Brown* also clarified the extent of the exemption recognized in Buckley, stating that the exemption included the disclosure of the names of recipients of disbursements as well as the names of contributors. The Court characterized the view that the exemption pertained only to contributors' names as "unduly narrow" and "inconsistent with the rationale for the exemption stated *in Buckley*."
459 U.S. at 95.

The United States Court of Appeals for the Second Circuit used the *Buckley* standard as a basis for exempting the campaign committee of the Communist Party presidential and vice presidential candidates from the requirements to disclose the identification of contributors and to maintain records of the name and addresses of contributors. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983). The court described the applicability of the standard, stating:

> [W]e note that Buckley did not impose unduly strict or burdensome requirements on the minority group seeking constitutional exemption. A minority party striving to avoid FECA's disclosure provisions does not carry a burden of demonstrating that harassment will certainly follow compelled disclosure of contributors' names. Indeed, when First Amendment rights are at stake and the spectre of significant chill exists, courts have never required such a heavy burden to be carried because 'First Amendment freedoms need breathing space to survive.' (Citations omitted.) Breathing space is especially important in a historical context of harassment based on political belief. Our examination of the treatment historically accorded persons identified with the Communist Party and a survey of statutes still extant reveal that the disclosure sought would have the effect of restraining the First Amendment rights of supporters of the Committee to an extent unjustified by the minimal governmental interest in obtaining the information.
> 678 F.2d at 421-422.

Commission agreement to the consent decrees granting the previous exemptions to the SWP committees has been based upon the long history of systematic harassment of the SWP and those associating with it and the continuation of harassment. The Commission has required only a "reasonable probability that the compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the application of this standard to both contributors and recipients of disbursements.

Advisory Opinion 1990-13 noted that, in agreeing to the granting of the exemption and its renewal, the Commission had considered both "present" and historical harassment. The 1979 Stipulation of Settlement refers to the fact that the Commission had been ordered "to develop a full factual record regarding the present nature and extent of harassment of the plaintiffs and their supporters resulting from the disclosure provisions." According to the 1985 Stipulation of

Settlement, the renewal was based on evidentiary materials regarding the nature and extent of harassment during the previous five years. As referred to above, Advisory Opinion 1990-13 based its grant on the evidence of harassment since 1985. The very nature of the periodic extensions indicates that, after a number of years, it is necessary to reassess the SWP's situation to see if the reasonable probability of harassment still exists.[3]

II. *Facts Presented*

In the request for the exemption granted in Advisory Opinion 1990-13 and in your present request, you have presented facts indicating SWP's status as a minor party since its founding in 1938. Despite running a presidential candidate in every election since 1948 and numerous other candidates for Federal, state, and local offices, no SWP candidate has ever been elected to public office in a partisan election. You have presented data from the 1992 and 1994 elections indicating very low vote totals for SWP presidential and senatorial candidates.

Advisory Opinion 1990-13 discusses the long history of governmental harassment of the SWP. The opinion describes FBI investigative activities lasting from 1941 to 1976 that included the extensive use of informants to gather information on SWP activities and on the personal lives of SWP members, warrantless electronic surveillance, surreptitious entry of SWP offices, other disruptive activity, including attempts to embarrass SWP candidates and to foment strife within the SWP and between the SWP and others, and frequent interviews of employers and landlords of SWP members.[4]

The advisory opinion also referred to statements made by Federal governmental officials in several agencies expressing the need for information about the SWP based on the officials' unfavorable perceptions of the SWP. These statements were made in affidavits submitted during 1987 in connection with *Socialist Workers Party v. Attorney General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction preventing the government from using, releasing, or disclosing information on the SWP unlawfully obtained or developed from unlawfully obtained material, except in response to a court order or an FOIA request.[5]

The opinion also discussed incidents of private and local governmental harassment of the SWP and those associating with it during the period from 1985 through the beginning of 1990. These included private threats and private acts of violence and vandalism, as well as harassment by local police.

As evidence of continuing private and governmental harassment of the SWP and those associated with the SWP during the 1990-1996 period, you have provided descriptions with supporting signed declarations or other documentation as to approximately 70 incidents. Incidents of harassment from private sources included (but were not limited to) acts of vandalism against SWP offices and SWP-related bookstores; threats and acts of violence from persons identifying themselves as members of the Ku Klux Klan; threats and acts of violence by anti-Castro activists; negative actions by, or statements from, employers against persons apparently as a result of those persons' association with the SWP; and abusive behavior toward SWP candidates or other persons publicly associating with the SWP.

Specific examples of the above-described activities area as follows: (1) The windows of SWP headquarters in Detroit, St. Louis, Kansas City, and Chicago were broken, in two cases from thrown objects (a piece of asphalt and a rock). A bullet was fired through the window of the Des Moines headquarters in 1992. A swastika and a "White Power" slogan were spray-painted on the building that housed SWP offices and the Pathfinder bookstore in Birmingham (AL) in 1991. (2) In 1994, the SWP office in Philadelphia (PA) received an abusive letter that was clearly intended to intimidate from a person representing himself as the Grand Dragon of the Pennsylvania KKK (with letterhead stating "The Revolutionary Knights of the Ku Klux Klan," and a mailing address of the state headquarters, as well as a card with the same information). In 1990 and 1991, threatening phone messages were left on the SWP answering machine in Greensboro (NC) by persons identifying themselves as with the KKK. In 1991, two threatening stickers, one purportedly from the KKK, were placed on the entrances of the SWP's Greensboro offices. (3) Anti-Castro activists in Miami overturned SWP informational tables in Miami in 1993 and 1996, and physically assaulted SWP personnel at informational tables in New Jersey in 1995 and 1993. The SWP headquarters in Miami received a number of threatening phone calls in Spanish after radio appearances by SWP candidates in 1993.[6] (4) In 1995, a woman, who was a politically active socialist and had been an SWP congressional candidate, was denied employment at a mine in Utah. The Employee Relations Director had informed her of his investigation of her socialist political activities, and they appear to have been a disqualifying factor. (5) In several cities, individuals who were known as SWP supporters were subject to insults, written threats, and vandalism, from co-workers, related to their political stances and activities.

Your request includes descriptions and documentation of approximately 20 incidents involving police interactions with SWP workers. Many of these incidents entailed demands by police to remove informational tables or to cease other activities involving petition-signing or the distribution of printed materials in public places. The police would assert that the SWP workers were obstructing pedestrian traffic or acting without a permit or peddler's license. They would sometimes arrest or give citations to the SWP workers. In almost all of those cases, the local prosecutor would drop the charges or the cases would be dismissed. These incidents sometimes appear to involve actions by the police that were apparently motivated by a hostile feeling toward the SWP or the views expressed by the SWP.

Two examples of these cases are as follows: (1) In 1996, three SWP workers who were petitioning for the placement of SWP candidates for president and vice president on the state ballot were taken to the police station by the New York City Parks Department Police and charged with unlawful solicitation and illegal assembly. Their materials, including the petitions, were held by the police for a week and returned after protests by NYCLU and the SWP. The charges were later dismissed in court. (2) According to a 1991 letter from counsel for the New Jersey chapter of the ACLU to the Newark Corporation Counsel, three policemen, two of them mounted, intimidated SWP workers who had set up a literature table outside of local SWP headquarters. The officers blocked access to the table and the book store for over one-half hour and threatened and verbally abused the workers (including comments related to their political views). The workers decided to take down the table.

You present only a few incidents that relate to SWP interaction with governmental officials other than local police. The two most significant events relate to the job status of SWP members: (1) A

civilian employee at the Alameda Naval Aviation Depot was investigated by the Office of Special Counsel (OSC) for violations of the Hatch Act because he ran for the San Francisco Board of Supervisors in 1992, distributed campaign literature for candidates running in partisan elections, and held positions in the SWP. Although candidates for the Board of Supervisors did not run under party labels, OSC noted that the employee accepted the endorsement and support of the SWP. Even though OSC concluded that violations occurred, it decided not to seek disciplinary action against the employee while noting that subsequent violations would be considered knowing and willful. The employee maintained that he should not have been considered a partisan candidate, that the investigation occurred only after his superiors at Alameda became concerned with the content of his views, and that other employees thought to have violated the Hatch Act were merely warned without a referral to OSC. (2) In 1991, the security clearance of an Air Force enlisted man was suspended, and he was transferred from his job as a computer programmer with the nuclear targeting staff to a job as a clerk at the base housing office. The airman was a member of the SWP's affiliate, the Young Socialist Alliance (YSA). The suspension occurred on the day he returned to work from a YSA convention. A subsequent Air Force letter notified the airman of the opening of a security investigation (to resolve the question of his clearance) based on his involvement in socialist organizations, unreported contact with a foreign national (referring to contact at the convention), and perceived questionable loyalty, honesty, and reliability in his previous workcenter. In reply to this letter, the airman disputed the charge as to the foreign national and noted his favorable reviews by supervisors and his initiative on the job. The airman resigned before the end of the investigation as a result of his inability to obtain a promotion in the field under which he enlisted, which would have required regaining his security clearance.

A review of the information presented by you indicates that the SWP and persons publicly associated with it have experienced a significant amount of harassment from private sources in the 1990-1996 period. Such harassment appears to have been intended to intimidate the SWP and persons associated with it from engaging in their political activities and in expressing their political views. There is also evidence of continuing harassment by local police, similar to incidents discussed in the 1990 opinion.

Based on the evidence presented, the hostility from other governmental sources appears to have abated. As indicated above, massive Federal governmental surveillance and disruption was discontinued well before 1990. Moreover, you do not present evidence similar to the affidavits filed by Federal officials in 1987, referred to above, indicating negative attitudes toward the SWP and the need to gather information on it. The incidents involving the naval employee and the airman are difficult to assess without complete information, although the airman's situation presents the possibility of a chilling effect on public association with the SWP.

Nevertheless, the continuation of harassment from private and local police sources during the 1990-1996 period, coupled with the long history of harassment of the SWP, is still sufficient evidence that there is a reasonable probability that the compelled public disclosure of previously exempted information will subject the persons in the exempted categories to threats or harassment from various sources. The Commission, therefore, grants the committees supporting the candidates of the SWP the exemption provided for in the consent agreements and in Advisory Opinion 1990-13, with one new condition described below. Consistent with the length

of the exemption granted in 1990, this exemption is to last for the reports covering the next six years, i.e., through December 31, 2002.[7] At least sixty days prior to December 31, 2002, the SWP may submit a new advisory opinion request seeking a renewal of the exemption. If a request is submitted, the Commission will consider the factual information then presented as to harassment after 1996, or the lack thereof, and will make a decision at that time as to the renewal.

As in Advisory Opinion 1990-13, the Commission emphasizes that the committees supporting the Federal office candidates of the SWP must still comply with all of the remaining requirements of the Act and Commission regulations. The committees must file reports containing the information required by 2 U.S.C. 434(b) with the exception of the information specifically exempted, and the committees must keep and maintain records as required under 2 U.S.C. 432 with sufficient accuracy so as to be able to provide information, otherwise exempt from disclosure, in connection with a Commission investigation. In addition to complying with the requirements of the decrees, the committees must file all reports required under 2 U.S.C. 434(a) in a timely manner. The committees must also comply with the provisions of the Act governing the organization and registration of political committees. See, e.g., 2 U.S.C. 432 and 433. Adherence to the disclaimer provisions of 2 U.S.C. 441d is also required. Finally, the committees must comply with the Act's contribution limitations and prohibitions. 2 U.S.C. 441a, 441b, 441c, 441e, 441f, and 441g.

As indicated above, the Commission adds one new condition to the reporting requirements. In partial reporting exemptions granted to an SWP campaign committee and various SWP candidates for state or local office, the agencies administering campaign disclosure in the States of Washington and Iowa have required that the committees assign a code number to each contributor whose name and address is not being disclosed. The Iowa agency required that the committee keep books and records that would correlate the code numbers with the names and contributions. The Commission believes that a requirement of assigning a code number for each contributor and reporting that code number when disclosing a contribution by that person would enable a reviewer of that report (i.e., either the Commission staff or a member of the public) to determine whether contributions in excess of the limits of 2 U.S.C. 441a are being made. At the same time, such a requirement would not diminish the anonymity that is already given to contributors under Advisory Opinion 1990-13 and the consent decrees. Therefore, each committee entitled to the exemption should assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar year. That code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. Consistent with the requirement that the committees comply with the recordkeeping provisions of the Act, the committee's records should correlate each code number with the name and other identification data of the contributor who is represented by that code.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

John Warren McGarry
Chairman

Enclosure (AO 1990-13)

1 Nevertheless, the agreement also stated that if the Commission found reason to believe that the committees violated a provision of the Act, other than those for which an exemption was specified, but needed the withheld information in order to proceed, the Commission could apply to the court for an order requiring the production of such information.
2 In view of the specific provisions of the 1979 amendments to the disclosure provisions, the agreement also makes reference to an exemption for reporting the identification of persons providing rebates, refunds or other offsets to operating expenditures, and persons providing any dividend, interest or other receipt.
3 In addition, the courts in *Brown and Hall-Tyner* rendered their decisions with reference to recent or current events or factors, as well as a history of harassment, i.e., recent incidents of harassment against the SWP and extant statutes directed against the Communist Party.
4 As noted in the opinion, these activities were set out in the Final Report of Special Master Judge Breitel in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980) and in *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357 (S.D.N.Y. 1986), a case in which the Federal District Court awarded judgment against the United States under the Federal Tort Claims Act for disruption activities, surreptitious entries, and use of informants by the FBI.
5 See Advisory Opinion 1990-13 for a further discussion of the implications of the unfavorable statements.
6 You also provide a declaration from an SWP congressional candidate from Florida who noted that some of her airline co- workers asked that SWP newspapers not be delivered to their homes and that they be hand-delivered at work instead, or that the newspapers be mailed in envelopes.
7 As stated above, you have asked for an exemption period that is similar to the previous period because that period was to last through the next two presidential election cycles. Nevertheless, the more important aspect of this exemption is the actual length of time, and that is why six years, not eight, is being granted. Moreover, in view of the apparent abatement in governmental harassment, a longer time interval between the dates when the Commission reviews its grant of the partial exemption is unwarranted.

# EXHIBIT B

FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 4, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-02

Michael Krinsky
Jaykumar Menon
Rabinowitz, Boudin, Standard, Krinsky & Lieberman
740 Broadway, Fifth Floor
New York, NY 1002-9518

Dear Mr. Krinsky and Mr. Menon:

This refers to your letters dated October 31, 2002 and February 14, 2003, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended, ("the Act") and Commission regulations to the continuation of a partial reporting exemption for the Socialist Workers Party National Campaign Committee and committees supporting candidates of the Socialist Workers Party ("SWP").[1]

**PROCEDURAL BACKGROUND**

*Judicial origins of the exemption*

The SWP National Campaign Committee and committees supporting SWP candidates were first granted a partial reporting exemption in a consent decree, dated

[1] The completed advisory request materials were not received until February 14. However, the date of your initial submission is accepted for purposes of tolling the time for the request of a continuation of the partial reporting exemption.

January 2, 1979, that resolved *Socialist Workers 1974 National Campaign Committee v. Federal Election Commission*, Civil Action No. 74-1338 (D.D.C. 1979). In that case, such committees brought an action for declaratory, injunctive and affirmative relief, alleging that specific disclosure sections of the Act operated to deprive them and their supporters of rights guaranteed by the First Amendment to the Constitution because of the likelihood of harassment resulting from such disclosure. The consent decree required the committees supporting SWP candidates to maintain records in accordance with the Act and to file reports in a timely manner. It also, however, exempted these committees from the provisions requiring the disclosure of: 1) the names, addresses, occupations, and principal places of business of contributors to SWP committees; 2) political committees or candidates supported by SWP committees; 3) lenders, endorsers or guarantors of loans to the SWP committees; and 4) persons to whom the SWP committees made expenditures.[2] The decree stated that its provisions would extend to the end of 1984, and established a procedure for the SWP committees to apply, prior to that date, for a renewal of the exemptions listed above.

On July 24, 1985, the court approved an updated settlement agreement with the same requirements and partial reporting exemption.[3] The court decree extended the exemption until the end of 1988, and again included a renewal procedure. However, the SWP missed the deadline for reapplication for the exemption.

*Renewal of the exemptions through advisory opinions*

In July 1990, SWP sought an extension of the partial reporting exemption through the advisory opinion process in lieu of obtaining a court decree. On August 21, 1990, the Commission issued Advisory Opinion 1990-13, which granted the same exemption provided for in the previous consent decrees. The advisory opinion provided that the exemption would be in effect through the next two presidential election cycles, i.e., through December 31, 1996. Additionally, the SWP committees could seek a renewal of the exemption by submitting an advisory opinion request by November 1, 1996 to present information as to harassment of SWP, or persons associated with SWP, during the 1990-1996 period. Advisory Opinion 1990-13.

On November 1, 1996, the committees again requested through the advisory opinion process a renewal of the exemption. In Advisory Opinion 1996-46, the Commission agreed to the renewal after examination of the evidence presented in affidavits that described the continuing harassment of SWP and its supporters. However,

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[2] The agreement also stated that if the Commission found reason to believe that the committees violated a provision of the Act, other that those for which an exemption was specified, but needed the withheld information to proceed, the Commission could apply to the court for an order requiring the production of such information.

[3] In view of the specific provisions of the 1979 amendments to the disclosure provisions, the agreement also makes reference to an exemption for reporting the identification of persons providing rebates, refunds or other assets to operating expenditures, and persons providing any dividend, interest or other receipts.

the Commission added a new condition to the renewal. This modification required that each committee entitled to the exemption must assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar year.[4] *See* Advisory Opinion 1996-46. This modified renewal extended the partial reporting exemption for the next six years, i.e., through December 31, 2002. The advisory opinion specified that at least sixty days prior to the expiration date, the requestor could submit a new advisory opinion request seeking another renewal of the exemption.

## ACT AND COMMISSION REGULATIONS

The Act requires political committees to file reports with the Commission that identify individuals and other persons who make contributions over $200 during the applicable time periods, or who come within various other disclosure categories listed above in reference to the consent agreements. 2 U.S.C. 434(b)(3), (5), and (6); *see also* 2 U.S.C. 431(13). However, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court recognized that, under certain circumstances, the Act's disclosure requirements as applied to a minor party would be unconstitutional because the threat to the exercise of First Amendment rights resulting from disclosure would outweigh the insubstantial interest in disclosure by that entity. 424 U.S. at 71-72. Reasoning that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim" for a reporting exemption, the Court stated that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id* at 74. The Court elaborated on this standard, stating:

> The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

*Id.* at 74; *see also McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995).

The Supreme Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee (Ohio),* 459 U.S. 87 (1982), granting SWP an exemption from state campaign disclosure requirements. The Court referred to the introduction of proof of

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[4] The Commission required that the code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. The committee's records were required to correlate each code number with the name and other identification data of the contributor who is represented by that code.

specific incidents of private and government hostility toward SWP and its members within the four years preceding the trial in that case. The Court also referred to the long history of Federal governmental surveillance and disruption of SWP until at least 1976. *Brown,* 459 U.S. at 99-100. Noting the appellants' challenge to the relevance of evidence of Government harassment "in light of recent efforts to curb official misconduct," the Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility toward the SWP is ingrained and likely to continue." *Id.* at 101.

The Supreme Court in *Brown* also clarified the extent of the exemption recognized in *Buckley*, stating that the exemption included the disclosure of the names of recipients of disbursements as well as the names of contributors. The Court characterized the view that the exemption pertained only to contributors' names as "unduly narrow" and "inconsistent with the rationale for the exemption stated in *Buckley*." *Id.* at 95.

The United States Court of Appeals for the Second Circuit also applied the *Buckley* standard in exempting the campaign committee of the Communist Party presidential and vice presidential candidates from the requirements to disclose the identification of contributors and to maintain records of the name and addresses of contributors. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied,* 459 U.S. 1145 (1983). The court described the applicability of the standard, stating:

> [W]e note that Buckley did not impose unduly strict or burdensome requirements on the minority group seeking constitutional exemption. A minority party striving to avoid FECA's disclosure provisions does not carry a burden of demonstrating that harassment will certainly follow compelled disclosure of contributors' names. Indeed, when First Amendment rights are at stake and the specter of significant chill exists, courts have never required such a heavy burden to be carried because 'First Amendment freedoms need breathing space to survive.' (Citations omitted.) Breathing space is especially important in a historical context of harassment based on political belief. Our examination of the treatment historically accorded persons identified with the Communist Party and a survey of statutes still extant reveal that the disclosure sought would have the effect of restraining the First Amendment rights of supporters of the Committee to an extent unjustified by the minimal governmental interest in obtaining the information.

678 F.2d at 421-422.

Commission agreement to the consent decrees granting the previous exemptions to the SWP committees has been based upon the long history of systematic harassment of the SWP and those associating with it and the continuation of harassment. The Commission has required only a "reasonable probability that the compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or

private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the application of this standard to both contributors and recipients of disbursements.

The Commission in Advisory Opinions 1996-46 and 1990-13 noted that, in agreeing to the granting of the exemption and its renewal, it considered both "present" and historical harassment. The 1985 Stipulation of Settlement refers to the fact that the Commission had been ordered, "to develop a full factual record regarding the present nature and extent of harassment of the plaintiffs and their supporters resulting from the disclosure provisions." 1985 Stipulation of Settlement, p. 2. According to the 1985 Stipulation of Settlement, the renewal was based on evidentiary materials regarding the nature and extent of harassment during the previous five years. As referred to above, these two Advisory Opinions based their grant, in part, on the evidence of harassment since 1985. The very nature of the periodic extensions indicates that, after a number of years, it is necessary to reassess the SWP's situation to see if the reasonable probability of harassment still exists.[5]

## *EXAMINATION OF FACTUAL BACKGROUND*

*Electoral status of SWP*

In the request for the exemption granted in the past two advisory opinions and in your present request, you have presented facts indicating SWP's status as a minor party since its founding in 1938. Despite running a presidential candidate in every election since 1948 and numerous other candidates for Federal, State and local offices, no SWP candidate has ever been elected to public office in a partisan election. You have presented data from the 2000 election indicating very low vote totals for SWP presidential and other Federal candidates.[6] Further, unlike several other minor parties, you state that SWP has never applied or qualified for national committee status. *See* 2 U.S.C 431(14) and Advisory Opinions 2001-13, 1998-2, 1995-16 and 1992-30.

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[5] In addition, the courts in *Brown* and *Hall-Tyner* rendered their decisions with reference to recent events or factors, as well as a history of harassment, i.e., recent incidents of harassments against the SWP and extant statutes directed against the Communist Party.

[6] The evidence you present, as well as information publicly available, indicates that no SWP candidate has come close to winning a Federal election in the six years since the last exemption was granted. SWP candidates for U.S. President received only 8,746 votes nationwide in 1996 and only 10,644 votes nationwide in 2000. Further, no SWP candidates on the ballot for U.S. Senate or House of Representatives received more than 15,000 votes in any election during that period, with the vast majority (thirty-five of thirty-seven candidates) receiving not even 5,000 votes. Additionally, the request provides information of a survey conducted by party leadership of the local campaign committees (of which 17 existed) that supported a candidate in 2000. According to this survey, only 354 people nationwide contributed funds to these committees, for an average of approximately twenty contributors per committee. There was only one contribution nationwide to that committee that was over $300.

*History of government harassment*

The request for the exemptions must be seen in the context of the relationship between the SWP and various Federal enforcement authorities, as well as SWP's relationship with other enforcement authorities and private parties. It is against this backdrop that the request and the supporting materials can properly be understood. Advisory Opinions 1996-46 and 1990-13 made reference to the long history of governmental harassment of the SWP. The advisory opinions described FBI investigative activities between 1941 and 1976 that included the extensive use of informants to gather information on SWP activities and on the personal lives of SWP members, warrantless electronic surveillance, surreptitious entry of SWP offices, other disruptive activities including attempts to embarrass SWP candidates and to foment strife within SWP and between SWP and others, and frequent interviews of employers and landlords of SWP members.

The advisory opinions also referred to statements made by Federal governmental officials in several agencies expressing the need for information about the SWP based on the officials' unfavorable perceptions of the SWP. These statements were made in affidavits submitted during 1987 in connection with *Socialist Workers Party v. Attorney General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction preventing the government from using, releasing, or disclosing information on the SWP that was unlawfully obtained or developed from unlawfully obtained material, except in response to a court order or a Freedom of Information Act request. The opinion also discussed incidents of private and local governmental harassment of SWP and those associating with it during the period from 1985 through 1996. These included private threats and acts of violence and vandalism, as well as harassment by local police.

*Organization of current evidentiary record*

In your current request you present over 80 exhibits including statements from various Party members and candidates, sometimes corroborated by local newspaper articles, police reports, court documents or other materials. The statements come from SWP members from different regions of the United States and are dated from 1997 to 2002. These statements are meant to attest to the hostility directed toward the SWP. They can be divided into three categories: 1) statements attesting to the fear possible SWP supporters have of providing identification when expressing SWP support, 2) statements and material attesting to hostility from private parties to SWP activity, and 3) statements and materials attesting to hostility from law enforcement sources to SWP activities.

Fears expressed by party supporters

The request contains eight statements by SWP officials relating the concerns of potential SWP supporters regarding public identification with SWP. These include statements by the 2000 Presidential and Vice Presidential SWP candidates

describing their experiences while campaigning and talking with potential supporters. It also includes statements from SWP workers who sell subscriptions to SWP newspapers. Several of the statements refer to individuals who expressed reluctance to buy subscriptions for fear of finding their names on lists maintained by enforcement authorities such as the FBI. See Exhibits L, M, and N. Your request also notes the refusal in 1997 of the Seattle Elections Commission to grant an exemption from its reporting requirements.[7] You provide statements from several SWP workers noting that several long-time contributors expressed reluctance to contribute again because now their names, addresses and professions would be public. See Exhibits H and I.

*Harassment and violence from private sources*

The largest number of exhibits in the request, over forty, consists of examples of harassment of SWP workers and candidates by private individuals and businesses. These are signed statements by SWP workers and candidates that concern their experiences while giving out SWP literature or selling SWP newspapers or gathering signatures for petitions. They include violence and threats of violence directed toward SWP workers and displays. *See,* for example, Exhibits 4, 19, 20, and 38. The request also includes well-documented accounts of attacks and vandalism against SWP headquarters and property. *See* Exhibit 5 (District of Columbia); Exhibit 12 (Houston, Texas); Exhibit 22 (Des Moines, Iowa); and Exhibit 50 (San Francisco, California). Your request also describes the receipt of hostile or threatening email, notes or phone messages at various SWP headquarters. *See* Exhibits 31, 64, and 74.

Additionally, you provide statements of SWP candidates who faced pressure or hostility at the work place once their employers became aware of their political activities. Some of the exhibits involve situations where rules concerning political activity in the workplace were violated. However, in several situations, employees faced sanctions simply because of their affiliation with SWP or their affirmation of its political beliefs. The most striking and well-documented example was the firing in 2001 of the SWP candidate for mayor of Miami. *See* Exhibit 15.

*Relations with law enforcement authorities*

The request also includes 25 exhibits describing interactions between SWP workers and local law enforcement authorities. The majority of these involve police or other law enforcement officials forcing SWP personnel to remove campaign and/or literature tables from streets or sidewalks or to cease the hand distribution of campaign or SWP materials. In one instance, local police charged SWP supporters manning a literature table with disorderly conduct and unlicensed vending. A judge later suspended the charges. *See* Exhibit 24. It is not certain that animus against SWP was the motivating factor in all these situations since it is not clear whether SWP workers were violating the

[7] Your request includes a 1998 decision of the Washington State Public Disclosure Commission, which by contrast, granted a reporting exemption to the SWP in regard to statewide activity by its sole statewide candidate.

laws of the localities. Nevertheless, prejudice against SWP is indicated in at least some of exhibits since there are cases where SWP activity was, according to evidence provided along with reports of the incidents, legal or protected within the jurisdiction involved. *See* Exhibits 25, 40, 41, 55, and 70. In one case, SWP successfully challenged in federal district court the constitutionality of a permit regulation as it was applied to SWP activities. *See* Exhibit 65.

In Advisory Opinion 1996-46, SWP presented less than a handful of incidents that related to SWP interaction with governmental officials other than local police. In your 2002 request, you present only one such situation. Exhibit 43 describes an individual who, as a SWP member and SWP Presidential elector, applied for a position as a census worker and received a very high score in the Census Bureau's standardized test. The SWP member states that his file was forwarded to the FBI for a security evaluation and that other applicants had their files reviewed by the FBI. You assert that he would have been hired but for the lack of action on his file by the FBI because of its stated inability to locate his file. With respect to the incident, you do not present evidence similar to the affidavits submitted by Federal officials with regard to previous determinations. Consequently, it is difficult to assess whether administrative mischance or actual prejudice played a role in the loss of the file. However, it could be seen as significant, in view of past actions by the FBI with regard to the SWP and its supporters.[8]

## *ANALYSIS AND CONCLUSIONS*

In applying the standard established by the court cases and court decrees described above in determining whether to renew the SWP's partial reporting exemption, the Commission must first determine whether SWP continues to maintain its status as a

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[8] Beginning in 1941, the FBI began a generalized investigation of the SWP that was to last at least until 1976. See Final Report of Special Master Judge Breitel in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980). Between the years 1960 and 1976, the FBI employed approximately 1300 informants who reported on the activities, discussions and debates of the SWP. In addition to reporting on what the Special Master described, with some qualifications, as "peaceful, lawful political activity" by the SWP and its adjunct, the Young Socialist Alliance ("YSA"), the informants also provided information as to the names, addresses, places and changes of employment of SWP members, and such personal data as information on "marital or cohabitational status, marital strife, health, travel plans, and personal habits." 642 F. Supp. at 1379-1381.

In the 1960's and 1970's, the SWP was the subject of FBI Counterintelligence Programs "designed to disrupt the SWP on a broad national basis." 642 F. Supp. at 1384. The disruption under these programs included attempts to embarrass SWP candidates, foment racial strife within the SWP, and cause strife between the SWP and others in a variety of political movements. 642 F. Supp. at 1385-1389. For a number of years, the FBI also conducted warrantless electronic surveillance of the SWP on an extensive basis and at least 204 surreptitious entries of SWP offices, principally to photograph or remove documents. The court noted that "there is no indication that the FBI obtained any documents showing any violence or any action to overthrow the Government." 642 F. Supp. at 1394.

Over a period of many years, the FBI maintained a list known successively as the Custodial Detention List, the Security Index, and the Administrative Index. The persons on this list were to be considered for apprehension and detention in time of war or national emergency. The FBI intended to include all SWP members on this list. The list was maintained by frequent interviews of landlords and employers of the members. 642 F. Supp. at 1395.

minor party. *See Buckley,* 424 U.S. at 68-74. As evidenced by low vote totals for SWP candidates and the small total amounts contributed to SWP and committees supporting SWP candidates, the Commission concludes that SWP continues to be a minor party. Having satisfied the minor party threshold, the Commission must balance three factors in analyzing your request. The first is the history of violence or harassment, or threats of violence or harassment, directed at the SWP or its supporters by Federal, state, or local law enforcement agencies or private parties. Second is evidence of continuing violence, harassment, or threats directed at the SWP or its supporters by these same organizations or persons since the last advisory opinion in 1996. These two factors must be balanced against the governmental interest in obtaining the information by determining whether the impact of the activities of the SWP and its supporters in connection with Federal elections is diminished by the low probability of the SWP winning an election. *See Hall-Tyner*, 678 F.2d at 422.

As evidenced by the various court cases and the information submitted in connection with previous advisory opinion requests and described briefly above, there is a long history of threats, violence, and harassment against the SWP and its supporters by Federal, state, or local law enforcement agencies and private parties. There is a sufficient record to establish that this history continues to have a chilling effect on possible membership in or association with SWP. One indication of this is the refusal of individuals to purchase or subscribe to SWP literature or circulations for fear of being included in lists maintained by the government identifying them as SWP supporters. *See* Exhibits L, M, and N.

A review of the information you have presented in connection with this AOR indicates that the SWP and persons publicly associated with it have experienced significant harassment from private sources in the 1997-2002 period. Such harassment appears to have been intended to intimidate the SWP and persons associated with it from engaging in their political activities and in expressing their political views. There is also some evidence of continuing harassment by local police, although here the evidence is not as great as that presented for the harassment from private parties and it is more difficult to evaluate. Based on the evidence presented, the hostility from other governmental sources still exists but continues to abate. As indicated above, massive Federal governmental surveillance and disruption were discontinued well before 1990. The incident involving the census position is difficult to assess without complete information, although it does present at least the possibility of a chilling effect on public association with the SWP. However, as stated above, the history of governmental harassment continues to have a present-day chilling effect that is not diminished by the abatement of governmental harassment.

As noted earlier, it must be stressed that the evidence presented in your request does not need to indicate a certainty that harassment would follow a revocation of the partial reporting exemption. The standard established in Advisory Opinions 1990-13 and 1996-46 and based on the case law cited earlier is that there only be "a reasonable probability that compelled disclosure" would result in "threats, harassment, or reprisals

from *either* Government offices *or* private parties" (emphasis added). The Commission considers the totality of the evidence for the 1997-2002 period, especially the evidence of continued harassment from private parties, and concludes that there is a reasonable probability that contributors to and vendors doing business with SWP and committees supporting SWP candidates would face threats, harassment, or reprisal if their names and information about them were disclosed.

Information provided in your request states that SWP and committees supporting its candidates receive very small total amounts of contributions and very low vote totals in partisan elections in which they are candidates. These low numbers indicate that the activities of SWP, its candidates, and committees supporting its candidates have little, if any, impact on Federal elections. Thus the governmental interest in obtaining the names and addresses of contributors to and vendors doing business with SWP and committees supporting SWP candidates in connection with Federal elections is diminished by the low probability of an SWP candidate winning an election.

As a result of its finding that SWP and the committees supporting SWP candidates have satisfied the factors established in the case law and prior advisory opinions, the Commission grants SWP and the committees supporting SWP candidates a further continuation of the partial reporting exemption provided for in the consent agreements as continued by Advisory Opinions 1990-13, and 1996-46. The condition established by the 1996-46 Opinion will also continue with the partial reporting exemption.[9]

Your request notes that the Act was amended in 1999, 2000, and 2002. You ask that the partial reporting exemption be applied to any new reporting obligations arising from these changes that may require SWP or committees supporting SWP candidates to disclose the names of their contributors and vendors. You identify the amended or new provisions as 2 U.S.C. 434(a)(6)(B) (candidate's notification of expenditure from personal funds), 434(a)(11)(B) (electronic availability of reports), 434(a)(12) (electronic filing standards), 434(e) (reporting by political committees), 434(f) (electioneering communication disclosure), 434(g) (independent expenditure reporting), and 434(h) (inaugural committee reporting). The Commission agrees that the partial exemption applies to SWP and candidate committees to the extent they are required to report the names of contributors and vendors under the amended or new sections of the Act that you

[9] Therefore, each unauthorized committee entitled to the exemption should assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar year. Similarly, each authorized committee of a SWP candidate should assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 during the election cycle. That code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. Consistent with the requirement that the committees comply with the recordkeeping provisions of the Act, the committee's records should correlate each code number with the name and other identifying data of the contributor who is represented by that code.

identify[10] except for 2 U.S.C. 434(a)(6)(B)[11] and 434(h).[12] Please note that SWP and the committees supporting SWP candidates must still comply with all other reporting obligations such as electronic filing and reporting their independent expenditures while omitting the names and information concerning contributors, donors and vendors.

Consistent with the length of the exemptions granted in 1990 and 1996, this partial reporting exemption applies to reports covering the next six years, i.e., through December 31, 2008. At least sixty days prior to December 31, 2008, the SWP may submit a new advisory opinion request seeking a renewal of the partial reporting exemption. If a request is submitted, the Commission will consider the factual information then presented as to harassment after 2002, or the lack thereof, and will make a decision at that time as to the renewal.

As in Advisory Opinion 1990-13 and 1996-46, the Commission emphasizes that the committees supporting the Federal candidates of the SWP must still comply with all of the remaining requirements of the Act and Commission regulations. The committees must file reports containing the information required by 2 U.S.C. 434(b) with the exception of the information specifically exempted, and the committees must keep and maintain records as required under 2 U.S.C. 432 with sufficient accuracy so as to be able to provide information, otherwise exempt from disclosure, in connection with a Commission investigation. In addition to complying with the requirements of the consent decrees, the committees must file all reports required under 2 U.S.C. 434(a) in a timely manner. The committees must also comply with the provisions of the Act governing the organization and registration of political committees. *See, e.g.,* 2 U.S.C. 432 and 433. Adherence to the disclaimer provisions of 2 U.S.C. 441d is also required. Finally, the committees must comply with the Act's contribution limitations and prohibitions. 2 U.S.C. 441a, 441b, 441c, 441e, 441f, 441g, 441i, and 441k.

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[10] If SWP or any committee supporting its candidates do not qualify as political committees and make an electioneering communication that must be reported under 2 U.S.C. 434(f), they must disclose the name of the broadcaster even though they would be exempt from disclosing names and addresses of donors and all other vendors. Additionally, your request concerns the granting of the partial exemption to both SWP and candidate committees. The partial exemption does not extend to individual SWP members who, as individuals, engage in activity that might require them to file reports of their own, for example, the filing of reports of electioneering communications under 2 U.S.C. 434(f) and independent expenditures under 2 U.S.C. 434(g).

[11] If a SWP candidate for the United States House of Representative or United States Senate makes sufficient expenditures from personal funds to require disclosure under 2 U.S.C. 434(a)(6)(B), the candidate must file FEC Form 10. This form does not require the candidate to disclose contributors other than the candidate nor does it require disclosure of vendors and therefore, is beyond the scope of the partial reporting exemption. Additionally, it is important for the SWP candidate to file this FEC Form 10 because it affects the opposing candidates' ability to accept contributions in excess of the contribution limitations under the Millionaires' Amendment at 2 U.S.C. 441a(i) and 441a-1.

[12] If the SWP or any candidate of the SWP is in a position to organize an inaugural committee, the analysis, and therefore the conclusion, of this advisory opinion would no longer be applicable.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosures: AOs 2001-13, 1998-2, 1996-46, 1995-16, 1992-30 and 1990-13

# EXHIBIT C

FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 20, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-01

Michael Krinsky, Esq.
Lindsey Frank, Esq.
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.
111 Broadway
Eleventh Floor
New York, NY 10006-1901

Dear Messrs. Krinsky and Frank:

We are responding to your advisory opinion request, on behalf of the Socialist Workers Party, the Socialist Workers National Campaign Committee, other Socialist Workers Party committees, and authorized committees of Federal candidates of the Socialist Workers Party (collectively "the SWP" or "SWP committees"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the continuation of a partial reporting exemption for the SWP. Based on the long history of systematic harassment of the SWP, and some evidence of harassment after 2002, the Commission is renewing the partial reporting exemption until December 31, 2012.

The facts presented in this advisory opinion are based on your letters received on October 31, 2008, and January 14, 2009, publicly available materials, and telephone conversations with a Commission attorney.

## I. Background

### A. *Socialist Workers Party Litigation*

The SWP was first granted a partial reporting exemption in a consent decree that resolved *Socialist Workers 1974 National Campaign Committee v. Federal Election Commission*, Civil Action No. 74-1338 (D.D.C. 1979). In that case, the SWP brought an action for declaratory, injunctive, and affirmative relief, alleging that specific disclosure sections of the Act deprived

the SWP and their supporters of their First Amendment rights because of the likelihood of harassment resulting from mandatory disclosure of contributors and vendors. The consent decree exempted the SWP from the Act's requirements to disclose: (1) the names, addresses, occupations, and principal places of business of contributors to the SWP committees; (2) other political committees or candidates to which the SWP committees made contributions; (3) lenders, endorsers, or guarantors of loans to the SWP committees; and (4) persons to whom the SWP committees made expenditures. It also, however, required the SWP to maintain records in accordance with the Act and to file reports in a timely manner. The decree extended to the end of 1984, and established a procedure for the SWP committees to apply for a renewal of these exemptions.

On July 24, 1985, the court approved an updated settlement agreement with the same requirements and partial reporting exemption.[1] The 1985 court decree extended the exemption until December 31, 1988, and again included a renewal procedure. However, the SWP missed the deadline for reapplication for the exemption.

B. *Renewal of SWP's exemptions through advisory opinions*

In July 1990, the SWP sought an extension of the partial reporting exemption through the advisory opinion process in lieu of obtaining a court decree. On August 21, 1990, the Commission issued Advisory Opinion 1990-13 (SWP), which granted the same exemption provided by the previous consent decrees. The advisory opinion provided that the exemption would be in effect through the next two presidential election cycles, *i.e.*, through December 31, 1996.

In response to the SWP's subsequent requests in 1996 and 2002, the Commission issued advisory opinions renewing the partial reporting exemptions, each advisory opinion covering the next six years. The Commission granted these renewals after examining the evidence presented in affidavits and other documents describing the continuing harassment of the SWP and its supporters during the six years preceding each request. *See* Advisory Opinions 2003-02 (SWP) and 1996-46 (SWP). The renewed exemption granted in 2003 also reflected amendments to the Act's reporting requirements since Advisory Opinion 1996-46.

The current exemption applies to reports covering committee activity up to December 31, 2008. Advisory Opinion 2003-02 specified that no later than sixty days prior to that date, the SWP could submit a new advisory opinion request seeking another renewal of the exemption.[2]

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[1] The 1985 agreement also exempted the SWP from reporting the identification of persons providing rebates, refunds, or other offsets to operating expenditures, and persons providing any dividend, interest, or other receipt.

[2] A complete advisory request was received on January 14, 2009. However, SWP's initial submission of October 31, 2008, met the deadline for applying for a renewal of the partial reporting exemption.

## II. Case Law

The Act requires political committees to file reports with the Commission that identify individuals and other persons who make contributions over $200 during the calendar year or election cycle (depending upon the type of committee), or who come within various other disclosure categories listed above in reference to the consent agreements. 2 U.S.C. 434(b)(3), (5), and (6); *see also* 2 U.S.C. 431(13). However, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court recognized that, under certain circumstances, the Act's disclosure requirements as applied to a minor party would be unconstitutional because the threat to the exercise of First Amendment rights resulting from disclosure would outweigh the government's insubstantial interest in disclosure by that particular entity. 424 U.S. at 71-72. Reasoning that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim" for a reporting exemption, the Court stated that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id* at 74. The Supreme Court elaborated on this standard, stating:

> The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

*Id*. at 74; *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 356 n.21 (1995).

The Supreme Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982), granting the SWP an exemption from State campaign disclosure requirements. The Court noted the evidence of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial in that case. The Court also noted the long history of Federal governmental surveillance and disruption of the SWP until at least 1976. 459 U.S. at 99-100. Noting the appellants' challenge to the relevance of evidence of government harassment "in light of recent efforts to curb official misconduct," the Supreme Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility toward the SWP is ingrained and likely to continue." *Id.* at 101.

The Supreme Court in *Brown* also clarified the extent of the exemption recognized in *Buckley*, stating that the exemption included the disclosure of the names of recipients of disbursements as well as the names of contributors. The Court characterized the view that the exemption pertained only to contributors' names as "unduly narrow" and "inconsistent with the rationale for the exemption stated in *Buckley*." *Id.* at 95.

The United States Court of Appeals for the Second Circuit also applied the *Buckley* standard in exempting the campaign committee of the Communist Party presidential and vice presidential candidates from the requirements to disclose the identification of contributors and to maintain records of the names and addresses of contributors. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983). The court described the applicability of the standard, stating:

> [W]e note that *Buckley* did not impose unduly strict or burdensome requirements on the minority group seeking constitutional exemption. A minority party striving to avoid FECA's disclosure provisions does not carry a burden of demonstrating that harassment will certainly follow compelled disclosure of contributors' names. Indeed, when First Amendment rights are at stake and the spectre of significant chill exists, courts have never required such a heavy burden to be carried because "First Amendment freedoms need breathing space to survive." (Citations omitted.) Breathing space is especially important in a historical context of harassment based on political belief. Our examination of the treatment historically accorded persons identified with the Communist Party and a survey of statutes still extant reveal that the disclosure sought by the FEC would have the effect of restraining the First Amendment rights of supporters of the Committee to an extent unjustified by the minimal governmental interest in obtaining the information.

678 F.2d at 421-422.[3]

The Commission's agreement to the consent decrees granting the previous exemptions to the SWP committees has been based upon the long history of systematic harassment of the SWP and those associating with it and the continuation of harassment. The Commission has required only a "reasonable probability that the compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the application of this standard to both contributors and recipients of disbursements.

In Advisory Opinions 2003-02, 1996-46, and 1990-13, the Commission noted that, in granting and renewing the exemption, it considered both current and historical harassment. The 1979 Stipulation of Settlement refers to the fact that the Commission had been ordered "to develop a full factual record regarding the present nature and extent of harassment of the plaintiffs and their supporters resulting from the disclosure provisions." 1979 Stipulation of Settlement, p. 2. According to the 1985 Stipulation of Settlement, the renewal was based on evidentiary materials regarding the nature and extent of harassment during the previous five years. The renewals granted in Advisory Opinions 1990-13, 1996-46, and 2003-02 were based, in part, on the evidence of harassment since 1985, 1990, and 1997, respectively. The very nature

[3] In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which was issued after Advisory Opinion 2003-02, the Supreme Court addressed the challenge by plaintiffs to certain disclosure requirements for electioneering communications. In discussing the importance of such disclosure and possible exemptions to the Act's disclosure requirements, the Court reiterated the standards set forth in *Buckley* and *Brown* that have formed the legal basis for past exemptions for the SWP. *See McConnell*, 540 U.S. at 198-199.

of the periodic extensions indicates that, after a number of years, it is necessary to reassess the SWP's situation to see if the reasonable probability of harassment still exists.[4]

## III. Facts Presented

A. *Status as a Minor Party*

The SWP's current request presents facts demonstrating that it has been a minor party since its founding in 1938. Despite running a presidential candidate in every election since 1948 and numerous other candidates for Federal, State and local offices, no SWP candidate has ever been elected to public office in a partisan election. Data from the 2004, 2006, and 2008 elections show very low vote totals for SWP presidential and other Federal candidates.[5] Information presented in the request and available on the Commission's website indicates a low level of financial activity by SWP political committees.[6] Further, unlike committees of several other minor parties, the SWP National Campaign Committee has never applied or qualified for national committee status.[7] *See* 2 U.S.C 431(14), 11 CFR 100.13; *cf.* Advisory Opinions 2001-13 (Green Party of the United States), 1998-2 (Reform Party USA), and 1995-16 (U.S. Taxpayers Party).

B. *History of government harassment*

The SWP's request for the exemptions must be evaluated in the context of the relationship between the SWP and various Federal, State, and local law enforcement authorities, and private parties. Advisory Opinions 2003-02, 1996-46 and 1990-13 discussed the long

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[4] Similarly, the courts in *Brown* and *Hall-Tyner* rendered their decisions with reference to recent events or factors, as well as a history of harassment, *i.e.*, recent incidents of harassments against the SWP and extant statutes directed against the Communist Party.

[5] The evidence presented, as well as information publicly available, indicates that no SWP candidate has come close to winning a Federal election in the six years since the last exemption was granted. SWP candidates for U.S. President received only 10,791 votes nationwide in 2004 and 9,827 votes (not yet including write-ins) nationwide in 2008. Further, in 2004, 2006, and 2008, no SWP candidates on the ballot for U.S. Senate (two in 2004 and 2006, and one in 2008) received more than 15,000 votes. Similarly, no SWP candidate on the ballot for the House of Representatives (two in 2004 and 2006, and three in 2008) received more than 4,600 votes in any election during that period. Information on non-Federal elections in 2008 indicates a similar lack of success for SWP candidates. *See* Exhibits D and S.

[6] A declaration submitted by the treasurer of the SWP's National Campaign Committee states that, up to October 25, 2008, only 243 people had contributed to the committee in 2008, and that, in 2004, 321 people contributed to the committee. Commission records indicate that 26 persons contributed over $200 per calendar year to the committee in 2007-2008 and that 76 persons contributed over $200 per calendar year to the committee in 2003-2004. In anticipation of the implementation of the Honest Leadership and Open Government Act of 2007 ("HLOGA"), the committee treasurer stated that the SWP has not received any "bundled" contributions that would require disclosure as such under HLOGA, and does not foresee receiving any such contributions. *See* Exhibit E.

[7] According to Commission records, no SWP party committee other than the National Campaign Committee was registered with the Commission during the 2006 and 2008 election cycles and only two other SWP party committees, both State committees, were registered during the 2004 cycle. During the 2008 election cycle, no authorized committee of any SWP candidate was registered with the Commission.

history of Federal government harassment of the SWP. Advisory Opinion 1990-13 described FBI investigative activities between 1941 and 1976 that included the extensive use of informants to gather information on SWP activities and on the personal lives of SWP members, warrantless electronic surveillance, surreptitious entry of SWP offices, other disruptive activities including attempts to embarrass SWP candidates and to foment strife within the SWP and between the SWP and others, and frequent interviews of employers and landlords of SWP members. The description of these activities was set out in the Final Report of Special Master Judge Breitel in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980) and *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357 (S.D.N.Y. 1986); *see also* Advisory Opinion 2003-02, n.8, for a description of FBI activities between 1941 and 1976.

The advisory opinions also referred to statements made in affidavits submitted by Federal governmental officials in several agencies expressing the need for information about the SWP based on the officials' unfavorable perceptions of the SWP. These affidavits were submitted in connection with *Socialist Workers Party v. Attorney General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction preventing the Federal government from using, releasing, or disclosing information about the SWP that was unlawfully obtained or developed from unlawfully obtained material, except in response to a court order or a Freedom of Information Act request. The advisory opinions also discussed the statements of SWP workers and candidates and media reports, among other sources, describing incidents of private threats and acts of violence and vandalism, harassment by local police, and difficulties with other governmental authorities experienced by the SWP and those associating with it from 1985 through 2002.

C. *Current evidentiary record*

The SWP's current request includes approximately 90 exhibits attesting to incidents of harassment or intimidation, or fears expressed by potential SWP supporters. Each exhibit includes at least one sworn statement from an individual associated with the SWP, sometimes accompanied by news accounts from the SWP's newspaper, *The Militant*, or from a local newspaper, police reports, correspondence, or other materials. The statements come from SWP members, candidates, campaign workers, or supporters from different regions of the United States and are dated from late 2002 to 2008. Generally, these statements fall into four categories: (1) statements attesting to the fear that potential SWP supporters have of being identified as an SWP supporter; (2) statements and materials attesting to alleged hostility from private parties to SWP activities; (3) statements and materials attesting to alleged hostility from local government law enforcement sources to SWP activities; and (4) statements attesting to other alleged governmental intimidation. The requestor indicates that the compilation of incidents "is not meant to be exhaustive, as acts of intimidation and harassment against the SWP and its supporters are frequent enough that they often go unreported to any central body."

1. Fears expressed by SWP supporters

The SWP's request contains 15 statements (Exhibits 63-71 and 86-90 and Exhibit Q) by SWP candidates and campaign workers relating the concerns expressed by potential SWP supporters regarding public identification with the SWP. These include statements by the 2008

SWP presidential and vice presidential candidates and the National Campaign Committee Chair describing their experiences while campaigning and talking with potential supporters, and statements by SWP workers asking individuals to sign candidate ballot petitions and selling subscriptions to *The Militant.* Individuals expressed fear that putting their names and addresses on public petitions or on subscription lists would result in further scrutiny of them by governmental authorities such as the FBI, the CIA, the Department of Homeland Security, or immigration authorities (even if they were legal residents).

Some of the statements referred to individuals' explicitly stating a concern as to recent increased government surveillance. See Exhibits Q, 65, and 68. In addition, the sworn statement by the National Campaign Committee's Chair (Exhibit Q) indicates that he has met an increasing number of individuals who are attracted to the SWP but are afraid of public involvement for fear of "harassment or victimization by the authorities or right-wing vigilantes." The Chair states that these expressed fears were greater in 2008 than in 2004.[8]

2. Hostility from private parties

The SWP submitted approximately fifty exhibits consisting of attestations as to incidents of harassment, threats, or violence by private individuals or businesses. These exhibits are described below.

Thirteen exhibits described acts of violence or vandalism against SWP workers, property, or materials, including an incident in 2004 when a brick wrapped in incendiary material was thrown through the window of a local SWP headquarters early in the morning, setting the front part of the building on fire and causing considerable damage. *See* Exhibit 1. Other exhibits described other incidents of violence or vandalism, including pouring paint over an SWP vehicle; racist, anti-gay, or anti-immigrant graffiti on the windows of SWP campaign offices; a threat of imminent bodily harm to SWP campaigners; a physical assault on an SWP worker at a campaign literature table; a piece of concrete thrown through the window of an SWP office in an attempted break-in; extensive egg-throwing at an SWP headquarters on a street where no other businesses or offices were vandalized; and a former head of personnel at a company engaged in disputes with SWP personnel racing his car at an SWP campaigner. *See* Exhibits 3, 4, 5, 15, 27, 73, 79, 81, 82, and 83.

Several exhibits described more generalized threats of harm made in person to SWP campaigners, such as a statement by an individual to SWP supporters seeking ballot signatures that he wished to "put a bullet in every one of your heads." *See* Exhibit 8.

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[8] In both the October 2008 and January 2009 letters, and accompanying lettered exhibits, the SWP raises the issue of recent changes in the Attorney General's Guidelines for Domestic FBI Operations. These guidelines, which concern FBI investigations and information gathering relating to threats to national security, are less restrictive than the guidelines issued in the 1970s. The FBI has also recently issued guidance to local law enforcement agencies about "suspicious" activity to be shared with Federal authorities, including information as to "extremist organizations." The SWP notes the general public concern as to the new guidelines and practices, and expresses its concern that the recently expanded governmental authority may lead to the renewal of "the very type of practices and excesses that characterized the FBI's long history of harassment of the SWP." October 30, 2008 Letter, pp. 23-24. *See also* January 13, 2009 Letter, pp. 14-16, and Exhibits F, G, H, M, N, and O.

Eleven exhibits allege threatening or hostile statements made by mail or by phone. Some of these examples merely involve insulting messages containing harsh language or questioning the SWP's loyalty to the U.S. They are not out of the ordinary experience of campaigns today. However, there are more alarming allegations, such as a threatening letter containing a syringe mailed to an SWP office. There was also a declaration describing a threat by an individual to shoot SWP workers who came to his door. *See* Exhibits 7 and 76.

In four instances, individuals publicly known to be associated with the SWP were terminated from their jobs. Three of these individuals were SWP candidates for public office and one had distributed SWP campaign literature, along with SWP candidates, at the entrance to her company's parking lot after work. In three of the examples, the official basis used by the company to fire the employee was alleged work-related misconduct and did not pertain to SWP-related activities. However, the requestor relies on the circumstances presented in each exhibit to raise doubts as to these official bases and to indicate the possibility that the employee may have been terminated for SWP-related activities. *See* Exhibits 20, 21, and 22. The fourth situation entailed a firing of an SWP candidate for taking three weeks leave to campaign and to attend a youth conference in Venezuela in fulfillment of a campaign promise. The company had refused to grant such leave, and there had been a history of conflict between the company and the SWP. *See* Exhibit 74.

In one described instance, the manager of a bank that was a landlord of an office of the Militant Labor Forum (an SWP entity that sponsors weekly discussion groups on social and political issues) removed a Forum sign from the office's front door and threatened to evict the Forum months before the end of the lease, saying that the Forum was "against a lot of customers that I do business with." (This occurred during a local coal miners' strike in which the Forum was active.) Ultimately, the landlord and the tenant agreed that the tenant would vacate the premises several months before the end of the lease. *See* Exhibit 23.

Nineteen exhibits, some of which are referred to above, describe disruption of SWP workers or candidates while they were distributing SWP literature or attempting to obtain ballot petition signatures. According to the descriptions of some of these incidents, personnel of nearby businesses, including company or store security officers, forced, or attempted to force, SWP campaigners to dismantle or move their tables displaying campaign literature and other party materials, or to cease hand distribution of SWP materials while standing in a certain area. According to the exhibits, these incidents often occurred when the table or the campaigner was not on company premises, but only near it, or in shopping mall parking lots. The exhibits indicate that, in some cases, company personnel referred disparagingly to the political orientation of the literature, although it is also possible that concerns as to any political activity on or near private property may have been the impetus for the disruption in a number of situations. The exhibits also described threats by company personnel to call the local police. *See* Exhibits 8, 30, 31, 33, 34, 41, 46, 47, 49, 61, 75, and 83.

3. Relations with local law enforcement authorities

The SWP also provides sixteen exhibits describing interactions between SWP workers and local law enforcement authorities in eleven cities or towns in the Northeast, the South, and

the Midwest. These often involved police personnel or security police at public institutions who, according to the descriptions in the exhibits, forced SWP campaigners to remove tables displaying campaign materials and other SWP literature from sidewalks or to cease hand distribution of such materials. A substantial number of the described interactions involved questions as to the content of the literature being displayed or distributed, or what appeared to be hostile statements or actions by the police that may have intimidated campaigners and others interested in SWP literature. *See* Exhibit J.

For example, the statement in one exhibit described the police in Phillipi, West Virginia seizing some copies of *The Militant* from SWP workers distributing from house to house, frisking the SWP workers, and then demanding that they leave town or risk arrest. The statement in another exhibit described Toledo, Ohio police hostilely confronting SWP campaigners distributing *The Militant,* forcing them to stop, and demanding that they leave the city, asserting that the campaigners could not distribute such material door-to-door. *See* Exhibits 24 and 25.

It is not certain that animus against the SWP was the motivating factor in these situations. In some of the situations, the police contended that the SWP campaigners needed permits to have a table on the sidewalks or to distribute literature by hand. The SWP asserts that, in seven of these eleven localities, local ordinances did not require a permit and the SWP campaigners' activities were lawful. (Exhibit K includes copies of relevant ordinances from five of the seven localities.)

4. Interactions with other governmental authorities

In the current request, the SWP provides exhibits as to three alleged incidents entailing problems with government officials.[9] The first consisted of an unannounced visit by FBI agents to the home of an SWP Congressional candidate who had just returned from a book-publicizing trip to Cuba. The candidate's statement indicates that, in questioning him, the FBI agents attempted to "bait [him] with accusations of advocating violence" and asked him other questions about his support of unionization in his workplace. The second incident involved what the SWP considered excessive fines for the posting of Militant Labor Forum event flyers on historic city lampposts. The organizers of the event claimed the posting was done without their knowledge. The third incident concerned the possible placement of an SWP activist on a no-fly list. Whether the individual was on the no-fly list is uncertain from his sworn statement, and the individual was permitted to board his flight. *See* Exhibits 19, 58, and 84.

[9] In Advisory Opinion 1996-46, the SWP presented evidence of only a few incidents related to SWP interaction with government officials other than local police. The SWP presented only one such situation in Advisory Opinion 2003-02.

## IV. Question Presented

*Should the SWP, the Socialist Workers National Campaign Committee, other SWP party committees, and authorized committees of candidates of the SWP be granted a continuation of their previous partial reporting exemption?*

## V. Legal Analysis and Conclusions

Yes, the Commission grants a continuation of the partial reporting exemption for reports covering activity up to December 31, 2012.

In applying the standard established by the court cases and court decrees described above for deciding whether to renew the SWP's partial reporting exemption, the Commission must first determine whether the SWP continues to maintain its status as a minor party. *See Buckley*, 424 U.S. at 68-74. As evidenced by the low vote totals for SWP candidates, the lack of success in ballot access, and the small total amounts contributed to SWP committees, the Commission concludes that the SWP continues to be a minor party.[10]

Next, the Commission must weigh three factors in making its determination. The first factor is the history of violence or harassment, or threats of violence or harassment, directed at the SWP or its supporters by governmental authorities, including law enforcement agencies, or by private parties. The second is evidence of continuing violence, harassment, or threats directed at the SWP or its supporters by these same organizations or persons since the end of 2002. These two factors must be balanced against the third factor, which is the governmental interest in obtaining indentifying information as contributors and recipients of expenditures. Where the impact of the activities of the SWP and its supporters on Federal elections is minimal because the possibility of winning an election is remote, the government's interest in obtaining such information is diminished. Advisory Opinion 2003-02; *see also Hall-Tyner*, 678 F.2d at 422.

First, as evidenced by the various court cases and the information submitted in previous advisory opinion requests, there is a long history of threats, violence, and harassment against the SWP and its supporters by Federal and local law enforcement agencies and private parties.[11] In addition, a review of the information presented in the advisory opinion request indicates that the

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[10] In fact, the SWP does not even come close to the level of success necessary for a party to be defined as a "minor party" for the purposes of presidential candidate public financing. According to 26 U.S.C. 9002(7), a "minor party" is a political party whose candidate for president in the preceding presidential election received five percent or more but less than 25 percent of the popular vote.

[11] The Commission has consistently viewed the SWP's requests for exemption from the Act's reporting requirements in light of the "long history of governmental harassment of the SWP." Advisory Opinions 2003-02, 1996-46, and 1990-13. Past courts have described in great detail this history of violence, harassment, surveillance and disruption against the SWP. *See generally, Socialist Workers Party v. Attorney General*, 642 F.Supp. 1357 (S.D.N.Y. 1986); *Socialist Workers Party v. Attorney General*, 666 F.Supp. 621 (S.D.N.Y. 1987). The Supreme Court has previously referred to the "substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 98-99 (1982) (quoting the underlying district court opinion). It is against this backdrop that the present evidence presented by the requesters must be considered. *See Buckley*, 424 U.S. at 74.

SWP and persons associated with it have likely experienced harassment from private sources from the end of 2002 to the present. Although some of the alleged incidents of harassment may seem minor or subject to differing interpretations based on the circumstances, there are still a number of examples that may legitimately raise concern by those associated with the SWP, particularly when such examples are taken together, rather than viewed in isolation from one another.

There are also some allegations of continuing harassment and hostility by local police toward the SWP based on its political views. The evidence presented suggests that harassment of the SWP by other governmental entities since 1990 still exists but has abated and has been significantly lower than other forms of harassment. Nevertheless, the long history of Federal and local governmental harassment continues to have some present-day chilling effect despite the abatement of Federal governmental harassment.[12]

The Commission notes that the evidence presented does not need to demonstrate a certainty that harassment would follow a revocation of the partial reporting exemption. The standard established in the previous advisory opinions, based on the case law cited earlier, is that there only be "a reasonable probability that compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. Based on its consideration of the evidence from the end of 2002 through 2008, the Commission concludes that there is a reasonable probability that contributors to, and vendors doing business with, the SWP and committees supporting SWP candidates would face threats, harassment, or reprisals if their names and information about them were disclosed.

Information provided by the SWP indicates that the SWP and committees supporting its candidates receive very small total amounts of contributions and its candidates receive very low vote totals in partisan elections. These low vote totals and dollar amounts indicate that the activities of the SWP, its candidates, and committees supporting its candidates have little, if any, impact on Federal elections. The governmental interest in obtaining the names, addresses, and other identifying information of contributors to and vendors doing business with the SWP and committees supporting SWP candidates in connection with Federal elections thus remains very low, and continues to be outweighed by the reasonable probability of threats, harassment, or reprisals resulting from such disclosure.

As a result of its finding that the SWP, the SWP's party committees, and the authorized committees of SWP candidates have satisfied the factors established in the case law and applied in prior advisory opinions, the Commission grants the SWP, the SWP's National Campaign Committee, the SWP's other party committees, and the authorized committees of SWP candidates a further continuation of the partial reporting exemption provided for in the consent agreements and continued in previous advisory opinions. As required in previous advisory opinions, each of the SWP committees must assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar

[12] For example, a number of SWP personnel filed sworn statements as to the reluctance of individuals to sign petitions or subscribe to SWP literature for fear of further scrutiny by governmental authorities, and some of these individuals cited concerns as to recent increased government surveillance.

year or applicable election cycle (depending upon the type of political committee).[13] *See* Advisory Opinions 2003-02 and 1996-46.

The partial reporting exemption will apply to the following sections of the Act: 2 U.S.C. 434(b)(3) (receipts of a political committee); 434(b)(5) and (6) (expenditures and disbursements by a political committee); 434(e) (reporting by political committees); 434(f) (electioneering communication disclosure); and 434(g) (independent expenditure reporting).[14] Please note that the SWP and the committees supporting SWP candidates must still comply with all other reporting obligations such as electronic filing and reporting their independent expenditures while omitting the names and identifications of contributors, donors, and vendors.

Since the issuance of Advisory Opinion 2003-02, Congress has enacted the Honest Leadership and Open Government Act of 2007 ("HLOGA") which requires disclosure of the names, addresses, and employers of lobbyists/registrants who provide bundled contributions in excess of $15,000 (as indexed under 2 U.S.C. 441a(c)) to an authorized committee, leadership PAC, or party committee during a "covered period." *See* 2 U.S.C. 434(i); 11 CFR 104.22. The SWP indicates that it has not received, and does not anticipate receiving, any such bundled contributions that would require disclosure, but nevertheless requested an exemption from this requirement. In the absence of any indication that contributions received by the SWP or committees supporting its candidates would be bundled by lobbyists/registrants and would also reach the current $16,000 threshold for triggering the requirements of HLOGA, the Commission concludes that this question is hypothetical.

Based on the record presented, the Commission grants this partial reporting exemption to reports covering the next four years, *i.e.*, through December 31, 2012, instead of the next six years as had been granted in previous advisory opinions. Although the evidence presented by the requestor demonstrates some continued incidents of violence and harassment, those incidents appear to be of lesser magnitude than those referenced in court opinions and prior AOs granting the exemption. The interest of disclosure, however, is weighed against both the historical and present day evidence of violence and harassment. As the number of severe incidents decline, it may become more difficult for the requestor to demonstrate a "reasonable probability that compelled disclosure" will result in "threats, harassment, or reprisals from either Government

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[13] Each political committee entitled to the exemption must assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of $200 in a calendar year (if an unauthorized committee) or in excess of $200 during the election cycle (if an authorized committee). That code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. Consistent with the requirement that the committees comply with the recordkeeping provisions of the Act, the committee's records must correlate each code number with the name and other identifying data of the contributor who is represented by that code.

[14] If an SWP committee does not qualify as a political committee and makes an electioneering communication that must be reported under 2 U.S.C. 434(f), it must disclose the name of the broadcasting station even though it would be exempt from disclosing names and addresses of donors and all other vendors. Additionally, the SWP's request concerns the granting of the partial exemption to both SWP party and candidate committees. The partial exemption does not extend to individual SWP supporters who, as individuals, engage in activity that might require them to file reports of their own, for example, the filing of reports of electioneering communications under 2 U.S.C. 434(f) and independent expenditures under 2 U.S.C. 434(g).

officials or private parties." *Buckley*, 424 U.S. at 74. The shorter exemption will allow the Commission to reassess the conditions presented by requestors against the interest of disclosure at that time. At least sixty days prior to December 31, 2012, the SWP may submit a new advisory opinion request seeking a renewal of the exemption. If a request is submitted, the Commission will consider the factual information then presented as to harassment after December 31, 2008, or the lack thereof, and will make a decision at that time as to the renewal.

The Commission emphasizes that the SWP committees must still comply with all of the remaining requirements of the Act and Commission regulations. These committees must file reports containing the information required by 2 U.S.C. 434(b) with the exception of the information specifically exempted, and they must keep and maintain records as required under 2 U.S.C. 432 with sufficient accuracy so as to be able to provide information, otherwise exempt from disclosure, in connection with a Commission investigation. In addition to complying with the requirements of the consent decrees, the SWP committees must file all reports required under 2 U.S.C. 434(a) in a timely manner. The SWP committees must also comply with the provisions of the Act governing the organization and registration of political committees. *See, e.g.*, 2 U.S.C. 432 and 433. Finally, the SWP committees must comply with the Act's contribution limitations, prohibitions, and disclaimer provisions. 2 U.S.C. 441a, 441b, 441c, 441d, 441e, 441f, 441g, and 441i.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. All cited advisory opinions are available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

(signed)
Steven T. Walther
Chairman

**EXHIBIT D**

# DECLARATION

I, Chris Hoeppner, submit the following list of election results for Socialist Workers candidates for public office since 2009, in support of the application to the Federal Elections Commission for an advisory opinion that the Socialist Workers Party, the Socialist Workers Party's National Campaign Committee, and the committees supporting the candidates of the Socialist Workers Party are entitled to an exemption from certain disclosure provisions of the Federal Elections Campaign Act.

1. I prepared the accompanying list.

2. Since January 1, 2009, the Socialist Workers candidates have won no elections.

3. In addition to the candidates for federal office, since January 2009, the Socialist Workers Party has run candidates for local and statewide offices in the states of California, Florida, Georgia, Illinois, Iowa, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Pennsylvania, and Texas, and the municipalities of Atlanta, Georgia; Boston, Massachusetts; Des Moines, Iowa; Houston, Texas; Los Angeles, California; Miami, Florida; Newark, New Jersey; New York, New York; Philadelphia, Pennsylvania; Minneapolis, Minnesota; San Francisco, California; Seattle, Washington; and Washington, D.C. Whenever there were applicable reporting requirements in these locations, elections authorities accepted the filing, including the SWP's claimed exemption.

I declare under penalty of perjury that the foregoing is true and correct. Executed October 21, 2012 in Philadelphia, Pennsylvania.

Chris Hoeppner
October 21, 2012

## Socialist Workers Presidential Ticket

### 2012

James Harris for president

Maura De Luca for vice-president

- On the ballot in 6 states: Colorado, Iowa, Louisiana, Minnesota, New Jersey, and Washington. Official write-in status in a number of states, including California, New York and Connecticut.

**Other federal candidates on the ballot:**

**Socialist Workers Candidates for U.S. House of Representatives**

**2010**

| Candidate | State | Vote total | Percentage |
|---|---|---|---|
| Roger Calero | New York | 2,647 | .02% |
| Rebecca Williamson | Iowa | 6,258 | .025% |

In addition to the states where Socialist Workers candidates for U.S. Congress were on the ballot, there were also write-in campaigns in California, Florida, Georgia, Illinois, Iowa, New York, Massachusetts, Minnesota, Pennsylvania, Texas, Washington, Washington, DC. No vote totals are available for these write-in candidates.

**2011**

| Candidate | State | Vote total | Percentage |
|---|---|---|---|
| Chris Hoeppner | New York | 143 | .004% |

In addition to the states where Socialist Workers candidates for U.S. Congress were on the ballot, there were also write-in campaigns in California, Florida, Massachusetts, New York, Pennsylvania, Texas, and Washington, D.C.

**2012**

| Candidate | State |
|---|---|
| Deborah Liatos | New York, 13th Congressional District |
| David Rosenfeld | Iowa, 3rd Congressional District |

**In addition to federal candidates, the Socialist Workers Party ran or is running candidates for numerous state and municipal offices, most of them write-in candidates. Candidates on the ballot are indicated by an asterisk (*).**

## 2009

**California**: City Attorney, City Treasurer, San Francisco; **Georgia**: Mayor, City Council President, Atlanta; **Iowa**: City Council At-Large*, City Council Ward 1*, Des Moines; **Massachusetts**: Mayor, City Council District 1, Boston; **Minnesota**: Mayor*, Minneapolis; **New Jersey**: Governor, Lieutenant Governor, State Assembly, 29th District; **New York**: Mayor*, Public Advocate*, Manhattan Borough President*; Pennsylvania: District Attorney, City Controller, Philadelphia; **Texas**: Mayor, City Controller, Houston; **Washington**: Mayor, City Council, Position #6.

## 2010

**California**: Governor, U.S. Senate, U.S. Congress, 8th CD, U.S. Congress, 33rd CD; **Florida**, U.S. Senate, Miami Commissioner, District 5*; Illinois: Governor, U.S. Senate, U.S. Congress, 1st CD; **Georgia**: Governor, U.S. Senate, Commissioner of Agriculture; **Iowa**: Governor*, Lt. Governor*, U.S. Senate, U.S. Congress, 3rd CD*; **Massachusetts**: Governor, U.S. Congress, 8th CD; **Minnesota**: Governor, U.S. Congress, 5th CD; **New York**: Governor, Lt. Governor, U.S. Senate, U.S. Senate, U.S. Congress, 15th CD*; **Pennsylvania**: U.S. Senate; Texas: Governor, U.S. Congress, 18th C.D.; **Washington**: U.S. Senate, U.S. Congress, 7th CD; **Washington, D.C.**: Mayor*, Delegate to U.S. House of Representatives, Chair of City Council

## 2011

**California:** San Francisco Mayor, District Attorney, Sheriff; **Florida:** Miami City Commission District 2; **Massachusetts:** Boston City Council, At-Large; **Pennsylvania:** Philadelphia, Mayor; **Texas**: Houston Mayor*, City Council At-Large, Position 1; **Washington:** Port of Seattle Commissioner, Position 2, Seattle School Board, District 6.

**2012**

**California:** U.S. Senate, Congress, 12th CD, Congress, 33rd CD, Congress, 34th CD; **Florida:** U.S. Senate, Congress, 17th CD, Congress, 20th CD, State Attorney, District 11; **Georgia:** Congress, 4th CD, Congress, 5th CD; **Illinois:** Congress, 1st CD, Congress, 3rd CD, Congress, 7th CD, Cook County Attorney; **Iowa:** State Senate, District 18, Iowa House, District 36; **Massachusetts:** U.S. Senate; **Minnesota:** U.S. Senate, Congress, 5th CD; **Nebraska:** U.S. Senate, 29th District Nebraska Legislature; **New York:** US Senate, Congress, 8th CD, Congress, 13th CD; **Pennsylvania:** U.S. Senate, Congress, 1st CD; **Texas:** U.S. Senate, Congress, 18th CD, Congress, 19th CD, Congress, 29th CD; **Washington:** Governor, U.S. Senate; **Washington, DC:** Delegate, U.S. House of Representatives.

**EXHIBIT E**

# DECLARATION

I, Lea Sherman, make this declaration in support of the application to the Federal Election Commission for an advisory opinion that the SWP, the SWP's National Campaign Committee, and the committees supporting the candidates of the SWP are entitled to an exemption from certain disclosure provisions of the Federal Election Campaign Act.

I make this statement on the basis of my personal knowledge.

1. I am the current treasurer of the Socialist Workers National Campaign Committee and have been its treasurer since October, 2007.
2. I reviewed the numbers of contributors to the committee and the total number of contributors of $300 or more, a randomly low dollar amount, for the 2012 presidential campaign until October 20, 2012.
3. So far in 2012, 118 people contributed funds to the committee. There were five contributions over $300 to the committee.
4. I also reviewed the numbers of contributors to the committee in 2008 and 2004. In 2008, 243 people contributed funds to the committee, including nine contributions over $300. In 2004, 321 people contributed funds to the committee, including 17 contributions over $300.
5. The Socialist Workers Party has not received any "bundled" contributions that would require disclosure, and does not foresee receiving any such contributions. A bundled contribution is a contribution to a candidate committee or party committee or a leadership PAC that is either forwarded to the committee from a contributor by a registered lobbyist (or a PAC controlled by a registered lobbyist), or is received from a contributor but credited to a registered lobbyist (or a PAC controlled by a registered lobbyist). The law requires a committee to disclose the name, address and employer of each person who made two or more bundled contributions in an aggregate amount of more than $15,000.
6. The Socialist Workers Party does not have any registered lobbyist. It never has had any registered lobbyists nor does it plan to.

I declare under penalty of perjury that the foregoing is true and correct.
Execute on October 20, 2012, in New York, New York.

Lea Sherman
October 20, 2012

# EXHIBIT F

# A Review of the FBI's Investigations of Certain Domestic Advocacy Groups

Oversight and Review Division
Office of the Inspector General
September 2010

**TABLE OF CONTENTS**

# CHAPTER ONE
# INTRODUCTION

## I. Background

The Office of the Inspector General (OIG) initiated this review in response to congressional inquiries that raised concerns over whether the Federal Bureau of Investigation (FBI) had improperly targeted domestic advocacy groups for investigation based solely upon their exercise of First Amendment rights.[1]

The congressional inquiries were prompted by media reports describing FBI documents released by the FBI pursuant to Freedom of Information Act (FOIA) requests. For example, in a letter to the OIG, Congresswoman Zoe Lofgren stated that the circumstances described in the news reports "suggest that the FBI is investigating these advocacy groups based solely on their engagement in peaceful, lawful speech and assembly activities protected under the [First] Amendment."[2] In a congressional hearing, Senator Patrick Leahy questioned FBI Director Mueller about allegations that the FBI had "targeted Americans based on their exercise of First Amendment rights," and Director Mueller stated that he would welcome such an investigation by the OIG.[3]

## II. Scope and Methodology

We reviewed FBI investigative activity relating to five groups and one individual because they were among those mentioned in the news articles and congressional inquiries related to the release of FBI documents. Our review addressed FBI activities over a 6-year period, from January 2001 to December 2006, related to the following entities:

- The Thomas Merton Center of Pittsburgh, PA;
- People for the Ethical Treatment of Animals (PETA);

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[1] The FBI has identified some material in this report as "sensitive but unclassified" information that the FBI believes, if distributed publicly, could compromise the law enforcement operations of the U.S. Department of Justice or affect the privacy of certain individuals. This information is redacted (blacked out) in the public version of this report.

[2] Letter from The Honorable Zoe Lofgren, U.S. House of Representatives, to Glenn A. Fine, Inspector General, Department of Justice Office of the Inspector General (May 18, 2006).

[3] FBI Oversight: Hearing Before the S. Jud. Comm. 109th Cong. 14 (2006). Senator Russell Feingold also wrote the FBI Director expressing concerns about the released FBI documents. See Letter from The Honorable Russell D. Feingold, U.S. Senate, to Director Robert S. Mueller, III, Federal Bureau of Investigation (April 24, 2006).

- Greenpeace USA;
- The Catholic Worker;
- Glen Milner, (an individual); and,
- The Religious Society of Friends (the "Quakers").[4]

In the case of PETA, our review focused on the investigative activities of the FBI's office in Norfolk, Virginia (Norfolk Field Division). PETA's corporate headquarters are located in Norfolk, Virginia, and during the time period covered by our review, the FBI's Norfolk Field Division conducted the investigation of PETA and several related investigations of PETA members.[5]

Our review focused on FBI investigative activities and documents that related to the exercise of First Amendment rights, most commonly protest activities. In general, we addressed the following issues raised by the FBI documents relating to these groups:

- Whether the FBI targeted the groups or their members because of their First Amendment expressions rather than for a valid law enforcement purpose;
- Whether investigations of the groups or individuals affiliated with them were adequately predicated under applicable Department of Justice (DOJ) or FBI policies;
- Whether the FBI improperly collected or retained information about the First Amendment activities of the groups or their members;
- Whether FBI documents contain improper characterizations of the groups or their members based on their First Amendment views; and,
- Whether the FBI improperly classified investigative matters relating to these groups or individuals as terrorism matters.

In this review, we examined over 8,000 pages of FBI documents referencing these groups. From this broad review we identified particular FBI investigations and other activities that potentially implicated the First Amendment activities of the groups or their members. In several of these matters, we examined additional FBI documents, including the complete investigative files of cases.

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[4] Our review period encompasses most of the years covered by the FOIA requests and ends in 2006, when the OIG received the Congressional inquiries.

[5] PETA was the only one of the groups we reviewed that the FBI had investigated during our review period as a terrorism enterprise.

We conducted over 40 interviews of FBI field office and Headquarters personnel, including interviews of current and former FBI Special Agents to obtain more detailed information on predication where it was not apparent from our document review. In addition, we interviewed attorneys in the FBI's Office of General Counsel to obtain information on FBI policies relating to FBI investigative activities and the First Amendment, as well as policies governing the FBI's Domestic Terrorism program.

We also examined federal laws, the Attorney General's Guidelines, and FBI policies and guidance addressing FBI investigative authorities. During the course of our review, the Attorney General issued new FBI investigative guidelines that went into effect in December 2008. We also reviewed the 2008 Attorney General's Guidelines and the new FBI policies implementing them.

The specific FBI investigations we examined in this report occurred several years ago when different FBI policies and versions of the Attorney General's Guidelines were in effect. Nevertheless, this report is relevant to current and prospective FBI investigations that may implicate First Amendment considerations. Although the current Attorney General's Guidelines and FBI policies contain some restrictions on the conduct of such cases, they continue to allow the FBI wide latitude to pursue these investigations. As described in this report, these current policies and guidelines, like prior policies and guidelines, allow the FBI to open preliminary and full investigations through standards that are easily met. We therefore believe that the findings of this report, concerns about the FBI's activities in cases we reviewed, and the recommendations we make in this report are important for current FBI practices.

## III. Organization of the Report

This report is divided into nine chapters. Chapter Two describes the relevant statutes, the Attorney Generals' Guidelines, and FBI policies governing the conduct of FBI investigations. Chapter Two also examines the predication requirements for certain investigative activities and the limitations or conditions on the FBI's use of investigative techniques that implicate First Amendment rights, including limitations on the collection or maintenance of records describing how an individual exercises his or her First Amendment rights.

Chapters Three and Four analyze the FBI's investigative activities directed at the Thomas Merton Center and PETA. Chapters Five, Six, and Seven examine the FBI's investigations of Greenpeace and The Catholic Worker. Chapter Eight analyzes the FBI's investigative activities directed at Glen Milner. In each of these chapters, we focus on those instances where predication was not readily apparent, the investigative activities were more

than minimally intrusive, or the references to a group contained in FBI documents presented unique issues.

Chapter Nine summarizes our findings regarding the individual groups and sets forth our overall conclusions and recommendations.[6]

[6] The FBI reviewed a draft of this report and submitted a formal response, which is attached as Appendix A.

## CHAPTER TWO
## AUTHORITIES GOVERNING FBI INVESTIGATIVE ACTIVITIES

In this chapter we provide background information on the authorities governing FBI investigative activities. We first describe a prior review we conducted regarding the FBI's investigation of protest groups. We then discuss the various statutes, the Attorney Generals' Guidelines, and FBI policies governing investigative activities. We examine the predication requirements for various FBI investigative activities, as well as explicit limitations or conditions on the FBI's use of investigative techniques that may burden or otherwise implicate First Amendment rights, including limitations on the collection or maintenance of records describing how individuals exercise their First Amendment rights. We also describe how recent DOJ and FBI policy changes may affect FBI investigative activities in the future with respect to domestic advocacy groups. As explained in subsequent chapters, recent changes in FBI policies would have changed our analysis of the FBI's conduct in particular cases had they been in effect at the time.

### I. Prior Review

The OIG previously conducted a review addressing the FBI's investigative activities directed at potential protesters planning to attend the 2004 Democratic and Republican national political conventions.[7] The OIG review found the FBI's investigative activities were focused on addressing 17 distinct threats to the 2 conventions falling within the FBI's Domestic Terrorism program. That review did not substantiate the allegations that the FBI improperly targeted protesters for interviews before the conventions in an effort to chill their First Amendment rights. Rather, we concluded that the FBI's investigative activities were conducted in accordance with the existing Attorney General's Guidelines.

### II. FBI Authorities

The FBI does not operate under a general statutory charter that identifies permitted investigative activities or places limitations on the use of particular investigative techniques. However there are numerous authorities that govern the FBI's investigative activities, including the Attorney Generals' Guidelines and internal FBI policies.

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[7] OIG Report, *A Review of the FBI's Investigative Activities Concerning Potential Protesters at the 2004 Democratic and Republican National Political Conventions*, (Apr. 27, 2006), available at http://www.justice.gov/oig/special/s0604/index.htm.

Beginning in 1976, the Attorney General has issued and revised guidelines that address specific types of investigations and investigative techniques.[8] The primary Guidelines regulating FBI domestic investigations addressed predication standards for opening general crimes, racketeering, and terrorism enterprise investigations. The Attorney General's Guidelines issued in 1989 were in effect until May 2002, when new Guidelines were issued.[9] The 1989 and 2002 Guidelines provided standards for opening preliminary inquiries and full investigations, in addition to providing guidance on investigative techniques and dissemination of information to other agencies.[10] In addition to these Guidelines, over the years Attorneys General have issued separate guidelines addressing the use of various investigative techniques, including confidential informants, undercover operations, and consensual monitoring.

In addition, the FBI has issued policies describing in detail the procedures and guidelines that control the conduct of investigations. During our entire review time period, from January 2001 to December 2006, the vast majority of applicable FBI policies were contained in the Manual of Investigative Operations & Guidelines (MIOG), and the Manual of Administrative Operations and Procedures (MAOP). In addition to the MIOG and MAOP, the FBI issued policy guidance through internal memoranda relevant to the issues in this review. These memoranda were issued by the

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[8] For a detailed historical background on the evolution of the Attorney General's Investigative Guidelines, see the DOJ OIG report, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines*, (Sept. 2005), at Chapter Two, available at http://www.usdoj.gov/oig/special/0509/index.htm.

[9] The 2002 Guidelines were the result of an Attorney General review of investigative guidelines to enhance the Department of Justice's ability to detect and prevent terrorist attacks in the aftermath of the September 11, 2001, terrorist attacks. The 2002 Guidelines stated in its preamble that the FBI's "highest priority" in discharging its investigative responsibilities was "to protect the security of the nation and the safety of the American people against the depredations of terrorists and foreign aggressors." The 2002 Guidelines made a series of changes, including authorizing preliminary inquiries for racketeering and terrorism enterprise investigations, lengthening the time period for preliminary inquiries, adding additional bases for initiating terrorism enterprise investigations, and providing new authorization to conduct counterterrorism investigative activities such as visiting public places and attending public events.

[10] "The Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations" (FCI guidelines) were in effect during the first part of our review time period (January 1, 2001, to October 30, 2003). The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection" (NSI guidelines) replaced the FCI guidelines and were in effect during the last part of our review time period (October 31, 2003, to December 31, 2006). The FCI and NSI guidelines, portions of which were classified, provided the FBI with additional investigative authority to conduct certain national security investigations, including international terrorism and espionage, and collection of foreign intelligence. We did not find that the FCI or NSI guidelines were implicated in any of the investigations we reviewed.

FBI's Office of General Counsel (OGC), Counterterrorism Division, or Criminal Investigative Division.

Effective December 1, 2008, the Attorney General's Guidelines for Domestic FBI Operations (2008 Guidelines) replaced the 2002 Attorney General's Guidelines and various other guidelines regulating FBI investigations, including the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection. A major objective of the 2008 Guidelines was to provide "simpler, clearer, and more uniform standards and procedures."[11] To that end, on December 16, 2008, the FBI issued the Domestic Investigations and Operations Guide (DIOG) "to standardize policy so that criminal, national security, and foreign intelligence investigative activities are consistently and uniformly accomplished whenever possible (e.g., same approval, notification, and reporting requirements)."

## III. General Principles and Policies Addressing Investigative Activities and the First Amendment

The 1989 and 2002 Attorney Generals' Guidelines contained general principles addressing FBI investigative activities and the First Amendment. The Guidelines stated that investigations initiated to anticipate or prevent a crime may "not be based solely on activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States." This principle was reaffirmed in the 2008 Attorney General's Guidelines. The Guidelines stated that statements that advocate criminal activity, particularly crimes of violence, may warrant investigation "unless it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm." The Guidelines contained other references to specific investigative activities or techniques and the First Amendment, some of which we describe below when discussing the investigative activity or technique.

FBI policy in the MIOG Introduction, § 1-4, addressed the FBI's investigative authority and the First Amendment, referring to the "importance of these rights in American society" and "careful scrutiny" of law enforcement activities that impact these rights by the legislative and judicial branches. The FBI policy required "strict compliance" with the Attorney General's Guidelines and FBI policies in initiating investigations of "individuals or members of assembled groups who advocate political or social goals through violent means, as well as investigations into the causes of civil or social disorder."[12] In

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[11] Memorandum from the Attorney General to Heads of Department Components, Sept. 29, 2008 at 1.

[12] MIOG, Introduction, § 1-4(1).

addition, the MIOG stated that "the scope of each investigation must be carefully tailored to fit the circumstances giving rise to the investigation; although expansion in the scope of an investigation may be undertaken if justified by a change in these circumstances."[13] The MIOG also required that the duration of these investigations "must not be permitted to extend beyond the point at which its underlying justification no longer exists."[14]

The FBI's Domestic Investigations and Operations Guide (DIOG) currently addresses FBI investigative authority and the First Amendment in a separate section that discusses related privacy and civil liberty issues. See DIOG § 4. In addition, the DIOG restates First Amendment, civil liberty, and privacy considerations in the sections that address various types of FBI investigative activities. See e.g., DIOG § 6.3.

## IV. Authorities Establishing Types of Investigations

FBI policies in effect during the period of our review established several different levels or types of investigations, each with its own predication requirement and its own set of authorized investigative techniques. In this section, we summarize the types of FBI investigations, describe the predication required to open each type of investigation, and summarize the investigative techniques approved or prohibited for use in each type of investigation during the period covered by our review.

### A. Prompt and Extremely Limited Checking Out of Initial Leads

Both the 1989 and 2002 Attorney Generals' Guidelines authorized the FBI to conduct the "checking out of initial leads" as the lowest level of investigative activity. The 1989 Guidelines made a passing reference to this authority, and the 2002 Guidelines described the "prompt and extremely limited checking out of initial leads" as the lowest level of investigative activity "which should be undertaken whenever information is received of such a nature that some follow-up as to the possibility of criminal activity is warranted." The Guidelines stated that the checking of leads "should be conducted with an eye toward promptly determining whether further investigation (either a preliminary inquiry or a full investigation) should be conducted." While the 2002 Guidelines described the checking of leads as "extremely limited," it did not identify the investigative techniques the FBI could not use when checking leads.

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[13] Id. at § 1-4(2).

[14] Id.

The lowest level of investigative activity under the 2008 Guidelines is "assessments," which may be conducted "to detect, obtain information about, or prevent or protect against crimes or threats to the national security or to collect foreign intelligence." The 2008 Guidelines state that while assessments require an authorized purpose, no particular factual predication is necessary. The 2008 Guidelines state that the FBI cannot be content to wait for leads to come in through the actions of others, but must be vigilant in detecting terrorist activities and may use the "proactive investigative authority conveyed in assessments" to discharge its responsibilities. However, under the 2008 Guidelines, in contrast to the former "checking of leads" activity, the investigative techniques that may be used during assessments are limited to a prescribed list of methods such as obtaining publicly available information and engaging in observation or surveillance not requiring a court order.

### B. Preliminary Inquiries

The 1989 and 2002 Attorney Generals' Guidelines provided identical standards for opening a preliminary inquiry. The Guidelines stated that the FBI may initiate a preliminary inquiry where the factual predicate for a full investigation has not yet been met but where "responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads." In such circumstances, the FBI could initiate an "inquiry" in response to an allegation or information that indicates "the possibility of criminal activity." The Guidelines stated that a preliminary inquiry is not a required step when the facts or circumstances reasonably indicate criminal activity; in those circumstances a full investigation can be opened immediately. The Guidelines required the FBI supervisor authorizing a preliminary inquiry to ensure the allegation or other information which warranted the inquiry was recorded in writing.

The 2008 Guidelines allow preliminary investigations to be initiated on the basis of "information or an allegation indicating the existence" of circumstances including activity constituting a federal crime or a threat to the national security or the targeting for attack or victimization of an individual, group, or other entity in violation of federal law. The DIOG states that the "purpose of and predication for a preliminary investigation must be documented in the initiating EC [Electronic Communication]." DIOG § 6.7.A.

The 1989, 2002, and 2008 Attorney Generals' Guidelines generally permitted the FBI to use any lawful investigative technique during a preliminary inquiry, except certain specified techniques that were prohibited. The 1989 Guidelines prohibited the use of mail covers, mail openings, nonconsensual electronic surveillance, or any other investigative techniques covered by Chapter 119 of Title 18 of the United States Code, the Electronic Communication Privacy Act (ECPA). The 2002 Guidelines also prohibited all of these investigative techniques except the use of mail covers. The 2008

Guidelines prohibit mail openings, electronic surveillance, and physical searches during preliminary investigations.

Both the 1989 and 2002 Attorney Generals' Guidelines described the supervisory approvals required for various investigative techniques during a preliminary inquiry. The DIOG describes the supervisory approvals currently required for investigative techniques used during preliminary investigations. See DIOG § 11.

### C. Full Investigations

The 1989 and 2002 Guidelines provided predication standards for opening two types of full investigations: general crimes investigations and criminal intelligence investigations (including terrorism enterprise investigations).

#### 1. General Crimes Investigations

The 1989 and 2002 Attorney Generals' Guidelines contained identical standards for opening a full investigation on a general crimes matter. The Guidelines stated that the FBI may initiate a general crimes investigation "when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed." The Guidelines stated that the "reasonable indication" standard is "substantially lower than probable cause." The Guidelines stated that an FBI Special Agent could take into account any facts or circumstances "that a prudent investigator would consider," and that the standard requires "specific facts or circumstances indicating a past, current, or future violation." The Guidelines stated that "there must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient."

Under the 2008 Attorney General's Guidelines, "predicated investigations may be carried out to detect, obtain information about, or protect against federal crimes or threats to the national security or to collect foreign intelligence." The core predication standard for investigations under the 2008 Guidelines is based on an articulable factual basis of a "reasonable indication" that a federal criminal violation or threat to the national security "has or may have occurred, is or may be occurring, or will or may occur . . . ."

Under the 1989 and 2002 Guidelines, the FBI supervisor authorizing a full investigation was required to "assure that the facts or circumstances meeting the standard of reasonable indication have been recorded in writing." Likewise, the DIOG requires that the "purpose of and predication for a full investigation must be documented in the initiating EC." See DIOG § 7.7.A. Each of the Attorney Generals' Guidelines stated that the FBI may use any lawful investigative technique in an investigation and also provided further

guidance about the use of certain intrusive techniques, as described below in Section D.

### 2. Terrorism Enterprise Investigations

The 1989 and 2002 Guidelines authorized criminal intelligence investigations for two types of criminal enterprises: racketeering or terrorism enterprises. The racketeering enterprise standards focused on investigations of organized crime and are generally not relevant to this review.

The 1989 Guidelines referred to terrorism enterprise investigations as "domestic security/terrorism investigations" and stated that they were "focused on investigations of enterprises other than those involved in international terrorism, whose goals are to achieve political or social change through activities that involve force or violence." The 2002 Guidelines expanded the grounds for opening a terrorism enterprise investigation and provided that such a case could be initiated when facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of: (1) furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law; (2) engaging in "international terrorism" or "domestic terrorism" as defined in federal law; or (3) committing any federal criminal offense listed in the federal law that defines the "federal crime of terrorism" or a pattern of racketeering activity involving any of the listed offenses. The first of these alternative predications was applicable to the FBI's investigation of PETA that we analyze in Chapter Four. The 2008 Guidelines provide for "enterprise investigations" and include predication language that is substantially similar to the 2002 Guidelines.

Both the 1989 and 2002 Guidelines described terrorism enterprise investigations as focused on the structure and scope of the entire enterprise as well as the relationship of its members, rather than on just individual participants and specific criminal acts. The 2008 Guidelines contain similar language describing the scope of enterprise investigations. The 1989 and 2002 Guidelines also stated that "mere speculation that force or violence might occur during the course of an otherwise peaceable demonstration is not sufficient grounds for initiation" of a terrorism enterprise investigation. The Guidelines cautioned that investigations of organizations alleged to be involved in politically motivated acts may present special problems necessitating "special care" be exercised "in sorting out protected activities from those which may lead to violence or serious disruption of society."[15]

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[15] The Guidelines stated: "There is 'often . . . a convergence of First and Fourth Amendment values' in such matters that is 'not present in cases of 'ordinary' crime.'" 2002 Guidelines at 12, quoting, *United States* v. *United States District Court*, 407 U.S. 297, 320 (1972).

The 2002 Guidelines made an important change to terrorism enterprise investigations that are relevant to the FBI's investigation of PETA: the Guidelines authorized the FBI to use preliminary inquiries to determine whether a full terrorism enterprise investigation of a group was warranted. Under the 1989 Guidelines, a preliminary inquiry could only be used in connection with individual crimes, and not to determine whether to open a broader investigation of groups involved in terrorism. Thus, under the 1989 Guidelines the "reasonable indication" standard applied to initiating any terrorism enterprise investigation, but under the 2002 Guidelines a preliminary inquiry could be opened based on information indicating the "possibility" of a group's involvement in terrorism. The 2008 Guidelines authorize full but not preliminary enterprise investigations of groups or organizations.

### D. General Authorities for Using Investigative Techniques During Preliminary Inquiries and Full Investigations

The 1989 and 2002 Guidelines contained general statements authorizing the FBI to use any lawful investigative technique when conducting preliminary inquiries or full investigations under the Guidelines. The 2002 Guidelines also stated that the choice of investigative techniques in either a preliminary inquiry or full investigation is a matter of judgment. These Guidelines also stated that the FBI should consider a number of factors including the intrusiveness of the technique, the effect on the privacy of individuals and potential damage to reputation, and the seriousness of the possible crime and strength of information indicating its existence or future commission. The Guidelines stated that where the conduct of a preliminary inquiry or full investigation "presents a choice between the use of more or less intrusive methods, the FBI should consider whether the information could be obtained in a timely and effective way by the less intrusive means."[16] However, the Guidelines also stated the FBI "should not hesitate to use any lawful techniques consistent" with the Guidelines, "even if intrusive, where the intrusiveness is warranted in light of the seriousness of the possible crime or strength of the information indicating its existence or future commission," and that this was "to be particularly observed" in inquires or full investigations "relating to possible terrorist activities."[17] Finally, both the 1989 and 2002 Guidelines noted the

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[16] FBI policy states that in "the case of those investigations with the potential to infringe upon First Amendment rights, consideration must be given to using those techniques that are less intrusive and less likely to adversely affect the exercise of those rights." MIOG, Introduction, §1-4(3).

[17] The 1989 Guidelines had language similar to the 2002 Guidelines stating that the FBI should consider whether information "could be obtained in a timely and effective way by less intrusive means." However, the 1989 Guidelines also stated that the techniques employed in preliminary investigations "should be generally less intrusive than those employed in a full investigation." The 1989 Guidelines did not state that the FBI should not hesitate to use investigative techniques, particularly in matters related to potential terrorist activities.

need to comply with all requirements for use of an investigative technique set by statute, Department regulations and policies, and Attorney General's Guidelines.[18]

The 2008 Guidelines contain language similar to the earlier Guidelines regarding choice of investigative techniques. In addition, the 2008 Guidelines state that in circumstances where different investigative methods "are each operationally sound and effective," the "least intrusive method feasible is to be used in such situations."

### E. Counterterrorism Authorizations under Part VI of the 2002 Attorney General's Guidelines

Part VI of the 2002 Guidelines authorized investigative activities designed to further the FBI's "central mission of preventing the commission of terrorist acts against the United States and its people." (The 1989 Guidelines did not contain a comparable provision to Part VI.) Part VI of the 2002 Guidelines provided authority for specified activities that could be conducted even in the absence of a checking of initial leads, preliminary inquiry, or full investigation. Part VI stated that "the FBI must draw on available sources of information to identify terrorist threats and activities . . . . It cannot be content to wait for leads to come in through the actions of others . . . ." However, the Guidelines stated that the activities authorized under Part VI "do not include maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States."

Part VI of the 2002 Guidelines identified several investigative activities, some of which were focused on counterterrorism and others that were authorized for both counterterrorism and general crimes matters. Below we describe the Part VI provisions most relevant to this review. Although the 2008

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[18] The Guidelines expressly addressed one technique and its impact on the First Amendment, stating: "In situations involving undisclosed participation in the activities of an organization by an undercover employee or cooperating private individual, any potential constitutional concerns relating to activities of the organization protected by the First Amendment must be addressed through full compliance with all applicable provisions of the Attorney General's Guidelines on FBI Undercover Operations and the Attorney General's Guidelines Regarding the Use of Confidential Informants." The 1989 Guidelines also stated: "Undisclosed participation in the activities of an organization by an undercover employee or cooperating private individual in a manner that may influence the exercise of rights protected by the First Amendment must be approved by FBIHQ [FBI Headquarters], with notification to Department of Justice." The 2008 Guidelines state: "Undisclosed participation in organizations in activities under these Guidelines shall be conducted in accordance with FBI policy approved by the Attorney General." The DIOG contains FBI policy regarding undisclosed participation in organizations and provides that the FBI's policy for undisclosed participation "uses a risk model: higher approval levels are required for [undisclosed participation] that carries a greater risk to civil liberties because it is more intrusive." DIOG §16.1.B.

Guidelines do not contain a separate section addressing the Part VI activities, the Part VI activities described below would be authorized by the 2008 Guidelines as part of an assessment.

### 1. Visiting Public Places and Events

Part VI.A.2 of the 2002 Guidelines provided that "for the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally."[19] However, this provision prohibited the FBI from retaining information obtained from such visits unless it related to "potential criminal or terrorist activity." Neither the 2008 Guidelines nor the DIOG contain a provision restricting retention of information obtained from such visits.

The FBI issued "Field Guidance," dated October 7, 2002, ("2002 guidance"), which stated that Part VI.A.2 was designed to "enhance the FBI's ability to visit public places and attend public events" while still imposing "sufficient limitations to properly balance public safety and civil liberties . . . ." This Field Guidance stated that "use of this investigative tool proactively, meaning prior to the development of a lead, is explicitly limited to the detection and prevention of terrorist activities." For collection of evidence of other crimes, an agent must have had authorization based on the "extremely limited checking out of leads, a preliminary inquiry, or a full investigation."

The 2002 Field Guidance emphasized that while the terms and conditions for gaining access to the event as a member of the public "may vary depending on the public place or event, it is logical to conclude that gaining access to public places or events through pretext or undercover activity is not permissible under" Part VI.A.2. A March 19, 2004, EC from the FBI's General Counsel expanded on this point, stating: "Undercover activity, surreptitious entry into a private gathering at these events, and certain other investigative techniques (e.g., consensual recording of conversations) are not permitted under this authority." The EC also stated that a source operating at the FBI's direction would "stand in the same shoes as the agent and, therefore, can only be directed to attend an event that an agent would also be permitted to attend under the Guidelines."

The 2002 Field Guidance also stated that, time permitting, agents should obtain a supervisor's approval before visiting a public place or attending a

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[19] Courts have generally held that no chilling effect on First Amendment activities results from certain intelligence gathering activities, including government agents' attendance at public meetings, the recording of information collected at public meetings, and the collection and retention of publicly available information or information provided by other law enforcement agencies. See *Laird* v. *Tatum*, 408 U.S. 5, 6 (1972).

public event under Part VI.A.2. According to the Guidance, such a policy would "help ensure that the attendance is for a law enforcement purpose authorized by this section, and reflects the appropriate balance between law enforcement and First Amendment concerns." The Field Guidance stated that supervisors "may want to consider" factors such as "the potential to detect or prevent terrorist activity and the potential chilling effect on First Amendment protected activity" when assessing the use of Part VI.A.2 authority.

The 2002 Field Guidance provided instructions for the retention of information from a public place or event visit. It stated that, "if information obtained during the visit rises to the level of a lead, such information should be properly documented, including a statement describing how the information is related to potential criminal and/or terrorist activity, and then filed accordingly." On the other hand, "[i]f the visit does not develop information relating to potential criminal or terrorist activity, an agent should note in the file the date, time and place visited and that the visit had negative results. No other information may be recorded."[20]

### 2. Research and Online Searches

Part VI.B.1 of the 2002 Guidelines authorized the FBI to conduct general topical research, including conducting online searches and accessing online sites and forums on the same terms and conditions as members of the public. General topical research was defined to mean "research concerning subject areas that are relevant for the purpose of facilitating or supporting the discharge of investigative responsibilities." However, the FBI was prohibited from using this authority to conduct online searches for information by individuals' names or other individual identifiers, except where such a search was incidental to the topical research, (e.g., searches for writings on a topic by a particular author). The 2002 guidance stated that this provision, while new to the Guidelines, clarified "pre-existing policy."

Part VI.B.2 stated that the FBI may conduct online search activity and access online sites and forums on the same terms and conditions as members of the public generally, "for the purpose of detecting and preventing terrorism or other criminal activities." The 2002 Field Guidance stated that this provision expanded the FBI's ability to gather investigative information from

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[20] Our 2005 report on the FBI's compliance with the Attorney General's Guidelines described our difficulties in ascertaining the degree to which the FBI has used the Part VI.A.2 authority and found no standardized reporting, a lack of clear guidance, and "zero" files which served as repositories for information relating to a Part VI.A.2 activity. See DOJ OIG report, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines*, (Sept. 2005) at 188-202. As we detail in Chapters Four and Eight of this report, we found several instances in which the FBI used this authority with respect to the advocacy groups we selected for this review or their members.

the Internet by allowing the FBI to conduct online searches to gather information related to terrorist or other criminal activities even prior to checking a lead. "In the past, the FBI could utilize the Internet to gather potentially evidentiary material only . . . if agents were working on a preliminary investigation, full investigation, or, at the very least, checking out a lead."

The 2008 Guidelines have loosened the restrictions on Internet research. They authorize the use of "online services and resources (whether nonprofit or commercial)" for assessments and do not state that use of online services must be on the same terms and conditions as members of the public or provide limitations on searching by individuals' names. The FBI's DIOG states that "[a]s part of an assessment or predicated investigation, an FBI employee may use any FBI-approved online service or resource that is available by subscription or purchase, including services available only to law enforcement entities." DIOG § 5.9.E.

### F. Authorities Governing Special Events Investigations

In addition to its authorities relating to preliminary inquiries and full investigations, the FBI has investigative authority relating to "special events" that may be targets for terrorists. Acting pursuant to Presidential Directives and a federal statute designating the FBI as the lead agency for countering threats or acts of terrorism in the United States, the FBI established a special events subprogram.[21] In its MIOG, the FBI defined a special event as "a significant domestic or international event, occurrence, circumstance, contest, activity, or meeting which, by virtue of its profile and/or status, represents an attractive target for terrorist attack."[22] According to the MIOG, the FBI provides enhanced involvement in "security planning issues at major domestic special events, and crisis management of any critical incident response to terrorism at a special event."[23] As detailed in subsequent chapters of this report, our review found several incidents in which the groups or individuals that were the subjects of our review were referenced in FBI files relating to special events.

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[21] Presidential Decision Directive 39 (June 21, 1995); 18 U.S.C. § 2332b(f). See also 28 C.F.R. § 0.85(l) and Homeland Security Presidential Directive 5 (February 2003).

[22] MIOG, Part 1, § 300-1(2).

[23] MIOG, Part 1, § 300-1(1). In addition, Presidential Decision Directive 62, issued by President Clinton in May 1998, assigns responsibility to the FBI for special events that are designated as National Special Security Events warranting stringent federal security measures. In a March 19, 2004, EC, the FBI stated that its special events subprogram includes events designated as National Special Security Events under Presidential Decision Directive 62 as well as other highly publicized and widely attended events for which the FBI has responsibility as part of its "general mission to detect and prevent terrorism."

### 1. Special Events Classifications and Investigations

The FBI created a Special Events Readiness Level (SERL) rating system to determine the amount of administrative and operational support it should dedicate to special events. Each event is classified on a four-part scale based upon several factors, including whether high-level U.S. and foreign government officials will participate, whether previous terrorist incidents are associated with the event or similar events, the degree of media attention, and the current level of domestic and global terrorist activity. The system ratings range from SERL I, the highest designation for special events requiring the greatest resources to support it, to SERL IV, a designation for events that generally are supported by state and local resources.[24] The approvals for the various SERLs also have a corresponding range, from certification by the Attorney General or his designee (SERL I) to designation by the Special Agent in Charge (SERL IV).

In addition to its SERL rating system, the FBI has created a case management classification code for counterterrorism activities at special events – the 300A classification. FBI policy provides that this classification is administrative and that no active criminal investigation should be conducted under it.[25] In the event a criminal act occurs at a special event, the MIOG states that a separate investigative file should be opened under the substantive violation.[26]

The MIOG, Part 1, § 300-1, contains several references to threat assessments of a special event's potential for a terrorist incident. Such threat assessments should provide the information necessary to establish a SERL rating, which in turn determines the level of federal resources to be deployed at the special event.

In a May 14, 2004, EC from the FBI's Counterterrorism Division (CTD) to all FBI divisions, the FBI provided some guidance on the type of investigative conduct it is permitted to engage in during its management of special events in the absence of a predicate to open a preliminary inquiry or full investigation. The EC reminded agents that Part VI of the 2002 Guidelines included authority to conduct certain investigative activities, and that these activities "may be quite useful in the context" of special events preparations. The EC stated this authorized conduct included "attendance at public events and visiting public

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[24] For additional details and background on the FBI's special events mission, see DOJ OIG report, *A Review of the FBI's Investigative Activities Concerning Potential Protesters at the 2004 Democratic and Republican National Political Conventions*, (Apr. 27, 2006), at 4-7, available at http://www.usdoj.gov/oig/special/s0604/final.pdf, hereinafter, "2006 Protesters Report."

[25] MIOG, Part 1, § 300-1(5)(b).

[26] Id.

places on the same terms [as] the public for the purpose of detecting and preventing terrorism or conducting an assessment of a terrorist threat, using on-line resources, and conducting topical research . . . ."[27]

Although neither the 1989 nor the 2002 Attorney Generals' Guidelines referenced special events, the 2008 Guidelines state that the FBI may conduct assessments as part of its special events management responsibilities. More broadly, the 2008 Guidelines state: "participation of the FBI in special events management, in relation to public events or other activities whose character may make them attractive targets for terrorist attack, is an authorized exercise of the authorities conveyed by these Guidelines."

### 2. FBI Policies Relating to Collection, Retention, and Dissemination of Special Events Information

FBI policies permit the collection, retention and dissemination of information relevant to the FBI's special events responsibilities, even in the absence of a preliminary inquiry or full investigation.

In an EC dated May 14, 2004, the FBI addressed the collection, retention and dissemination of information during special events. The FBI sent this EC to all FBI divisions to clarify the terminology that field division agents should use when sending lead requests to other divisions. The EC stated that the type of information which should be collected, retained, and disseminated is that which is relevant to an open preliminary inquiry or full investigation, sufficient to predicate a newly authorized preliminary inquiry or full investigation, or relevant to an authorized FBI law enforcement function such the FBI special events mission. The May 2004 EC concluded by requiring FBI field offices to include the following sentence in the last paragraph of any EC that requests special events related information from other FBI offices: "Forward positive intelligence from sources with knowledge of planned activity by individuals, domestic or international groups under open preliminary inquiries or full investigations, as well as intelligence from any source indicative of unlawful activity or other acts of violence."

As stated above, the 2008 Guidelines state that the FBI may conduct assessments as part of its special events management responsibilities. As a general matter, the 2008 Guidelines authorize the retention of records created relating to the activities pursued under the Guidelines. The DIOG addresses information obtained as a result of an assessment and generally states that

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[27] The FBI originally provided similar guidance in an April 26, 2004, EC. Other aspects of this EC are discussed in greater detail below. In the March 19, 2004, EC, issued by the FBI's General Counsel and sent to all FBI divisions, the FBI stated that its agents could attend and conduct surveillance of public events in connection with the special events mission authorized by Presidential Decision Directive 62.

such information may be retained. However, DIOG § 5.13 provides that if an assessment turns up no sufficient basis to justify further investigation of an individual or group, then the records must be clearly annotated to state that the individual or group identified during the assessment does not warrant further FBI investigation.

## V. Statutes and Rules Governing the FBI's Collection, Maintenance, and Dissemination of Information about the First Amendment Activities of Individuals or Groups

In this section, we provide a background on the applicable standards governing the collection, retention, and dissemination of information about the First Amendment activities of individuals and groups. These standards are primarily found in the Privacy Act of 1974, the Attorney Generals' Guidelines, and the MIOG's Part 1, §§ 1-4 and 100-4.

### A. The Privacy Act of 1974

The Privacy Act of 1974, 5 U.S.C. § 552a, contains various provisions relating to federal agency records that reference information about individuals. These provisions include requirements on agencies collecting, maintaining, or disseminating records about individuals. However, the Privacy Act applies only to records that provide certain information about individuals and not to references in agency records about corporations, organizations, or groups. Below we discuss the requirements placed on agencies by the Privacy Act that are most relevant to our review.

The Privacy Act, 5 U.S.C. § 552a(e)(7), prohibits agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

Office of Management and Budget (OMB) Guidelines interpreting the Privacy Act advise agencies to "apply the broadest reasonable interpretation" when determining whether a record describes an individual's First Amendment exercise. 40 Fed. Reg. 28,948, 28,965 (July 9, 1975). Courts have held that the prohibition applies only to records that describe how the individual exercised his or her First Amendment Rights and not to records that merely indicate "that such a right was exercised."[28]

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[28] *Pototsky* v. *Department of Navy*, 717 F. Supp. 20, 23 (D. Mass. 1989). See also *England* v. *Commissioner of Internal Revenue*, 798 F.2d 350 (9th Cir. 1986). (IRS's classification of individual as "tax protestor" based on tax return the individual submitted (Cont'd.)

When the FBI describes an individual's exercise of First Amendment rights in a record, 5 U.S.C. § 552a(e)(7) permits retention if it is expressly authorized by statute, by the individual, or if the information is "pertinent to and within the scope of an authorized law enforcement activity." What constitutes "authorized law enforcement activity" (a term not defined in the Privacy Act) is a question that has been the subject of voluminous litigation. As discussed in the next section, the Guidelines provide guidance for interpreting this language with respect to FBI records.

### B. Attorney General's Guidelines

The 2002 Guidelines referenced the law enforcement exception contained in the Privacy Act, 5 U.S.C. § 552a(e)(7). The Guidelines defined "authorized law enforcement activities" for purposes of the Privacy Act to "include carrying out and retaining information resulting from the checking of leads, preliminary inquiries, or investigations" as well as activities authorized in Part VI of the Guidelines.[29] However, the 2002 Guidelines stated that this list of activities was not exhaustive, "and does not limit other authorized law enforcement activities, such as those relating to foreign counterintelligence or foreign intelligence." The 2008 Guidelines contain a comparable provision. In sum, according to the Guidelines any information that may be collected and retained under the Guidelines is deemed to be "within the scope of an authorized law enforcement activity" and therefore falls within the Privacy Act exception, 5 U.S.C. § 552a(e)(7).

The 2002 Guidelines also expressly authorized the FBI to disseminate information acquired during the checking of leads, preliminary inquiries or full investigations – including properly collected information about an individual's exercise of First Amendment rights – to other components of the Department to Justice. In addition, the 2002 Guidelines authorized dissemination of such information to other federal agencies or to state or local criminal justice agencies when the information: (1) falls within the investigative or protective jurisdiction or litigative responsibility of the agency; (2) may assist in preventing a crime or the use of violence or any other conduct dangerous to human life; (3) is required to be furnished to another agency by Executive Order 10450; or (4) is required to be disseminated by statute, interagency agreement approved by the Attorney General, or Presidential Directive.[30] The

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relates "only to the determination of tax liability, not to how [individual] has exercised his first amendment rights.")

[29] The 1989 Guidelines did not address this provision of the Privacy Act.

[30] The 1989 Guidelines authorized dissemination of information "during investigations" but did not reference checking of leads or preliminary inquiries. The 1989 Guidelines permitted dissemination to another agency based on the four circumstances identified in the 2002 Guidelines.

2008 Guidelines contain a comparable provision, except that dissemination is authorized to other federal, state, local or tribal agencies "if related to their responsibilities and, in relation to other Intelligence Community agencies, the determination whether information is related to the recipient's responsibilities may be left to the recipient."

### C. FBI Policy

FBI policy, primarily in the MIOG, addresses the collection, retention, and dissemination of information in FBI records about groups or individuals and the implications on First Amendment activities. Below we discuss the provisions that were most relevant to our review.

#### 1. Collection of Information Concerning First Amendment Exercise

Section 1-4 of the Introduction to the MIOG addressed the FBI's investigative authority and the First Amendment and mirrored requirements of the Privacy Act, 5 U.S.C. § 552a(e)(1) and (7).[31] However, the MIOG expanded the application of Privacy Act principles to include protection for groups as well as individuals.[32] Section1-4(4) states:

> [T]he collection of information concerning groups and individuals must be justified as reasonable and necessary for investigative purposes. Information concerning the exercise of First Amendment rights should be made a matter of record only if it is pertinent to and within the scope of the authorized law enforcement activity . . . ."[33]

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[31] Similar provisions were contained in MIOG, Part 1, § 190-5.1.

[32] The FBI's CTD emphasized in an April 2004 EC that it is advisable to apply the Privacy Act restrictions to information concerning not just individuals, but also to groups – especially those with social or political agendas. The EC stated that, "treating FBI records of information about a group's constitutional activities with the same level of retention criteria required for individual record of these activities would be consistent with agency policy on protecting civil liberties during the course of investigative activity." Current FBI policy does not have a provision requiring references to groups be justified as reasonable and necessary for investigative purposes. However, the DIOG § 5.13 provides that if an assessment turns up no sufficient basis to justify further information on an individual or group, then the records must be clearly annotated to state that the individual or group identified during the assessment does not warrant further FBI investigation.

[33] A 1989 FBI document addressing the First Amendment and Privacy Act requirements contained a similar statement. It stated:

> the FBI must ensure that our files are not repositories of all information concerning an individual or group under investigation. FBI files must contain only that information that is reasonably believed to be useful and necessary to the accomplishment of our mission.

(Cont'd.)

The MIOGs Introduction, § 1-4(4) and Part 1, § 100-4(5) also addressed the collection of "public-source printed material concerning the exercise of First Amendment rights" and required that when such material was to be retained, "a notation must be placed on the material describing the reason(s) it was collected and retained." It stated: "The notation must clearly indicate the specific investigative interest(s) which led to the decision to retain the item."[34] There are no comparable provisions in current FBI policy addressing the collection of information concerning groups or requiring specific notations on public source material. However, the DIOG states that investigative activity may not be based solely on the exercise of First Amendment rights, while noting that the Privacy Act is an important corollary to this principle in prohibiting the retention of information describing how a person exercises First Amendment rights. See DIOG § 4.2.

### 2. Collection of Publicly Available Information

The MIOG, Part 1 § 100-4, addressed the publications of terrorism enterprise organizations and the collection of publicly available information. Part 1 § 100-4(2) stated that while the FBI was authorized to collect as "library material" general information available to the public, (e.g., news media data banks, newspapers, magazines), such information "should not be indexed as to particular individuals or placed in FBI files." However, publications of a group that is the subject of an investigation could be collected and placed in an investigative file or indexed as to particular individuals.[35] Part 1, § 100-4(4) stated:

> All information received or made available to the FBI during the course of an investigation should be evaluated for its pertinence to the investigation. This is particularly true when information concerns exercise of an individual's or group's First Amendment rights. In such cases, the information concerning the exercise of First Amendment rights should be made a matter of record only if it is pertinent to and within the scope of the authorized law enforcement activity.

There are no provisions in current FBI policy expressly addressing the retention of information concerning the exercise of a group's First Amendment rights. The DIOG states that the Privacy Act prohibits the retention of information describing how a person exercises rights under the First Amendment. See DIOG § 4.2. Although courts have held that the Privacy Act

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Airtel from the FBI Director to All Special Agents In Charge (July 17, 1989).

[34] MIOG, Introduction, § 1-4(4), and MIOG, Part 1, § 100-4(5).

[35] MIOG, Part 1, § 100-4(3).

does not apply to corporations and other organizations, the FBI also applies this DIOG provision to such groups.

### 3. Characterization of Groups or Individuals in FBI Records

The MIOG Introduction, § 1-4(5), addressed characterizations of groups or individuals and required that characterizations in FBI records reflect whether the characterization was made by a third party. However, the MIOG provided that the FBI record may also state whether the characterization comports with the results of an independent FBI investigation. These same requirements were also applicable to characterizations of a group or individual appearing in printed public source material disseminated by the FBI.[36] The DIOG superseded the MIOG, Introduction, § 1-4(5), and current FBI policy does not otherwise expressly address these requirements.

The MIOG, Part 1, § 100-3.1.5, and the FBI's Manual of Administrative Operations and Procedures (MAOP), Part 2, § 10-17.13.1, also addressed certain characterizations appearing in certain FBI records about a subject organization at the time when a domestic security/terrorism investigation was initiated under the Terrorism Enterprise classification used for domestic terrorist groups. Such characterizations were required to "include a statement regarding the political or social goals which the group hopes to achieve through violence, its geographic area of operation, and a summary of the violence or criminal activity it either has been involved in or is advocating in the future."[37] These MIOG and MAOP provisions are still in effect.

## VI. FBI Terrorism Classifications

The FBI classified many of the investigations we reviewed as pertaining to "acts of domestic terrorism" and, in one case, as a Terrorism Enterprise investigation. These classifications raised questions about whether the FBI has expanded the definition of domestic terrorism to people who engage in mainstream political activity, including nonviolent protest and civil disobedience. As described in this section, the consequences of being identified as the subject of a "terrorism" investigation may include being placed on a terrorism watchlist. In subsequent chapters, we discuss some specific cases in which the FBI's naming of individuals as subjects of terrorism investigations have led to their being placed on terrorism watchlists.

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[36] MIOG, Part 1, § 100-4(6).

[37] MIOG, Part 1, § 101.3.1.5.

### A. Terrorism Enterprise Investigations

Part 1, § 100 of the MIOG, reserves an investigative classification for suspected domestic terrorist groups and incorporated the definition of a Terrorism Enterprise investigation found in the 2002 Guidelines, discussed above.

### B. Act of Terrorism – Domestic Terrorist

According to the MIOG, the Act of Terrorism classification "was developed in order to focus upon the specific criminal activity of the domestic terrorist," that is, specific criminal violations "on the part of a person or persons affiliated with a domestic terrorist group."[38] For the first several years of our review period, the MIOG, Part 1 § 266-1(1), stated that the Act of Terrorism classification "shall include any investigation of a criminal act which involves an individual or individuals affiliated with a domestic terrorist group."

Effective July 9, 2003, the FBI changed this language to state that the Act of Terrorism classification "shall include any investigation of a criminal act which involves an individual(s) who seeks to further political and/or social goals wholly or in part through activities that involve the use of force or violence and violate federal law."[39]

In a September 1, 2004, EC, the FBI Counterterrorism Division issued new policies regarding investigative activities directed at domestic groups or individuals who engage, at least in part, in exercising constitutionally protected rights, such as protest activities. The EC required any Act of Terrorism matter which is "directed at groups or persons who may be engaged in planning criminal or terrorist activity in relation to their exercise of constitutionally guaranteed freedoms" to be "reviewed for sufficient predication by the field office Chief Division Counsel prior to the opening of the case." "[I]n order to ensure compliance with established directives and policies regarding preservation of civil liberties," the EC mandated the "continuous involvement" of the Chief Division Counsel in the Act of Terrorism investigation "through periodic consultation, at least semi-annually," which must be documented in the Act of Terrorism file. The September 2004 EC also stated that opening ECs for this category of Act of Terrorism cases must fully set forth the predication and document the Chief Division Counsel's concurrence. Further, the EC

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[38] MIOG, Part 1, § 266-1(2).

[39] These MIOG provisions suggest that the Act of Terrorism classification was, at least for a time, reserved only for investigations of criminal acts by individuals. However, effective December 30, 2004, revisions to the MIOG, Part 1, § 266-3(6), referenced Act of Terrorism investigations as "directed at *groups or persons* who may be engaged in planning criminal or terrorist activity . . ." (Emphasis added.)

instructed field supervisors to review pending domestic terrorism cases fitting the above description in order to ensure compliance with the new policy.

The new requirements issued in this EC were added to Part 1, § 266-3(6) of the MIOG, which stated that "investigations that target subjects engaged at least in part in the exercise of constitutionally protected freedoms, such as protest, demonstrations and civil disobedience must comply" with the new policy requirements. In 2009, the FBI's Inspection Division issued a report of the FBI's Domestic Terrorism program in which it found a 47 percent compliance rate with the requirements in MIOG Part 1, § 266-3(6).

### C. Placement of Individuals on Terrorist Watchlists

One significant consequence of the FBI's terrorism classifications is that persons identified as subjects of full investigations in Act of Terrorism cases must be placed on watchlists. One such watchlist list is the Violent Gang and Terrorist Offender File (VGTOF). VGTOF became fully operational on October 1, 1995, and provides identifying information about persons placed in the database to members of the law enforcement community who come into contact with such persons such as during a traffic stop.[40] Initially, VGTOF was primarily used to track violent street gangs and gang members. Also, initially a person was entered on VGTOF at the discretion of an FBI agent or other law enforcement official if criteria was satisfied indicating the person was associated with a violent street gang or terrorist organization. Beginning in January 2002, the FBI required its field divisions to enter all subjects of international and domestic terrorism preliminary inquiries and full investigations into VGTOF. In June 2002, the FBI modified this requirement and allowed field divisions the discretion to enter subject identities of international and domestic terrorism preliminary inquiries. In January 2004, the FBI modified the policy again to remove the field division's discretion to enter subjects of international terrorism preliminary investigations and require their entry into VGTOF.

In March 2004, the FBI's Terrorist Screening Center (TSC) created the consolidated terrorist watchlist, also known as the Terrorist Screening Database (TSDB). The consolidated terrorist watchlist merged terrorist watchlists that were separately maintained by various federal government agencies. The watchlist is used to alert officials who may screen individuals at various points such as when an individual attempts to travel on a commercial airline or is stopped by a law enforcement officer for a traffic violation. The

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[40] The VGTOF is one of many files in the National Crime Information Center (NCIC), "a computerized database of documented criminal justice information available to virtually every law enforcement agency nationwide, 24 hours a day, 365 days a year." Hearing before the S. Comm. on Homeland Sec. & Gov. Affairs, 109th Cong. 22-199 (2005) (statement of Thomas E. Bush, Assist. Dir., Crim. Just. Info. Serv. Div., FBI).

TSDB maintains all watchlist data and exports information to several "downstream" screening databases, including the FBI's VGTOF.[41]

Since 2008, the FBI has been the only agency within the Department of Justice that formally nominates individuals to the consolidated terrorist watchlist.[42] FBI policy requires that all subjects of international terrorism preliminary and full investigations and domestic terrorism full investigations be nominated to the consolidated terrorist watchlist. Subjects of domestic terrorism preliminary inquiries may be nominated to the watchlist at the discretion of the field office opening the matter.[43]

During the time period under review, FBI policy required that subjects of closed investigations be removed from the watchlist and prohibited the nomination of subjects from closed investigations. However, under limited circumstances, FBI policy allowed certain subjects of closed international terrorism full investigations to be retained on the watchlist. FBI policy required that all domestic terrorism subjects and international terrorism preliminary inquiry subjects be removed from the watchlist when the case is closed.

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[41] Other downstream screening databases include the Interagency Border Inspection System, Consular Lookout and Support System, No-Fly List and Selectee List. See U.S. Department of Justice Office of the Inspector General, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Audit Report 09-25, (May 2009) at 5, 69-70, available at www.justice.gov/oig/reports/FBI/a0925/final.pdf.

[42] Although other DOJ components share information with the FBI about known or suspected terrorists, only the FBI formally nominates individuals to the watchlist. According to the FBI, the responsibility for the FBI to nominate individuals was established by a Department of Justice memorandum issued on October 3, 2008. Prior to then, other DOJ components could nominate individuals to the consolidated terrorist watchlist. For a discussion of the terrorist watchlist and the FBI's nomination process and practices, see U.S. Department of Justice Office of the Inspector General, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Audit Report 09-25, (May 2009),and U.S. Department of Justice Office of the Inspector General, *Audit of the U.S. Department of Justice Terrorist Watchlist Nomination Processes*, Audit Report 08-16, (March 2008), available at www.justice.gov/oig/reports/plus/a0816/final.pdf.

[43] The FBI stated that it has "thoroughly reviewed and updated the watchlist policies in a classified EC dated December 7, 2009. The FBI also stated that "the Terrorist Review and Examination Unit which has program management responsibilities for the watchlisting process has implemented major changes and detailed oversight protocols to monitor compliance" with watchlist policies. In addition, the FBI has stated that nomination to the watchlist is no longer automatic for subjects of terrorism preliminary investigations. The December 2009 EC provides that the FBI may nominate an individual only if it has "reasonable suspicion to believe that the subject is a known or suspected terrorist," based on "articulable" intelligence or information and an "objective factual basis." This is a higher evidentiary standard than the "possibility" standard for opening preliminary inquiries. The OIG has conducted a series of audits on the consolidated terrorist watchlist, and we intend to conduct more work in this area.

A subject's inclusion on the consolidated terrorist watchlist could also have consequences for associates of the subjects, even though they are not themselves the subject of any investigation. The TSC Associates Project was developed to identify possible associates of known or suspected terrorists who are on the watchlist. According to the Terrorist Screening Center:

> During their normal course of duties, law enforcement officers, [Department of State] officials and Border Agents encounter known or suspected terrorists in the TSDB from querying their case management systems during an encounter. These encounters provide valuable information which includes who the known or suspected terrorist is with at the time of the encounter. These encounters with possible associates will be documented and provided to the office of origin for appropriate action.[44]

During our review we determined that in several cases individual subjects of the investigations we examined were place on watchlists such as VGTOF as a result of the FBI's use of the Act of Terrorism classification.

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[44] U.S. Department of Justice Office of the Inspector General, *Review of the Terrorist Screening Center*, Audit Report 05-27, (June 2005) at 100, available at *www.justice.gov/oig/reports/FBI/a0527/final.pdf.*

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## CHAPTER THREE
## THE THOMAS MERTON CENTER

### I. Background

The Thomas Merton Center (Merton Center) describes itself as "Pittsburgh's peace and social justice center." Thomas Merton was a writer and Trappist monk at an abbey in Kentucky who died in 1968. A recent Merton Center news publication stated:

> [The Merton Center] responds to social issues and effects social change in the spirit and according to the principles of Thomas Merton, Trappist monk, priest, poet, and writer. By its work, the Thomas Merton Center honors his commitment to nonviolence, social justice, peace and human dignity.

According to its website, the Merton Center opened in 1972 in a storefront office on the Southside of Pittsburgh "to protest the continuation of the war in Vietnam." The Merton Center is now located in Pittsburgh's Garfield neighborhood. The Merton Center's website solicits individual members and volunteers for its projects and campaigns.

The Merton Center aligns itself with "affiliates and friends," which are groups that financially support the Merton Center or regularly co-sponsor events. The Merton Center states in its news publication that affiliates and friends are "groups that [the Merton Center] feels confident enough in to refer individuals to join them and/or to participate in their activities." However, according to the Merton Center affiliate status "is NOT an official endorsement of all the aims, goals and strategies of these organizations."

The Pittsburgh Organizing Group (POG) is listed in a recent Merton Center news publication as one of its affiliates.[45] We discuss certain FBI investigations in this chapter that referenced both the POG and the Merton Center.

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[45] The POG recently described itself on its website as "an anarchist group" whose "goal is the creation of a directly democratic, free society capable of maximizing human potential and freedom within a framework of collective responsibility, mutual-aid, and solidarity." Its website described its recent efforts as focused "on combining education and direct action . . . to strategically fight back against the war machine by confronting its local manifestations: military recruitment, corporate and educational war profiteers, and militaristic politicians."

We selected the Merton Center for this review because it was one of the groups whose FOIA releases prompted significant media attention and congressional inquiries.

The remainder of this chapter is organized into three additional sections. Section II addresses an incident in 2002 in which the FBI conducted surveillance at a Merton Center-sponsored antiwar leafleting event. We address this incident at length because the FBI's conduct in connection with the event raised significant issues, and the FBI's subsequent statements to the public and Congress about the incident were not accurate.

Section III of this chapter addresses several other incidents in which FBI investigative activities touched upon the Merton Center. Section IV describes the FBI's response to issues brought to the public's attention when the Merton Center documents were released.

## II. The Anti-War Rally in Pittsburgh

In February 2006, the FBI publicly released an Electronic Communication (EC) dated November 29, 2002, that was written by Mark Berry, an FBI Special Agent based in Pittsburgh.[46] Berry stated in the EC that he photographed leaflet distributors participating in an anti-war rally relating to Iraq at Pittsburgh's Market Square Pavilion, sponsored by the Thomas Merton Center. The synopsis line stated that the EC was written "[t]o report results of investigation of Pittsburgh anti-war activity." The EC was released pursuant to a Freedom of Information Act (FOIA) request, and its disclosure led members of the public and Congress to question whether the FBI was spying on protestors because of their anti-war views.

A press response from the FBI shortly after the FOIA release stated that the agent took photographs of a participant at the Merton Center anti-war rally "as a direct result of information provided to the FBI, related to an ongoing investigation."

In a Senate hearing in May 2006, Senator Patrick Leahy questioned FBI Director Mueller about the FBI's surveillance of the Merton Center, and in particular the November 29, 2002, EC about the anti-war rally in Pittsburgh. Director Mueller responded by stating:

> We were attempting to identify an individual. The agents were not concerned about the political dissent. They were attempting to identify an individual who happened to be, we believed, in attendance at the rally. I'd be happy to have the IG look into that

[46] Mark Berry is a pseudonym.

and any of the other assertions or allegations that you've made in terms of our investigating persons who are exercising their First Amendment rights.

In addition, in response to follow-up Questions for the Record to the FBI from Senator Leahy, the FBI stated that "[t]he investigation of the individual whose presence at the rally was anticipated is still ongoing," and declined to provide further information.

As discussed below, we determined that for a variety of reasons the FBI's explanations were inaccurate and misleading.

## A. Factual Chronology

### 1. FBI Surveillance of the Anti-War Rally

During his OIG interview, Berry described the circumstances leading to his surveillance activities at the Merton Center rally in Pittsburgh. Berry told us that he graduated from the FBI Academy in August 2002 and was assigned to the Pittsburgh Field Division's Joint Terrorism Task Force (JTTF) to work on international terrorism cases. At the time of the surveillance he was still in probationary status with the FBI, on a training rotation working on a variety of criminal investigations. His international terrorism caseload consisted of one case.

Berry told us that when work was slow he would ask his supervisor, Supervisory Special Agent Susan Crosetti, for a work assignment.[47] Berry said November 29, 2002, the Friday after Thanksgiving, was one of those slow work days. Berry told us that he asked Crosetti for work, and she directed him to go to an anti-war rally in downtown Pittsburgh to identify Pittsburgh Field Division terrorism subjects "and to see what they are doing." Berry said he could not precisely recollect Crosetti's instructions but that "the gist of it was that [I] needed to go identify our subjects' involvement in the anti-war protest." Berry told us he could not recall whether Crosetti told him why she believed that any terrorism subjects would attend the event.

The Merton Center web site described the event as an anti-war leafleting event held on the Pavilion in Market Square, an open park-like space in downtown Pittsburgh. The web site stated that the participants would "[f]an out in teams to leaflet and engage people in the Square and downtown shopping spots" to "[t]ake the anti-war message to more people" on "the biggest shopping day of the year." Berry described the event as an anti-war protest or rally "with many people in attendance."

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[47] Susan Crosetti is a pseudonym.

Berry told us that in response to Crosetti's instructions, before going to the rally he reviewed a binder containing color photographs of Pittsburgh's international terrorism subjects, which was maintained in Crosetti's office. The binder contained photographs of all international terrorism subjects of full field investigations or preliminary inquiries originating in Pittsburgh. Berry said he attempted to memorize the faces depicted in the binder of photographs but he was "totally unfamiliar" with the subjects' faces because he was a new agent.

During her OIG interviews, Crosetti told us that she did not have any present recollection of the circumstances leading up to the decision to conduct the surveillance of the event. She stated that she believed that Berry -not her - had initiated the surveillance in order to identify terrorism subjects. She also told us that she believed the Pittsburgh JTTF possessed information that its international terrorism subjects would be in attendance at events such as the Merton Center anti-war rally. We asked Crosetti if she knew the identity of the subjects the agent went to identify at the rally and could describe the link between these subjects and the Merton Center. She responded that the majority of Pittsburgh's international terrorism subjects congregated at the Islamic Center of Pittsburgh, and she said that the EC regarding the surveillance of the anti-war rally stated that the Merton Center had recently coordinated an event at the Islamic Center.

Apart from the November 29, 2002, EC, we found no FBI documents created in 2002 that described the purpose or any of the background for the FBI's surveillance of the anti-war rally. We also found no documents predating the event suggesting a basis for believing that any terrorism subjects were in fact associated with the Merton Center or were likely to be present at the event. Our review of FBI documents referencing the Islamic Center of Pittsburgh, which Crosetti had pointed to, confirmed that some international terrorism subjects in 2002 were members of the Islamic Center or attended its functions. However, as discussed below, we found no evidence the FBI knew of a link between the Islamic Center and the Merton Center before the anti-war rally occurred.

According to Berry, he went to the anti-war rally alone. When he arrived there, he saw a large crowd but he could not recall the faces he had attempted to memorize from the binder. He told us he did not bring any photographs of subjects with him to the event.

At some point, a man in the crowd handed Berry a leaflet.[48] Berry said he noticed then that the leaflet was produced by the Merton Center. He told us that this was the first time that he had heard of the Merton Center.

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[48] Berry said he did not recall what he did with the leaflet, and the FBI did not provide us any leaflet from the event in response to our requests for information.

Berry also told us that although he could not recall the faces of the subjects in the binder for whom he was supposed to be looking, he decided he would take a couple of photographs of a woman who was in attendance. He said he did so because he believed he needed to show his supervisor that he was "earning his pay" and was doing what he was told. Berry said he did not know whether the woman he photographed was a terrorism subject. He said some of the terrorism subjects in Pittsburgh for whom he was supposed to be looking were female, but at the time he took the photographs he did not remember what the female subjects looked like. He told us that he had a conversation at the rally with a female leaflet distributor he perceived to be of Middle Eastern descent. Berry told us that the woman was probably the person he photographed, although he qualified this by saying that he did not remember her.

Berry said he was at the event for a short time, not longer than 30 minutes and "probably a total of 10 minutes," because it was a "nonstarter" given that he could not "even remember what [the subjects] look[ed] like." He said that had he been able to identify individual subjects the assignment may have developed into something worthwhile. But he said that he was not prepared and did not have the knowledge he needed to have to do the job his supervisor asked him to do. Berry said this was the first surveillance activity he conducted in a terrorism matter. He said that this was the only time that he conducted surveillance activities at an anti-war protest.

Berry said he had a vague recollection of showing the photographs he took of the woman to others in the JTTF, but no one could identify her. He said that at that point he discarded the photographs.

### 2. The November 2002 EC

Berry told us he drafted the EC, including its synopsis line, when he returned to the office on November 29, 2002, the day he conducted the surveillance. According to Berry, after his return to the office he conducted Internet research, including visiting the Merton Center's website, to obtain some of the information that he provided in the EC.

Crosetti approved the EC and it was placed in the Pittsburgh Field Division's "zero" file, for the "199" classification, which is used for investigative matters related to international terrorism.[49] Berry said he had no recollection of discussing the EC with Crosetti or any others in 2002. He told us he would

[49] A zero file is a type of file used by the FBI to retain information relating to a classification that does not require investigation at the time it is collected. See MAOP, Part 2, s. 2-4.1.2. The 199 classification was, at the time of the EC, used for the National Foreign Intelligence Program (NFIP) -International Terrorism matters.

have placed the EC in Crosetti's inbox and that would have been the last time he thought of it in 2002.

The 2-page EC was entitled "IT Matters." The synopsis stated: "To report results of Pittsburgh anti-war activity." The EC did not identify any individual who was a subject or person of interest in an FBI investigation. Nor did it state that the Merton Center or any other group was the target of an investigation.[50] The EC began by providing the Merton Center's contact information and characterizing it as "a left-wing organization advocating, among many political causes, pacificism [sic]." Berry told us he came up with this characterization of the Merton Center, and that he believes he based this characterization on the leaflet's content. The EC stated that the Merton Center held daily leaflet distribution activities in downtown Pittsburgh and was then "currently focused on its opposition to the potential war with Iraq." It described the leaflets as stating that, "Iraq does not possess weapons of mass destruction and that, if the United States invades Iraq, Sadam Hussien [sic] will unleash bio-chemical weapons upon American soldiers."

The EC stated that the Merton Center advertises its activities on its webpage and that 5 days earlier the Merton Center "coordinated the 8th Annual An-Nass (Humanity) Day at the Islamic Center of Pittsburgh." The EC identified Farooq Hussaini as the contact person for the event at the Islamic Center. The EC stated that Hussaini was affiliated with the Islamic Center, and the EC provided his contact information. Berry told us that he obtained this information from the Internet research he conducted after he returned to the office on the day of the surveillance. He stated that he had never heard of Farooq Hussaini before doing the Internet research for the EC after the rally.

The EC identified the Merton Center's executive director by name and stated that he had told a local newspaper columnist that "there are more than a few Muslims and people of Middle Eastern descent among the regulars attending meetings" at the Merton Center. Berry told us that he also obtained this information from his Internet research after the surveillance.

The EC stated that Berry had photographed Merton Center leaflet distributors during the event, and that the "photographs are being reviewed by Pittsburgh IT (international terrorism) specialists." The EC concluded by stating that one female leaflet distributor, who appeared to be of Middle Eastern descent, inquired whether the Special Agent was an FBI agent and that no other Merton Center participants appeared to be of Middle Eastern descent.

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[50] The EC was classified at the Secret level when it was created in 2002. It was declassified during the FOIA process in 2006. A copy of the declassified version released to the public is contained in Appendix B of this report.

The EC did not contain any description of the FBI's purpose in attending the event. It did not state that the FBI was attempting to identify any terrorism subjects or that Berry had been unsuccessful in doing so. Berry told us he did not know why he did not include this information in the EC. He said he believes his lack of experience explained why he wrote the EC as he did. He told us that knowing what he knows now, "there would be no point" in having written an EC documenting his activities. He said that it was a "poorly written EC" that did "not capture exactly what was going on." He also described the EC as "atrocious on many levels" and stated that "the EC was a horrible mistake" and that he could "understand why people would become inflamed about it." He stated that he wrote the EC as he did because he was a probationary agent at the time and needed to please his supervisor and to show her that whatever she told him to do he would do as thoroughly as he could. He said that he did not want to give his supervisor an EC that was just "three sentences long." Berry said that he realized the significance of the synopsis line – "To report results of Pittsburgh anti-war activity" – when he reread the EC in preparation for his interview with the OIG. He stated that when he read the synopsis line, his "jaw hit the table" and that it did not "accurately indicate what was going on."

Crosetti told us that the EC did not adequately describe Berry's activities. She said there is "a lot of stuff behind this that we didn't put in there and shame on me for approving it and you know I can't blame" the agent who wrote it. She said that the EC should have stated the reasons that Berry conducted the surveillance activities. She said the EC "could have less information on some things, more information on others." She stated that the synopsis line was a bad choice of words.

### 3. Pittsburgh Division Legal Staff Drafts Routing Slip Regarding FOIA Response (February 2006)

In May 2005, the American Civil Liberties Union (ACLU) filed a FOIA request for FBI documents referencing the Thomas Merton Center. Legal staff in the FBI Pittsburgh Field Division coordinated the FOIA response with the Records Management Division (RMD), the FBI Headquarters Division responsible for releasing nonexempt responsive documents pursuant to FOIA. Berry's November 2002 EC was one of the responsive documents. Stanley Kempler, a Pittsburgh Field Division attorney, became involved in coordinating the Pittsburgh Field Division's response.[51]

Just prior to the FBI's release of Merton Center related documents, Kempler sent the Records Management Division a memorandum, titled "routing slip," dated February 8, 2006. The routing slip recommended redactions to the

[51] Stanley Kempler is a pseudonym.

RMD's proposed release of several Merton Center-related documents, including the November 2002 EC.[52] The routing slip also provided information about the November 2002 EC that conflicted with what Berry and Crosetti told us.

Kempler's routing slip stated that "according to the agent" who wrote the November 2002 EC, "the investigative activity reflected in this EC was directed at Farooq Hussaini, not the Thomas Merton Center." Farooq Hussaini was the person identified in the November 2002 EC as the contact person at the Islamic Center of Pittsburgh for a recent event that was coordinated by the Merton Center. The November 2002 EC did not identify Farooq Hussaini or anyone else as the subject of the surveillance.

The routing slip continued, "[t]he agent stated that his supervisor directed him to attempt to photograph individuals who were in contact with FAROOQ HUSSAINI." The routing slip also stated that Hussaini first became of interest to the Pittsburgh Field Division on June 7, 2002, as a result of information developed in an international terrorism investigation being conducted by the FBI Dallas Field Division. Specifically, a June 7, 2002, EC from the Dallas file (Dallas EC), reported [redacted]

The routing slip stated that Hussaini was also associated with [redacted] (referred to as Person B in this report), who was the subject of a Pittsburgh full field investigation that "remains in a pending status."[53] The routing slip did not identify any connection between Person B and the leafleting event or the Merton Center.[54] The routing slip stated that the Pittsburgh Field Division had never opened an investigation of Farooq Hussaini, but recommended that his name be redacted from the document because "publication of an FBI interest in him may negatively affect [redacted]."

In sum, the routing slip asserted that Farooq Hussaini was the target of the November 2002 surveillance of the Merton Center anti-war rally and stated that the FBI Pittsburgh Field Division became interested in Hussaini as a result of information developed in an FBI Dallas Field Division international terrorism investigation of a different subject. However, as described below, the evidence

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[52] We discuss some of the other Merton Center related documents addressed in the routing slip separately, in Part III of this chapter.

[53] We use "Person B" to refer to this individual in order to limit redactions in the public version of this report.

[54] As detailed in Section 8 below, the FBI later stated that it was Person B, not Farooq Hussaini, who was the target of the surveillance.

showed that these assertions were not true. We determined that these inaccurate assertions also became the basis of subsequent inaccurate statements made by the FBI to the public and by FBI Director Mueller to Congress.[55]

We interviewed Berry a second time after we received the routing slip from the FBI. When we asked Berry to review the routing slip he told us he was "certain" he was not sent to the rally to find Farooq Hussaini. He stated that he did not know who Hussaini was prior to going to the rally. When we showed Berry the Dallas EC, he said he had never seen it. He said that the chance of [redacted] was "almost non-existent." Berry said the routing slip was "utterly false" and "wholly, factually inaccurate." Berry said the routing slip "absolutely blows me out of the water" and that he had "no knowledge" of it. He told us he had no current memory of discussing the routing slip or Farooq Hussaini with Pittsburgh Field Division attorney Kempler or anyone else. He said that he gave Kempler the same account of the November 2002 surveillance that he gave to the OIG.

When we showed the routing slip to Crosetti, she told us Berry did not go to the anti-war rally to identify Farooq Hussaini because he was not a subject, and that Berry went to the event to see if Pittsburgh Field Division subjects might attend. When we asked Crosetti to review the Dallas EC she said she had never seen this document and to her knowledge it was never brought to the attention of the Pittsburgh Field Division. She pointed out that [redacted].

Crosetti told us she had never seen the routing slip, was not contacted during its preparation, and was not a source of information contained in it. She disputed the routing slip's assertion that she directed Berry to photograph persons in contact with Farooq Hussaini. Crosetti told us she would never have given such an instruction as it would have been "improper" because the Pittsburgh Field Division did not have a case open on Hussaini.

In short, both Berry and Crosetti disputed the facts in the routing slip. The Dallas EC [redacted]

[55] The Legal Administrative Specialist in the RMD who processed the Merton Center FOIA request told us he believed Hussaini's name was not redacted from the November 2002 EC because he was listed as a contact person in public information.

[redacted]. We found no basis to conclude that there was any actual connection between Farooq Hussaini in Pittsburgh and the Dallas investigation or the Dallas EC.

Several news articles in Pittsburgh publications from 2001 to 2003 described a Farooq Hussaini who was associated with the Islamic Center of Pittsburgh. According to the news articles, he was active in fostering interfaith relations and understanding of Islam in Pittsburgh. In fact, following Hussaini's death in May 2008, the Pittsburgh City Council designated June 8, 2008, as "Syed Farooq Hussaini Day," in recognition of his contributions to the community.

We found no evidence suggesting that anyone in the Pittsburgh Field Division was even aware of the Dallas EC before the anti-war rally, much less that it triggered any interest by the Pittsburgh Field Division in Farooq Hussaini. As noted above, both Berry and Crosetti told us they never saw the Dallas EC. Indeed, no one in the Pittsburgh Field Division would have been alerted to the Dallas EC since it was not addressed to the Pittsburgh Field Division but rather was placed in the Dallas file and sent to the attention of an FBI office in Idaho.

The FBI Special Agent who wrote the Dallas EC told us she could not imagine any reason why she would have forwarded the EC to the Pittsburgh Field Division, and she did not believe she would have done so informally by telephone or e-mail. The FBI analyst in Pocatello, Idaho who received the Dallas EC and [redacted] told us she would only contact an FBI field office in writing and that she found no FBI records indicating that she alerted the Pittsburgh Field Division to the Dallas EC.

We also obtained query logs showing FBI employee searches of the FBI databases routinely used in investigations. If Farooq Hussaini in fact had been a person of interest to the Pittsburgh Field Division, we would have expected to find documentation or database searches relating to him prior to the anti-war rally. We found that no one in the Pittsburgh Field Division had ever searched the databases using Farooq Hussaini's name as a search term prior to the rally.[56] We found no Pittsburgh Field Division documents referencing Farooq Hussaini dated before the event.

In sum, we concluded that the routing slip falsely stated that the Pittsburgh Field Division had investigative interest in Farooq Hussaini at the

[56] Employees from other FBI field offices searched the databases for the name "Farooq Hussaini" during this time period. We interviewed those who from the circumstances of their searches might plausibly have alerted the Pittsburgh Field Division to Hussaini in the time before the leafleting event. Based on these interviews, we found no evidence that anyone did.

time of the November 2002 rally and that Hussaini was the target of the FBI's surveillance at the event.

### 4. Source of the Routing Slip Information

As detailed in Section B below, we believe that the false version of events in the routing slip influenced subsequent FBI public statements about the November 2002 EC, including a press response distributed after the FOIA release and the congressional testimony from the FBI Director. We therefore attempted to determine who was responsible for the false information contained in the routing slip. In the next section, we describe the results of our investigation on this issue. After reviewing a draft of this report, the FBI submitted a detailed response on this issue, which we respond to in subpart b.

#### a. OIG Investigation

Pittsburgh Field Division attorney Stanley Kempler's name appears in the "from" line on the routing slip. Kempler and Carl Fritsch, a non-attorney member of the Pittsburgh Field Division legal staff, told us that the routing slip was primarily drafted by Fritsch and only edited by Kempler.[57] Kempler and Fritsch both told us that they have no current recollection of discussing the contents of the routing slip with Berry, although they said they believed they had done so based on statements in the document, which identified the agent who wrote the November 2002 EC (Berry) as the source of the information. However, as noted above, Berry denied that Farooq Hussaini was the target of the surveillance and said he did not recall discussing Hussaini with Kempler, Fritsch, or anyone else.

In an effort to reconstruct the origins of the routing slip, we reviewed search logs from the FBI databases near the date of the routing slip. This review showed that on January 23, 2006, 16 days before the date of the routing slip, Fritsch and Crosetti both had separately searched a database using search terms based on Farooq Hussaini's name.[58] Fritsch was the first to search the database on January 23, 2006, at 2:30 p.m. His search produced results that included the Dallas EC. Next, beginning at 4:05 p.m., Crosetti conducted a series of database searches related to Farooq Hussaini and the Dallas EC and case number. She printed 25 ECs that were generated from the Farooq Hussaini search, including the June 2002 Dallas EC and 4 ECs from the Pittsburgh investigation of Person B. At 5:10 p.m. Fritsch

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[57] Carl Fritsch is a pseudonym.

[58] The logical reason for anyone to search for Farooq Hussaini's name in the database in 2006 as a step in finding an explanation for the November 2002 EC was that Hussaini was identified in the November 2002 EC as being the contact person for an event jointly coordinated by the Merton Center and the Islamic Center, as detailed above, although the EC did not identify him as a target of that surveillance.

searched the database again, this time using the case number for the Person B investigation.[59]

During our interview of Fritsch, which took place before we had received the database search logs, he denied having spoken to Crosetti in connection with the preparation of the routing slip, and he denied having conducted any database searches himself in order to find information for the routing slip. He stated that if he had relied on a database search or on information from Crosetti in drafting the routing slip, he would have said so in the routing slip.

We also determined that the search logs contradicted Crosetti's statement to the OIG that she had never seen the Dallas EC before. When we discussed the search logs with Crosetti, she told us they did not refresh her recollection about having any conversations with Kempler or Fritsch about Farooq Hussaini being the target at the anti-war rally or of having reviewed and considered the relevance of the Dallas EC. Crosetti said she believed she was prompted to conduct this database search activity by an inquiry from someone, most likely Kempler, but she said she did not recall the search activity or who prompted it.

Kempler told us he recalled having spoken to Crosetti in connection with the routing slip. Kempler said Crosetti provided a "stack of documents" that she had printed from a database search but that the documents did not provide any useful context for explaining the November 2002 EC. Kempler said he believes he told Crosetti that the documents were not helpful.

We concluded that the version of events contained in the routing slip about why the FBI had attended the anti-war rally – allegedly to determine if Farooq Hussaini was there – was an after-the-fact reconstruction that was not corroborated by any witnesses or contemporaneous documents. This version conflicted with statements from Berry, who attended the rally, and Crosetti, his supervisor, about why Berry went to the event. The timing, pattern, and similarity of the database searches in 2006 indicate that Crosetti and Fritsch coordinated research for the routing slip or otherwise communicated about Farooq Hussaini in the days leading up to the routing slip. Those database searches uncovered [redacted] in the Dallas EC and therefore were likely the source of the

[59] The only other Pittsburgh employee who searched the databases during this time period using search terms based on Farooq Hussaini's name was a different Pittsburgh Special Agent who conducted such a search on February 7, 2006, the day before the routing slip was sent to the Records Management Division. This agent was also supervised by Crosetti. The agent told us he did not recall why he searched for information related to Hussaini. He told us he had no knowledge of the routing slip or its creation. Crosetti told us she did not ask this agent to conduct the database searches related to Hussaini.

inaccurate assertion in the EC that Pittsburgh Field Division became interested in Hussaini as a result of evidence developed in the Dallas investigation.

Fritsch acknowledged that he drafted the routing slip and that Kempler edited it. The routing slip identified Berry as the source of the information for the routing slip, although Berry told us he was not the source and denied he was sent to identify Farooq Hussaini. Based on the database logs, we believe that Crosetti also had a hand in generating the version of events contained in this document. The version of events given in the routing slip presented the surveillance in a manner that was different from, and more favorable to, the FBI Pittsburgh Field Division than what had actually occurred. However, we were unable to determine with certainty the original source of the false account contained in the routing slip, primarily because the witnesses told us they could not recall the underlying events.

### b. FBI Interpretation of the Facts

After reviewing a draft of this report, the FBI acknowledged that the version of events stated in the routing slip was inaccurate, but the FBI argued that the inaccuracies were not intentional.

According to the FBI's suggested interpretation, when Kempler found the November 2002 EC in connection with the FOIA response, he asked SSA Crosetti to provide context for the EC. Crosetti responded by conducting a database search of Farooq Hussaini, believing the surveillance might have been related to him. Crosetti provided a stack of 25 ECs resulting from her database search to Fritsch, which according to the FBI "implied to any reasonable person that the basis of the surveillance could be found in them." According to the FBI, Crosetti did not tell Fritsch that she had no recollection of the underlying facts. Fritsch then created an erroneous reconstruction of the events surrounding the November 2002 surveillance based entirely on the stack of documents provided by Crosetti (which included the Dallas EC), but Fritsch never showed his reconstruction to Berry or Crosetti. The FBI asserts that although Fritsch's failure to show the routing slip to Berry or Crosetti was not a "best practice," the errors in the routing slip were accidental.

For a variety of reasons, we were not convinced by the FBI's explanation. First, the available evidence, while somewhat contradictory, does not support the FBI's characterization of the sequence of events. The routing slip itself identifies Berry as the sole source of the information (a claim that Berry vehemently denied to the OIG) but it makes no mention of a reconstruction of events from historical documents. Fritsch told us that if he had relied on the database search or on information from Crosetti in drafting the routing slip he would have said so in his draft, and the draft does not say that. In addition, Kempler specifically denied that the documents Crosetti provided as a result of her database search provided any useful context for explaining the November

2002 EC. Thus, both Fritsch and Kempler told the OIG that they were confident they got the information in the routing slip from Berry, not through a reconstruction from historical documents, as the FBI's explanation asserts.

Second, the routing slip contains several details that could not reasonably be inferred from the stack of historical documents alone. For example, the routing slip stated that "FAROOQ HUSSAINI became of interest *to the Pittsburgh Office* on 06/07/2002 . . . ." (Emphasis added.) Yet, nothing in the stack of documents generated as a result of the database searches of Farooq Hussaini's name suggests that Hussaini became of interest to the FBI Pittsburgh Field Division on that date or any other date before the surveillance. Similarly, the routing slip stated that "the agent [Berry] stated that his supervisor [Crosetti] directed him to attempt to photograph individuals who were in contact with FAROOQ HUSSAINI." This statement, which Berry vehemently denied to the OIG and which the FBI agrees was not true, also could not have been inferred from the documents resulting from the database search. This statement either was speculation that the author presented as fact in an official document, or it was deliberately misleading.

Third, even if Fritsch alone had made the inferences from the stack of documents to reach the statements made in the routing slip, we find it difficult to believe that he or Kempler would have sent out this reconstruction without taking any steps at all to verify its accuracy with Berry or Crosetti, the two people – both still working in the FBI Pittsburgh Field Division at the time – who had direct knowledge of the facts.

After reviewing a draft of this report, the FBI also asserted that because the OIG found that the original surveillance did not violate FBI policy, nobody had a motive to provide an intentionally misleading account of it. This argument ignores the fact that the original November 2002 EC did not state any justification for the surveillance and could be anticipated to generate significant adverse publicity upon its release. Tying the surveillance to a particular person of interest or terrorism suspect would be a better justification than what actually happened, which was that Berry was sent to the rally as a "make-work" assignment to see if any of the Pittsburgh terrorism subjects happened to show up without having any reason to think any of them would be there. Although we concluded that this assignment did not violate the Attorney General Guidelines, it did not reflect well on the Pittsburgh Field Division and could likely cause significant concern or embarrassment to the FBI if the true facts surrounding the surveillance were publicly presented.

At best, the person or persons who were responsible for the version of events contained in the routing slip were extraordinarily careless in characterizing their speculation about the basis of the surveillance as established fact without any attempt to confirm it. In light of the circumstances described above, however, we believe that it is more likely that

the person or persons intentionally drafted a version of events in the routing slip that provided a stronger justification for the surveillance of the Merton Center anti-war rally than was in fact the case.

### 5. FBI Headquarters Issues Press Response (March 2006)

The release of the Merton Center documents to the ACLU in February 2006 generated significant media interest and resulted in questions to the FBI regarding the documents and the FBI's investigative interest in the Merton Center. On March 14, 2006, the FBI issued a "press response" that addressed the Special Agent's surveillance at the Merton Center anti-war rally and the November 2002 EC that resulted from this surveillance.[60] The FBI press response stated, in relevant part:

> Some FBI documents recently released to the ACLU under the Freedom of Information Act refer to an FBI Agent taking photographs at a public anti-war event in Pittsburgh in November 2002.
>
> While the Agent was acting with all appropriate investigative authorities, it is important to emphasize some points not evident in the publicly released documents. First, the photos taken at the November 29, 2002, event were taken as a direct result of information provided to the FBI, related to an ongoing investigation. Specifically, the photos were compared with photographs of a person under FBI investigation. Once that comparison was made, and determined to be of no value to the ongoing investigation, the photos taken at the event were destroyed.
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> * * *
>
> A related internal communication that was also released [the November 2002 EC] was written in a manner that suggests it is a report on the activities of an anti-war group. Such a characterization would be factually misleading. The Agent was not in attendance at the event for the purpose of monitoring this group's political activities. As noted above, he was present for the sole purpose of determining the validity of information he received from another source establishing a link between an on-going

[60] Appendix C contains a copy of the press response. According to the FBI's Assistant Director for the Office of Public Affairs, a "press response" is usually distributed to a reporter who initiates an inquiry about the matter addressed in the response, in contrast to a press statement that the FBI proactively releases to many media outlets.

investigation and the group engaging in anti-war protests. Finding no such link, he terminated his surveillance.[61]

The press response also stated that since 2002 the FBI had issued additional directives that "reiterated and, where appropriate, clarified policy pertaining to investigations that in some way involve public demonstrations or protest activities."

We believe that the press response was drafted by the FBI's National Press Office based in substantial part on information provided by Pittsburgh Field Division attorney Kempler.[62] Kempler told us he responded to questions from someone in the FBI's National Press Office sometime before the press response was released, but he said he could not remember who specifically it was. Kempler told us that he did not recall the telephone conversation in any detail but that he "just parroted what was in the routing slip." Kempler said that the Pittsburgh Field Division did not create the press response and that it originated from the National Press Office.

We were unable to determine specifically who in the National Press Office drafted the press response. A Public Affairs Specialist from the FBI's National Press Office told us he recalled a telephone conference that he and his Section Chief participated in with Kempler during which Kempler explained to them what had occurred with regard to the November 2002 EC and the anti-war rally. He said that what Kempler told them was consistent with what was contained in the press response. However, the Public Affairs Specialist said he did not write the contents of the press response and did not know who did.

We also interviewed the person who was the Section Chief of the National Press Office at the time. He said he did not remember who wrote the press response, how it was created, what was discussed, or the telephone conference with Kempler. He said he did not recognize the press response as something that he would have written.

Like the routing slip on which it was based, the press response contained important information that was false. The press response stated that an FBI agent was present at the rally in order the "determine the validity of information he received from another source establishing a link between an on-going investigation and the group engaging in anti-war protests." The "ongoing investigation" discussed in the press response is apparently a reference to the

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[61] The press response also described a February 26, 2003, FBI Letterhead Memorandum that was also released under FOIA. We discuss the Letterhead Memorandum in the next section of this report.

[62] A portion of the press response that is not at issue here was likely drafted by an attorney in the FBI's Office of General Counsel.

Dallas investigation discussed in the routing slip, and the "information" that the FBI supposedly received was [redacted]. The "link between" the investigation and the Merton Center appears to be a reference to the fact that, as mentioned in the 2002 EC, Farooq Hussaini was identified as the contact person for an event sponsored by the Merton Center. As noted above, none of this information was known to the Pittsburgh Field Division before the rally, and it was not the reason for Berry's attendance at the rally. In fact, neither Berry nor Crosetti was aware of the Dallas investigation at the time, and Berry did not learn of Hussaini's connection to the Merton Center until after he returned to the office.[63]

We found several local and national newspaper articles published in the days after the release of the press response that quoted directly from the press response or the Pittsburgh Field Division's Media Coordinator, and, in one instance, from the Public Affairs Specialist.[64]

The contents of the press response were also included in an internal FBI newsletter, "The Horizon," which is used by the Assistant Director of the Office of Public Affairs to brief the FBI Director about media matters.

In sum, it appears that in response to the FOIA request for documents, Pittsburgh Field Division attorney Kempler discussed the matter with the FBI's National Press Office, which in turn drafted and released the press response. However, that response was not an accurate depiction of the reasons for the FBI's attendance at the Merton Center anti-war rally. The press response was subsequently quoted in news accounts and, as detailed below, was likely used to brief the Director for his congressional testimony.

### 6. Director Mueller Testifies About Merton Center Surveillance (May 2006)

On May 2, 2006, Director Mueller testified before the Senate Judiciary Committee in an FBI oversight hearing. At the hearing, Senator Leahy questioned Director Mueller about FBI documents released under FOIA that Senator Leahy stated suggested that the FBI was using its enhanced counterterrorism capabilities "to conduct domestic surveillance on law-abiding American citizens simply because they oppose the Government's war policy in

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[63] As detailed below, subsequent FBI documents later claimed that another individual, Person B, was the target of the surveillance and that the Pittsburgh Field Division investigation of Person B was the "on-going investigation." We found no evidence that this version of events had been articulated by anyone at the time the press response was created.

[64] See, e.g., Paula Reed Ward, "Peace Group Claims FBI Spied on Activities; Feds Say their Interest was in an Individual, Not Merton Center," *Pittsburgh Post-Gazette*, Mar. 15, 2006, at B1; Nicholas Riccardi, "FBI Keeps Watch on Activists," *Los Angeles Times*, Mar. 27, 2006, at 1.

Iraq."[65] Senator Leahy asked in particular about the surveillance of the Merton Center anti-war rally discussed in the November 2002 EC. After quoting from the November 2002 EC, Senator Leahy asked: "What possible business does the FBI have spying on law-abiding American citizens simply because they may oppose the war in Iraq?"[66] Director Mueller responded:

> On that particular case, sir, it was an outgrowth on an investigation. We were attempting to identify an individual. The agents were not concerned about the political dissent. They were attempting to identify an individual who happened to be, we believed, in attendance at that rally.[67]

Senator Leahy pressed the FBI Director by quoting twice from the synopsis line of the November 2002 EC ("To report results of investigation of Pittsburgh anti-war activity"). Director Mueller responded by stating that he had given "the background of that report" and he would be "happy to have the IG followup on that."[68]

During our investigation, the FBI provided us with the written materials Director Mueller used in advance of his May 2006 testimony to the Senate Judiciary Committee relating to the allegations that the FBI was "spying" on domestic advocacy groups. Among these materials, we found only one document that referenced the Merton Center surveillance. This document, titled "ACLU Allegations of Spying," and dated March 22, 2006, was prepared by the FBI's Director's Research Group.[69] The FBI's Office of Congressional Affairs used the document in the Director's "briefing book" for the May 2006 Senate hearing. The document contained the following one-paragraph reference to the Merton Center surveillance:

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[65] *FBI Oversight: Hearing Before the* S. *Comm. on Jud.*, 109th Cong. 13 (2006). The FBI's Office of Congressional Affairs prepared a "note" to the Director in advance of the May 2006 hearing reporting on the anticipated questions from Senators. The note stated that Senator Leahy would want "assurances that the FBI is not spying on anti-war groups because of their beliefs."

[66] Id. at 15.

[67] Id.

[68] Id. Senator Leahy also referred to allegations of FBI surveillance of other groups and individuals, including the Quakers and Glen Milner, which we discuss later in this report. Director Mueller stated that to his knowledge the FBI has not surveilled the Quakers. As discussed in Chapter Eight, we found no evidence that the FBI surveilled the Quakers during the time period of our review.

[69] The functions of the Director's Research Group include preparing briefing materials for the FBI Director, including materials used to prepare the director for congressional testimony.

> FBI agents have attended First Amendment protected activities when acting under all appropriate investigative authorities. For example, in November 2002, an agent took photographs of an individual at a peace rally, based on information directly related to an investigation. Upon further investigation, the individual in the photographs proved unconnected to the criminal matter under investigation, and the photographs were destroyed. No monitoring of First Amendment protected activities occurred.

Given the similarly of content and that it is dated a few days after the press response was issued, it appears that the press response was a source for the Director's Research Group document.[70] FBI officials told us they were unable to identify any individual who briefed the Director specifically about the Merton Center matter in advance of the hearing. Director Mueller told us that he has testified to Congress many times since the May 2006 hearing and he did not have a current recollection of who briefed him on the Merton Center surveillance. He said he could not recall the materials he may have reviewed when preparing for his testimony.

Director Mueller's testimony was not accurate for the same reasons the press response on which it was based was not accurate, as discussed above. However, we found no evidence indicating that Director Mueller was aware of the inaccuracy of the information that was provided to him and that was the basis for his testimony.

### 7. FBI Responds to Follow-Up Question From Senator Leahy (May and June 2006)

Soon after the May 2, 2006, Senate Judiciary Committee hearing, Senators submitted written follow up "Questions for Record" to the FBI. Senator Leahy's questions included four related to the FBI's alleged domestic surveillance of peace groups. Three of the questions related to the Merton Center. One question asked:

> You testified that the agents "were attempting to identify an individual who happened to be, we believed, in attendance at that rally." Please provide copies of *earlier* investigative memos that document the basis for the agents' belief that a person of interest in an International Terrorism Matter would be present during [Merton Center] leafleting activities on November 29, 2002.[71]

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[70] The Director's Research Group document does not identify the Merton Center as the protesting group or Pittsburgh as the site of the investigative activity described in the paragraph.

[71] *FBI Oversight: Hearing Before the* S. *Comm. on Jud.*, 109th Cong. 125 (2006).

The second question pertained to a February 26, 2003, FBI Letterhead Memorandum that referred to the Merton Center. We discuss this memorandum in the next section of this chapter. The third question asked whether the Director had referred the Merton Center matter to the OIG for review.

The FBI's Office of Congressional Affairs was assigned to prepare responses to the questions about the anti-war rally and the Letterhead Memorandum, although the Department of Justice Office of Legislative Affairs submitted the final responses to Congress. The responses were based on information the Office of Congressional Affairs received from the FBI's Counterterrorism Division (CTD).[72] As detailed below, the information provided by the CTD ultimately led to the submission of another inaccurate response to Congress.

### 8. The Counterterrorism Division Response

The CTD prepared a detailed 3-paragraph response to Senator Leahy's question about the Merton Center anti-war rally in a document that is dated June 5, 2006, and that was provided to the FBI's Office of Congressional Affairs. While the CTD's response was not provided to Congress, it influenced the final response that was submitted to Congress. The CTD response stated in relevant part:

> One agent from the Pittsburgh Division JTTF was sent to the November 29, 2002 public rally in Market Square in Pittsburgh, Pennsylvania to identify and conduct surveillance of Pittsburgh Division International Terrorism (IT) subject [Person B], who was involved in anti-war activities. The supervisor at the time claims that no specific written or verbal tasking was given to the agent. The agent recalls that his purpose on 11/29/02 was to identify and conduct surveillance of Pittsburgh Division's IT subjects involved in the anti-war activities going on in Market Square, to include [Person B]. The Thomas Merton Center has never been the subject of an investigation; however, IT subjects are believed to be associated with the Thomas Merton Center.
>
> [redacted]

[72] Typically, when the Office of Congressional Affairs receives questions for the record it distributes the questions to the appropriate FBI divisions best able to provide a response to the substance of the question. In this case, the Office of Congressional Affairs sent Senator Leahy's questions regarding the Merton Center surveillance and the Letterhead Memorandum to the CTD for a response.

Two photos of a single female were taken at the Market Street rally, and were subsequently destroyed after JTTF members were unable to identify an individual as a subject. The purpose of the [November 2002 EC] was to indicate that no further investigative activity was necessary as no Pittsburgh IT subjects were identified and no nexus to international terrorism was uncovered. The Merton Center was detailed in the communication to convey that the rally was a political event and not an activity that required further investigation.

However, the CTD response did not address the core request by Senator Leahy for investigative memorandums that predated the anti-war rally which documented the FBI's reasons for attending. As explained below, we believe that the response prepared by the CTD was inaccurate and misleading.

**a. Person B**

At the time of the Merton Center anti-war rally, Person B was the subject of an international terrorism preliminary investigation in the FBI's Pittsburgh Field Division. However, we found no evidence – either a witness or a document written before the rally – that suggested Person B was a particular focus of the Pittsburgh Field Division's surveillance at the anti-war rally.

Neither Berry nor Crosetti substantiated the assertion that Person B was the reason that Berry attended the event. As discussed above, Crosetti said she did not have a current memory of the instructions Berry was acting on when he attended the rally. After we received the CTD response from the FBI, we interviewed Berry again and asked him specifically if he went to the antiwar rally to see if Person B was attending. Berry told us he did not recall being sent to target anyone specifically, "let alone [Person B]." Although Berry added in his second interview that the possibility exists that those were the instructions he was given and no longer remembered, he said to the best of his recollection he was "not sent to target" Person B. He also said that he doubted he even knew who Person B was in 2002. In addition, Berry told us that he did not take a picture of Person B with him to the anti-war rally. He said:

> Knowing how I operate, even as a probationary agent, if I was going out on one guy, I would have brought a photo with me. I

remember distinctly looking at the [subject] book and trying to internalize all these different pictures and being overwhelmed.

Moreover, as noted above, Berry told us he took two pictures of a woman at the event. Person B was a male. We would not have expected that Berry would take pictures of the woman if he had been instructed to identify and conduct surveillance on a particular male subject.

Further, Berry did not report his activities at the anti-war rally in the Person B case file, as one would expect if he was asked to conduct surveillance on Person B. As a former CTD manager told us, one would expect the results of the surveillance activity, even if those results are negative, to appear in the file of the ongoing investigation relating to the target of the surveillance, and not in a zero file.

Daniel Sampson, the primary agent assigned to the Person B case, also told us he did not direct Berry to attend the Merton Center rally, did not know who did, and had no knowledge of why Berry attended the event.[73] Sampson said he first became aware of the November 2002 EC during his OIG interview when we asked him to review it. He said that if Berry had been directed to identify a particular subject at the event or was sent to conduct surveillance related to a pending investigation he would have expected that the results would be reported in the case file.

In addition, Alfred Rogers, the co-case agent assigned to the Person B case, told us he did not direct Berry to attend the Merton Center rally, did not know who did, and had no knowledge of why Berry attended the event.[74] Rogers said he first became aware of the November 2002 EC when he was contacted by the OIG for an interview. Rogers also told us that he served as Berry's training agent and if Berry had been directed to identify Person B at the event, Rogers would have expected Berry to report the results of the surveillance activities in the Person B file.

We were also unable to find any documents to support the key facts of the CTD response. We reviewed the entire Person B case file looking for precisely the document Senator Leahy requested – any investigative memorandum that predated the anti-war rally that would document the basis for the FBI believing that Person B or any other person of interest in an International Terrorism matter would be present during Merton Center leafleting activities. We found no such document.

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[73] Daniel Sampson is a pseudonym.

[74] Alfred Rogers is a pseudonym.

We found an October 2002 EC memorializing [redacted] of Person B that was conducted by the FBI agents assigned to his case. The EC did not describe any association between Person B and the Merton Center. Rogers told us that he does not recall if he learned during [redacted] of Person B whether he was associated with the Merton Center. Rogers said that he would not view such an association as a significant fact.

We found a few documents that associated Person B with the Merton Center, but each of these was dated after the rally, and we found no evidence indicating that the association identified in the document was known to the FBI before the rally. The earliest such document was dated July 10, 2003, 8 months after the rally. Moreover, when we showed these documents to Berry and Crosetti they said it did not refresh their recollections of their having any pre-rally knowledge of a link between Person B and the Merton Center.

Information learned by the FBI *after* the anti-war rally was summarized in the CTD response in a manner that created the misimpression that such information was known before the event and was the basis for the surveillance at the Merton Center. For example, the only documents in the Person B file stating that he was involved in anti-war activities and had been observed at rallies protesting the war in Iraq and the U.S. Government's National Security Entry Exit Registration (NSEER) were dated after the rally. The only pre-leafleting information in the file that even touches on Person B's anti-war protest activities is a notation of his "strong pro-Palestinian sentiment" and a collection of local newspaper articles that [redacted]

Moreover, we found no evidence to support the claim that international terrorism subjects "are believed to be associated with the Thomas Merton Center," except for the Person B link noted in *post-rally* documents. In response to our document request, the FBI did not supply us with any document identifying any association between the Merton Center and any other Pittsburgh subject of an international terrorism matter.

In sum, the CTD response to Senator Leahy's questions provided an entirely new version of the events surrounding the FBI's surveillance of the Merton Center rally. As with the prior versions, the witnesses and contemporaneous documents indicate this version of events was also false.

### b. Source of Information for the CTD Response

We attempted to determine how the CTD response was created and sourced. We provide the results of our investigation in this subsection. Again, because the FBI provided a detailed response regarding this matter after reviewing a draft of this report, we also address the FBI's assertions about the CTD response in the next subsection.

The CTD response was prepared by the CTD's Executive Staff from a draft written by the CTD's International Terrorism Operation Section II (ITOS-II), Iraq Unit. The Unit Chief at the time was Clarence Parkman.[75] On May 16, 2006, Parkman received an e-mail from CTD's Executive Staff requesting by May 22 a response to Senator Leahy's questions about the Merton Center. Parkman forwarded the e-mail to Dorothy Andrews, an ITOS-II Intelligence Analyst, and David Steele, her supervisor.[76] Steele then forwarded the e-mail to Kempler in the Pittsburgh Field Division, requesting that Kempler provide anything he had on the matter by the next day. Steele copied Berry on the e-mail to Kempler.

We interviewed Parkman before we received the e-mails described in this section. Although Parkman's name appeared on the CTD response, he told us he was not in any way involved in preparing it. However, the e-mail exchange and Andrews's testimony make it clear that the Unit Parkman supervised was in fact responsible for preparing a draft of the CTD response. Moreover, the database logs showed that minutes before Parkman received the first e-mail from the CTD executive staff he conducted one search using the search term "Thomas Merton Center."

We determined that after Kempler received the e-mail request from the CTD on May 16, he forwarded the e-mail to Crosetti, writing in the e-mail: "I cannot answer these questions. I just received the documents. Can you assist?"[77] Less than 3 hours later on May 16, Crosetti responded by e-mail that she had found from a search of FBI databases 38 documents that referenced the Merton Center. She then noted for international terrorism cases, "the one case that is highlighted" regarding the Merton Center is the Person B case and provided case opening dates and its pending status. Crosetti also stated in the e-mail response that she would provide copies of each of the documents, including the most recent annual summary of the Person B case, contained in a Letterhead Memorandum dated December 7, 2005. Her e-mail also stated:

> There was no investigation of the [Merton Center], only notations in various FBI program files re activities at the [Merton Center]. [Berry] had public access to the event at the Pavilion in Market Square, downtown Pittsburgh, PA. No specific written tasking was

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[75] Clarence Parkman is a pseudonym.

[76] Dorothy Andrews and David Steele are pseudonyms. Andrews had just been hired by the FBI a few months before the e-mail and was previously a graduate student.

[77] We found no indication that Kempler referred to the routing slip discussed above, which was dated February 8, 2006 (just a few months earlier), and which suggested that the reason Berry had attended the rally was because of Farooq Hussaini.

given re the event. To my knowledge, only one [Special Agent] was involved.

Crosetti copied Berry on this e-mail. When we showed Berry the e-mail chain, he said he did not recall it.

Crosetti told us that she included the information in the e-mail because it was information she found from her search of the database that was potentially relevant to answering Senator Leahy's question. She said that she viewed the information she provided in her email as raw data and not as an analysis or a conclusion that Person B was the target. She said she only "highlighted" the Person B matter because her search revealed documents associating him with the Merton Center.

Kempler forwarded the Crosetti e-mail to ITOS-II Supervisor Steele, stating that Crosetti had provided him "a pile of documents" and asking Steele if he wanted them. Steele responded to Kempler that he should hold on to the documents for now and that Steele would have ITOS-II Intelligence Analyst Andrews pull up the documents at Headquarters herself and contact Crosetti directly.

Later in the day on May 16, Andrews e-mailed Crosetti asking a few questions, including "do we know who was being investigated at the rally? – [Person B] . . . ?" Andrews told us that her file (where she found the e-mail chain described above) did not contain any further or responsive e-mails on this matter. Andrews told us she was unable to recall whether Crosetti responded to this e-mail. Crosetti told us she did not recall whether or how she responded to Andrews's question.

However, Andrews stated to us that someone in the Pittsburgh Field Division, probably Berry or Crosetti, had provided the information identifying Person B as the person who Berry was sent to identify at the anti-war rally, as stated in the first sentence of the CTD response.[78] Andrews said she was "fairly confident" the information came to her in an e-mail.[79]

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[78] Andrews said she recalled contacting Berry by e-mail and said that she thought Berry did not provide a lot of information because he had been "advised by [Kempler]" in some fashion. She also said she did not know what the nature of the advice was or whether it affected his ability to provide information.

When we showed Andrews the routing slip, she said she had not seen it before and she did not believe she ever heard during her work Farooq Hussaini's name mentioned as a person of interest at the anti-war rally. When we showed Andrews the press response she said she may have seen it and it may have been e-mailed to her.

[79] We requested all e-mails from the Pittsburgh employees connected with this matter for the relevant dates. However, the FBI provided none that pertained to this matter.

Berry told us that he did not know the source of the statement in the CTD response that he was sent to identify Person B because he had no recollection of being sent for that specific purpose. He also said the first sentence in the CTD response – that he was sent to the rally to identify and conduct surveillance of Person B – was not "wholly accurate" because he was sent to conduct surveillance on Pittsburgh subjects in general, not Person B in particular. He also said that "in reality, I was sent, I think, to get me out of [Crosetti]'s hair." Berry held open the possibility that the information he provided was used as the source of the first sentence in the CTD response because he would have said he was sent to identify multiple subjects, and Person B was one of the Pittsburgh subjects at that time. However, as noted above, Berry told us he did not take a picture of Person B with him to the anti-war rally and if he had been sent there to conduct surveillance on one individual he would have taken a photograph of the individual.

Crosetti told us that she did not remember receiving a telephone call from someone in FBI Headquarters regarding the Director's testimony, and if she had received such a phone call, she would remember it because she would have made certain to alert the Pittsburgh Special Agent in Charge.

We also showed Crosetti the May 16 e-mail chain containing the communications with FBI Headquarters regarding the Director's testimony. She told us she viewed her e-mail as simply responding to Kempler's request for basic information and she believed he was coordinating the Pittsburgh Division's response to the CTD. Crosetti told us the May 16 e-mail chain did not refresh her memory of any additional communications with Headquarters on the topic.

Kempler told us the only inquiry he recalled receiving from another FBI component was the one call from the National Press Office regarding the press response. When we showed Kempler the May 16 e-mail chain, he told us it did not refresh his recollection regarding any communications with the CTD on a response to Senator Leahy's questions.

As stated above, the e-mail that Crosetti sent on May 16 noted the Person B case, the one international terrorism matter which referenced the Merton Center. The December 2005 LHM that Crosetti referred to in the e-mail contains a sentence indicating Person B had been observed at rallies protesting the Iraq War and the National Security Entry Exit Registration. That sentence appears almost verbatim in the CTD response to Senator Leahy's question. Sampson, the primary agent on the Person B case, worked in the Pittsburgh Field Division until January 2007. He told us that he had no recollection of ever being contacted by anyone from the Pittsburgh Field Division or from FBI Headquarters regarding the November 29, 2002, surveillance activities

conducted by Berry.[80] We believe that Crosetti's May 16 e-mail was where the inaccurate suggestion that the Person B case was the target of the surveillance of the Merton event originated.

ITOS-II Intelligence Analyst Andrews wrote a draft of the CTD response, which she provided to us, that was substantially identical to the final version of the CTD response. Andrews said she showed the draft to her supervisor, Steele, and she then provided it to Parkman for review. Parkman said he had no recollection of this. Andrews said she does not believe the draft CTD response came back to her for further work after that point. She also said she does not recall whether the Pittsburgh Division ever reviewed any drafts of the CTD response.

In sum, we determined that the CTD response was another inaccurate description of the reason for Berry's surveillance at the Merton Center anti-war rally. The CTD response to Senator Leahy's question was based on documents dated several months after the event that were provided to the CTD by Pittsburgh Supervisory Special Agent Crosetti. In this version of the event, Person B was the target of the surveillance. Yet, although Crosetti highlighted the Person B case in an e-mail she sent to the CTD, her e-mail did not identify him as the target. Berry denied ever stating that Person B was the target of his surveillance, and Crosetti said she did not recall how she had answered Andrews's question about this. However, Andrews told us that she recalled that information confirming Person B's status as the target was provided by Pittsburgh, most likely in an e-mail.

### c. FBI Interpretation

After reviewing a draft of this report, the FBI agreed that the CTD response contained inaccurate statements but argued again that these errors were accidental, based on the FBI's following interpretation of events.

According to the FBI, when the CTD sent the Congressional Questions for Record to Pittsburgh Field Division attorney Kempler, he asked Pittsburgh SSA Crosetti for help. Crosetti conducted another database search, this time turning up 38 documents that she sent to Kempler, highlighting documents relating to Person B. According to the FBI, Crosetti repeated the error she had committed in connection with the routing slip, by failing to tell Kempler that she had no specific recollection of whether Person B was the target of the surveillance.

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[80] Rogers, the Person B co-case agent, retired from the FBI in December 2004. He told us he first became aware of Merton Center anti-war rally that Berry attended and the November 2002 EC when the OIG called him to request an interview.

Andrews, the CTD Intelligence Analyst assigned to the matter, asked in an e-mail to Crosetti whether Person B was the target of the rally surveillance. Andrews's file contained no written response. The FBI stated that "[i]t is reasonable to conclude that [Crosetti] did not respond" because Andrews would have saved any such response in her file. The FBI's argument suggests that Andrews must have simply inferred that Person B was the target when Crosetti failed to respond to her question, but that she failed to transmit the draft CTD response to Berry or Crosetti for review. The FBI asserts that this failure was not "best practice" but that Andrews had no motive to intentionally craft the CTD response to be misleading.

We do not agree that it is likely that Andrews, who was a new FBI analyst who had only recently completed graduate school, would have made the inference on her own that the target of the surveillance was Person B, without seeking confirmation. Indeed, the May 16 e-mail chain shows that Andrews specifically asked Crosetti for confirmation of this important detail. We do not agree with the FBI that the absence of a written response in Andrews's file indicates that she received no such response. Andrews specifically asked the question, "was Person B the target of the surveillance" and later drafted the CTD to indicate that he was. We believe that the more reasonable inference from this sequence is that someone from the Pittsburgh Field Division answered Andrews's question, "yes." This answer could have been provided orally, by telephone, or by an e-mail that Andrews did not save in her file.

Moreover, contrary to the FBI's assertion, Andrews specifically told us she received the answer she put in the draft response from someone in the Pittsburgh Field Division, although she said she could not recall whom. As the FBI recognizes, that answer – whoever provided it – was misleading because Berry was not in fact specifically targeting Person B for surveillance.

We were not persuaded by the FBI's interpretation attributing this inaccuracy to accident. First, by highlighting Person B's name in the documents she provided to CTD, Crosetti conveyed the clear impression that Person B was the actual target of the surveillance. If the problem was that Crosetti could not remember, and that the Person B version of events was her best reconstruction from the documents she found, she should have made this clear to Andrews, and the CTD response could have acknowledged this uncertainty. Moreover, if this had been the scenario, a simple check of this matter with Berry would have shown that this was not true. Again, the FBI contends that the error could have been the result of extraordinary carelessness on the part of the FBI employees involved in providing information in response to Senator Leahy's Question for the Record. However, we believe that a more realistic explanation is that someone in the Pittsburgh Field Division provided this version of events to Andrews because it provided a stronger justification for the FBI's surveillance than the actual facts. At the time the FBI was being criticized for this surveillance, and the true reason –

that Berry was monitoring the Merton Center anti-war rally in response to a "make work" assignment – was not helpful.

Moreover, there is another reason indicating that the errors in the CTD response were not accidental. The Question for Record that the CTD Response was addressing specifically requested information from *before* the Merton Center rally to show that the FBI expected a person of interest to be there. As explained above, the CTD response contained out-of-sequence information about Person B that the FBI did not learn until after the time of the surveillance. Citing these facts without acknowledging when they were learned created the impression that this information was developed prior to the rally and was part of the basis for expecting Person B to be present at the rally. The dates on which the FBI learned those facts would be apparent to anyone reviewing the documents that Crosetti assembled. We believe that this presentation of later-learned information about Person B also provides evidence of an effort to mislead.

The FBI also asserts that the fact that the Farooq Hussaini version and the Person B version were inconsistent indicates that the inaccuracies were unintentional. We agree that it is strange that the first time Crosetti was asked about the surveillance in January 2006 she provided a stack of documents pointing Fritsch and Kempler toward Hussaini, but that when she was asked again about the matter in May 2006 she provided a different stack of documents pointing Kempler and Andrews toward Person B. However, we do not believe that the inconsistency between the versions indicates that the inaccuracies were unintentional.

The CTD response contains language lifted nearly verbatim from the routing slip regarding other matters.[81] This shows that someone involved in developing the CTD response was aware of the routing slip version of events, which focused on Farooq Hussaini. There are several reasons that someone involved in preparing the CTD response could have realized the routing slip version could not be corroborated. For example, it is clear that someone involved in preparing the CTD response spoke to Berry. Based on our interview of Berry, we believe he would have rejected the suggestion that Farooq Hussaini was the target of his surveillance. Further, the persons involved in preparing the routing slip could have realized that there was no actual connection between Farooq Hussaini and the Dallas investigation. These factors would logically cause someone who was interested in providing a more favorable justification for the Merton Center rally surveillance to abandon the "Farooq Hussaini" version in favor of the "Person B" version, which had the

[81] The first paragraph of page 3 of the routing slip, relating to the Letterhead Memorandum discussed in Section III.A of this chapter, is reproduced almost verbatim in the last paragraph of the CTD response.

advantage of being partly accurate, in that Person B was in fact the subject of a Pittsburgh Field Division terrorism investigation. Therefore, we were not persuaded that the fact that the two versions were different was compelling evidence of an innocent error.

We acknowledge that the passage of time and the inconsistency and incompleteness of witness accounts made it difficult to determine with certainty whether the inaccuracies in the routing slip and the CTD response were intentional or accidental. We acknowledge that it is conceivable that these inaccurate reconstructions of events could have been the product of chain of events indicating extraordinary carelessness by several FBI employees involved in creating the inaccuracies. However, we believe the evidence suggests that it was more likely an effort to present a version of events that would provide stronger justification for the FBI Pittsburgh Field Division's surveillance of the rally than could be found in the true reasons for the surveillance.

### d. Final Response Sent to Congress

The CTD response was an internal document that was not released to Congress or the public. However, this response was used by an attorney in the FBI's Office of Congressional Affairs as the basis for the public response that went to the DOJ's Office of Legislative Affairs and that was ultimately sent to Congress in response to Senator Leahy's question.

As noted above, the central request from Senator Leahy was: "Please provide copies of *earlier* investigative memos that document the basis for the agents' belief that a person of interest in an International Terrorism Matter would be present during Merton Center leafleting activities on November 29, 2002." The final FBI response to this question stated:

> The investigation of the individual whose presence at the rally was anticipated is still ongoing. Consequently, we are not able to discuss this investigation further.

Because the final response was based on the CTD response, it was also misleading. The final response refers to "the individual whose presence at the rally was anticipated." Because Person B is apparently the "person of interest" referred to in the final response, the final response is inaccurate. As detailed above, the FBI did not have any evidence to suggest that any person of interest in an international terrorism matter would attend the Merton Center anti-war rally. Moreover, the evidence demonstrates that the Berry was not sent to the Merton Center rally specifically to look for Person B. Rather, this claim was an after-the-fact justification, based on a search of documents in 2006, not based on anything that occurred before the rally. Senator Leahy requested copies of "*earlier* investigative memos" documenting the basis for the agents' belief that

the person of interest would be present. An accurate response would have stated that "no such earlier memos exist."[82]

### B. OIG Analysis

In this section, we first analyze the FBI's conduct in attending the anti-war rally and creating and retaining the November 2002 EC. We then analyze the FBI's inaccurate and misleading descriptions of the matter in statements to the public and in response to Congressional questions.

#### 1. Issues Raised by the FBI's Attendance at the Anti-War Rally

The FBI's conduct in sending an agent to conduct surveillance at the Merton Center anti-war rally, and the agent's recording of information in an EC, raised several issues: (1) whether the FBI was monitoring the Merton Center or its members because of the Merton Center's anti-war advocacy; (2) whether the FBI's attendance at the event was authorized under the Attorney General Guidelines; (3) whether the agent's follow-up Internet research regarding the Merton Center and associated persons and organizations was authorized under the Attorney General Guidelines; and (4) whether the retention of information about the First Amendment activities of the Merton Center in the EC complied with the Attorney General Guidelines. We address each of these issues in turn.

##### a. Monitoring of First Amendment Activities

The synopsis line of the November 2002 EC prepared by Special Agent Berry following his attendance at the Merton Center anti-war rally stated: "To report results of investigation of Pittsburgh anti-war activity." This synopsis, together with other facts set forth in the EC, raised questions regarding whether the FBI was monitoring the First Amendment activities of the Merton Center or other protesters because of their opposition to the Iraq war.

We found the November 2002 EC extremely troubling on its face. It described no legitimate purpose for the FBI to attend the event. It created the strong impression that the FBI's reason for being there was to monitor the First Amendment activities of persons with anti-war views. It supplied no evidence or even suspicion that any criminal or terrorist element was associated with the Merton Center or likely to be present at the event.

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[82] However, the Office of Congressional Affairs attorney who prepared the response to Congress told us that she would not have confirmed or denied the existence of an earlier investigative memorandum because whether such a document exists is an aspect of a pending investigation that the FBI does not publicly reveal.

Berry told the OIG that the EC was poorly written and did not accurately portray the nature of his assignment that day. He stated that he was not busy that day and when he asked Crosetti (his supervisor) for work she instructed him to attend the event to identify any Pittsburgh Field Division terrorism subjects, and that in advance of this event he reviewed photographs of those subjects maintained in a binder in the office. He stated that after arriving at the event he realized he was unable to recall any of the faces he had reviewed with sufficient certainty to make any identifications. He photographed one woman who appeared to him to be of Middle Eastern descent handing out leaflets, and then returned to the FBI offices.

In assessing Berry's explanation for the surveillance, we attempted to determine whether the FBI had a basis to believe that any terrorism subjects would be present at the rally. We found no documents, witnesses, or other evidence suggesting that the FBI had identified any particularized reason at the time the anti-war rally took place to expect that any terrorism subjects would be attending the event.

Berry told us that although Crosetti might have explained the basis for her assignment to him, he could not recall what it was. Crosetti told us she had no current recollection of the reasons for the surveillance. After reviewing Berry's EC during her interview, Crosetti pointed to the discussion in the EC about a Merton Center-coordinated event at the Islamic Center of Pittsburgh, and stated that the link between the Merton Center and the Islamic Center of Pittsburgh might have been the basis for concluding that terrorism subjects would be present at the anti-war rally. However, we did not find any documents in FBI files suggesting that the FBI was aware of a link between the Islamic Center and the Merton Center or the rally *before* the event. In fact, Berry told us he learned that the Merton Center had coordinated the Islamic Center event *after* he returned from the rally, when he visited the Merton Center website. We found no pre-event FBI documents corroborating Crosetti's suggestion that the FBI's interest in the Islamic Center was any factor in the decision to send Berry to the anti-war rally.[83]

Although we found no corroboration for the notion that terrorism subjects would be present at the event, we also found no evidence that Berry was sent to the event to monitor the First Amendment activities of the Merton Center or anyone else because of their anti-war activities. We found no evidence that the FBI ever opened any kind of investigation in which the Merton Center was a named subject. We also found no evidence that the FBI's

[83] Berry's EC did not indicate that his purpose in attending the event was to identify terrorism subjects and that it did not report his failure to do so. Berry said he did not know why he omitted this information except that he was inexperienced at the time and that it was a "poorly written EC" that "does not capture exactly what was going on." Nevertheless, we found that Berry gave a credible account of the circumstances of his presence at the event.

attendance was part of any unofficial investigation of anti-war activity in Pittsburgh or that the FBI was focusing on the Merton Center or others because of their anti-war views. Additionally, we determined that no FBI employees searched the FBI's investigative databases for key terms such as "Thomas Merton Center" or the name of the Merton Center executive director in the month prior to or after the anti-war rally. We found no evidence that prior to the assignment the FBI had any investigative interest in the Merton Center at all; indeed, the very first reference to the Merton Center in any official FBI document provided to us was in the EC itself.

Taking all of the evidence together, we concluded that Berry was sent to the event pursuant to a casual, spur-of-the-moment assignment given in substantial part because Berry was a probationary agent with nothing to do on a slow work day – the day after Thanksgiving. We believe that Berry was told to look for terrorism subjects at the event, but we could not find any particularized basis for the FBI to believe that any terrorism subject would be in attendance. We believe that the surveillance was an ill-conceived "make work" assignment.

### b. Attendance at the Event

Part VI of the 2002 Attorney General Guidelines provided that "for the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally." The leafleting rally was open to the public and any member of the public could have done what Berry did: observe and speak with participants, and take photographs.

As discussed above, we found no evidence to suggest that the FBI had, at the time of the event, any basis to believe that any Pittsburgh terrorist subject was connected with the Merton Center or likely to be in attendance. Although subsequent FBI documents and testimony claimed that the assignment was an outgrowth of, or related to, a particular anti-terrorism investigation, the evidence we found contradicted these claims.

However, the "purpose" test for attending public events under Part VI of the 2002 Attorney General Guidelines did not require any demonstration of an articulable suspicion to attend the event. It simply required that the agent ordering the activity have an antiterrorism purpose in mind.

We concluded that this assignment fulfilled this undemanding requirement, since the assignment was designed at least in part to check whether any Pittsburgh Field Division terrorism subjects attended the public event. Although the possibility that any useful information was likely to result from this make work assignment was remote, the "purpose test" in Part VI of the 2002 Attorney General Guidelines was not violated. Therefore, we believe

that attendance at the event was not prohibited by the Attorney General Guidelines in effect at the time.

### c. Online Research

Berry stated that after returning from the event he conducted online research and reported the results in several paragraphs of the EC. The results included information about the Merton Center, its executive director, and its activities. The EC also reported information about an interfaith event that it stated was coordinated by the Merton Center at the Islamic Center of Pittsburgh.

Part VI of the Attorney General Guidelines, which addressed Internet research, permitted such activity "for the purpose of detecting and preventing terrorism or other criminal activities." We concluded that Berry's Internet research regarding the Merton Center and the Islamic Center was not authorized under this provision. If Berry had identified any Pittsburgh Field Division terrorism subjects at the event or if he had any other information at the time linking such subjects to the Merton Center – which he did not – his research might have been authorized as the collection of another piece of information for the purpose of detecting or preventing terrorism. But Berry could not identify any authorized purpose for conducting this research, and no such purpose is suggested in any contemporaneous documents. To the contrary, Berry told us that he collected the information after the event in order to have something to give his supervisor despite having failed to identify any terrorism subjects at the event.

### d. Retention of Information

The November 2002 EC contains information about the First Amendment activities of the Merton Center, including the contents of the Merton Center leaflets and information from the Merton Center website.

Part VI of the Attorney General Guidelines prohibited the FBI from retaining information obtained from visits to public events unless it related to "potential criminal or terrorist activity." When Berry returned from the event, he had no basis for suspecting that the photographs he took of a woman who appeared to him to be of Middle Eastern descent would help identify any terrorism subject who was present at the event.

In the end, Berry did not identify any terrorism subjects at the event and he collected no other information linking the Merton Center to terrorism. Therefore, the information he collected at the event (in the form of the Merton Center leaflet and descriptions of Merton Center leaflet distributors) did not relate to potential criminal or terrorist activity and should not have been retained. Similarly, the information from the Merton Center website (which was collected during the agent's online research, discussed in the prior

section), including the agent's characterization of the Merton Center as a "left-wing organization," should not have been recorded in the EC and retained in FBI records.

As described above, Berry's EC contained information about the Merton Center, including some First Amendment material. Berry (who was a probationary agent at the time) told us that he included this information because he had not identified any subjects, it was information he collected at the rally, and because he was trying to fill out his EC so that it would not be "just three sentences long." Reviewing the EC during his interview, Berry said it was "atrocious on many levels," "a horrible mistake," and "a terrible EC." We agree, and we believe that when the agent returned from what appeared to be a fruitless endeavor he went too far in seeking to show productive work. Berry did precisely what the synopsis line states – he reported on results of investigation of Pittsburgh anti-war activity. But there was no law enforcement basis for retaining such information. Crosetti also admitted to us that she should not have approved the EC or permitted it to become an FBI record.

Berry did comply with the prohibition on retention of information in Part VI when he discarded the photographs he took during the event after determining that nobody in the Pittsburgh Field Division could identify the person depicted.

Finally, it is important to note that there are not any applicable policies or guidelines that would prohibit the retention of the information in the EC or the photographs if they were collected today pursuant to an "assessment" under the 2008 Attorney General Guidelines.

### 2. Issues Raised by the FBI's Statements to the Public

In response to the controversy sparked by the FOIA release of the November 2002 EC about the Merton Center anti-war leafleting, the FBI made several statements to the public and to Congress that were inaccurate and misleading. The substance of these statements was that the FBI's purpose in attending the rally was to identify a particular subject or person of interest in an international terrorism investigation, on the basis of information that the FBI had received indicating that the person would be present at the event.

As discussed above, this was not true. The FBI's two different versions of why it had sent an agent to the Merton Center rally were the basis of inaccurate statements the FBI provided to Congress and to the public. These versions were inconsistent, were contradicted by Berry's statements, and were also contradicted by contemporaneous documents. In the first version, which was contained in a routing slip that was created in response to a FOIA request in February 2006, the alleged target of the FBI surveillance at the anti-war rally was Farooq Hussaini, who was supposedly a "person of interest" but not the

subject of any investigation. In the second version, which was generated by the CTD in response to congressional questions after FBI Director Mueller's testimony at a Senate oversight hearing, the alleged target was a different individual we have referred to a Person B, who was the subject of a Pittsburgh Division international terrorism investigation.

In the first version, the FBI Pittsburgh Field Division allegedly was targeting Farooq Hussaini at the Merton Center rally because of information developed in a terrorism investigation by the FBI's Dallas Field Division. We concluded this version was false. Berry told us he had never heard of Hussaini at the time of the rally. Berry and Crosetti both expressed doubt that Farooq Hussaini [redacted]. Moreover, there was no evidence that Berry or Crosetti even became aware of the Dallas case until years after the Merton Center anti-war rally.

This version of events was originally contained in the Pittsburgh FBI's February 2006 routing slip, prepared in connection with the FOIA request. Although the routing slip was prepared by the Pittsburgh Field Division legal staff, we were unable to determine with certainty the original source of the false account it contains, primarily because several witnesses told us they could not recall the underlying events. While it is conceivable, as the FBI now asserts, that the version of events contained in the routing slip reflected carelessness by several FBI employees, we believe the evidence indicates it more likely was an effort to reconstruct the events in a manner that would provide a stronger justification for the FBI's surveillance of the Merton Center rally than was in fact the case.

The Farooq Hussaini version of events was also the basis of a press response issued by the FBI in March 2006 after the Merton documents had been publicly released pursuant to the FOIA request. Pittsburgh Field Division attorney Stanley Kempler said he used the routing slip to brief the FBI's National Press Office about the incident after the Merton Center documents were released and the FBI's surveillance activities at the Merton Center rally had become controversial. In the subsequent press response prepared by the National Press Office, the FBI stated that the surveillance at the rally related to an "on-going investigation" (referring, we believe, to the Dallas investigation discussed in the routing slip) and that the FBI had received source information that there was a "link" between the investigation and the Merton Center. However, this was false and misleading for the same reasons as the routing slip on which is was based. Neither Berry nor his supervisor, Crosetti, was aware of the Dallas investigation at the time of the surveillance, and there was no suspected "link" between the Dallas investigation and the Merton Center rally in Pittsburgh. To the extent that the press response was referring to the "link" between Farooq Hussaini and the Merton Center, that connection was not known to the FBI until after the surveillance. However, we could not determine

with certainty who was responsible for the false account that the FBI provided to the public in the press response.

The false account of events given in the press response was used to prepare FBI Director Mueller for his testimony to Congress in May 2006. In response to a question from Senator Leahy, Director Mueller stated that the FBI's surveillance at the Merton Center event was "an outgrowth of an investigation," and that the FBI was "attempting to identify an individual, who happened to be, we believe, at the rally." This statement can be traced back to the press response (which was used to brief Director Mueller) and from there back to the routing slip (which was used to brief the National Press Office). As a result, the "individual" mentioned in the Director's testimony was most likely Farooq Hussaini, and the "investigation" that the Director referred to was most likely the Dallas antiterrorism investigation discussed in the routing slip.

For the same reasons the press response was inaccurate, the Director's testimony was inaccurate. Neither Berry (who conducted the surveillance) nor Crosetti (his supervisor) was aware of the Dallas investigation when the Merton Center rally took place. Moreover, we found no evidence that Farooq Hussaini was in any sense a person of interest to the Pittsburgh Field Division at the time, much less the subject of an investigation. Nor could we find any basis for the suggestion that the FBI expected Hussaini (or any subject or other "person of interest" in a terrorism case) to be present at the rally.

We do not believe that the Director intentionally misled Congress. We found no evidence that he received information that should have given him reason to doubt the accuracy of the briefing materials he relied on in preparing to testify. Yet, it is clear that FBI personnel took insufficient care to ensure that Director Mueller was given accurate information. In this case, the Director was poorly served by those responsible for the contents of the routing slip and press response.

The second inconsistent and inaccurate version of events that the FBI advanced for the surveillance at the Merton anti-war rally was advanced in the aftermath of the Director's May 2006 testimony. After the FBI received a follow-up question for the record from Senator Leahy, the CTD prepared an internal response that identified Person B, rather than Farooq Hussaini, as the FBI's target when it conducted surveillance at the Merton Center rally. Person B was the subject of a preliminary inquiry in Pittsburgh at the time, and it is therefore plausible that his picture would have been among those in the binder that Berry reviewed before attending the anti-war rally. However, Berry denied that Person B or anyone subject was the particular focus of his surveillance, noting that he did not carry a photograph of Person B to the event. In addition, we did not locate any contemporaneous document suggesting that the FBI had any reason at the time of the event to believe that Person B would be in attendance or that he had any connection to the Merton Center. Moreover, the

CTD response included several facts about Person B that were not documented by the FBI in the Person B file until after the anti-war event, but the CTD response implied that these facts were part of the basis for the surveillance. This was not true.

We determined that the Person B version of the explanation for the FBI's surveillance of the Merton Center leafleting originated with an e-mail exchange on May 16, 2006, between the Pittsburgh Field Division and the CTD unit that had been assigned to draft a response to Senator Leahy's question. After the CTD's inquiries about the matter were forwarded to Pittsburgh Field Division SSA Crosetti, she conducted a database search for documents referencing the Merton Center. She then highlighted Person B in an e-mail that was forwarded to the CTD, which we believe was the basis for the CTD response.

The Person B version of events was reconstructed after the fact and provided a version of events from available information that was consistent with the Director's testimony. Yet, this account was inconsistent with the Farooq Hussaini version of events, which was the original basis for the Director's testimony. Unlike the Farooq Hussaini version, the Person B version may have had a strand of accuracy in it, since Person B (unlike Hussaini) was in fact the subject of an FBI investigation at the time. However, we found no evidence that this investigation was the reason Berry went to the Merton Center rally. Moreover, this account was misleading in that it cited information that was not documented in the Person B file at the time of the anti-war rally and suggested Person B was the singular focus when in fact that was not the case.

The CTD sent its response to the FBI's Office of Congressional Affairs, which prepared a formal response to Senator Leahy declining to provide the requested information because "the investigation of the individual whose presence was anticipated is still ongoing." This response was also misleading. The "individual" referenced in the Office of Congressional Affairs response was Person B. But as discussed above, there is no evidence that Person B's presence at the anti-war rally was "anticipated" by the FBI.

In short, we found that the FBI made a series of misleading and inaccurate statements to Congress and the public about the circumstances surrounding the Pittsburgh Field Division's surveillance of the Merton Center anti-war rally.

In fact, the true reason for the FBI's surveillance of the Merton Center's anti-war rally was that a probationary agent was sent to the event on an ill-conceived, spur-of-the-moment assignment given to him on a slow work day, and was told to look for terrorism subjects. Finding none, he attempted to document his efforts by writing an EC that resulted in the improper retention of information that was not relevant to any criminal or terrorist investigation.

The FBI's subsequent public statements about the incident were based on inaccurate after-the-fact reconstructions of events, and claimed stronger justification for the surveillance than was in fact the case.

## III. Other FBI Activities Related to the Merton Center

### A. The 2003 Pittsburgh Field Division Letterhead Memorandum

#### 1. Facts

The FBI's FOIA release of Merton Center documents also included a Letterhead Memorandum (LHM) dated February 26, 2003, and titled, "International Terrorism Matters."[84] The LHM stated: "Pittsburgh Division Joint Terrorism Task Force (JTTF) investigation has revealed the following information of which your agency may already be aware." It then provided contact information for the Merton Center and stated that it "has been determined to be an organization which is opposed to the United States' war with Iraq." The LHM stated that a review of the Merton Center website revealed a call for "[a]ll who desire peace and an end to the war" to gather at the Federal building in downtown Pittsburgh "when the United States begins war with Iraq." The LHM quoted from the website the details of the anticipated protest that was to include an interfaith prayer vigil at noon, and at 5 p.m. a rally "and possible civil disobedience for those prepared to do this."

Next, the LHM described national and regional anti-war protest events promoted by another organization that had previously occurred on February 15, 2003. The past event information appears also to have been acquired from the Merton Center's website. The LHM concluded by stating that this information was provided "for your use and any action deemed appropriate."

We were unable to determine the origins and author of the February 2003 LHM. We were also unable to determine to whom the LHM was sent, or whether it was distributed outside the Pittsburgh Field Division. The LHM bears no signature, initials, or routing information. It did not have a file number assigned to it. The LHM was on an FBI form used to disseminate information to other law enforcement agencies, but it did not identify its intended recipients.[85]

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[84] The LHM is attached as Appendix D. According to the FBI, an LHM is a formal document typically used to provide information to an outside agency.

[85] The LHM contains a disclaimer stating: "This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency."

As discussed in the prior section, we obtained a "routing slip" dated February 8, 2006, prepared by the Pittsburgh Field Division Chief Division Counsel's office in response to the FOIA request. The routing slip "strongly urge[d]" the FBI's Record Management Division (RMD) not to release the LHM on the grounds that it did not appear to be an "agency record."[86] The routing slip stated that the LHM "contains no author, no file number, and contains no marking indicating supervisory approval for entering into any FBI record keeping system." The routing slip also stated that the LHM gave the wrong impression that the Merton Center "was the subject of an FBI investigation involved in international terrorism matters." In describing the background for the LHM, the routing slip stated:

> The source of this document appeared on a stenographer's computer hard drive. The Pittsburgh Division was unable to identify the author of this document. Attempts to locate a file associated with this document were negative. The Pittsburgh Division believes that this document could possibly have been a draft that was never approved for filing.

In the March 2006 press response that primarily addressed the leafleting event, the FBI commented on the February 2003 LHM. The press response stated that the LHM "was actually a draft which was never finalized – nor made a part of an FBI file." It also stated that the "draft was retrieved from a work file and processed under FOIA as part of the ACLU request."

We asked the FBI to provide the "work file" referred to in the FBI's press response but were told that there is no work file associated with the LHM, consistent with the routing slip's assertion. The FBI also stated in its response to our request that the LHM was located on a stenographer's computer, but the Pittsburgh Field Division was unable to identify the author.

At the May 2006 Senate Judiciary Hearing, Director Mueller was not asked about the February 2003 LHM. However, one of Senator Leahy's written follow-up questions addressed the LHM and requested detailed information about the investigation referenced in the LHM. The FBI's response stated:

> In response to the FOIA request the FBI conducted a manual search beyond its record system for all information responsive to the request. The 2/26/03 document was discovered during the search of a stenographer's computer hard drive for responsive information. This document identifies no author or file number

[86] The routing slip cited the case law standards for determining what constitutes an "agency record." We assume that the RMD considered the applicable legal standards before releasing the LHM. We did not analyze this question.

and contains no markings indicating supervisory approval for entering into any FBI record keeping system. The Pittsburgh Division where the document was located was unable to identify the actual author or locate a file associated with this document. The document could possibly have been a draft that was never approved for filing. As a loose document it could be retrieved only by someone with access to the computer on which it had been saved.[87]

We interviewed the FBI stenographer whose computer contained the LHM. In a June 2005 e-mail from the stenographer to the Chief Division Counsel paralegal that coordinated the FOIA document collection for the Pittsburgh Field Division, the stenographer identified a Pittsburgh Field Division Special Agent as the author of the LHM. The stenographer told us she believed she identified this agent as the author from a review of her logs that at the time recorded information about her typing work, including the name of the person making the typing request. However, she said that given the high volume of her typing work, she had only a vague recollection of having typed the LHM and did not have a current memory of who requested that she type it.

When we interviewed the agent that the stenographer identified, he denied that he was the author of the LHM. He said that at the time of the February 2003 LHM he was the Pittsburgh Field Division's JTTF coordinator and also worked on investigations in the domestic terrorism squad. The agent said he believed it was possible the LHM may have derived from source reporting that may have prompted an agent to review websites and obtain the information in the LHM. However, he said he was not aware of any investigations that were focused on or would have affected the Merton Center in any way.

The LHM was titled "International Terrorism Matters." The supervisor of the JTTF's international terrorism squad at the time of the LHM was Susan Crosetti, the supervisor who approved Berry's November 29, 2002, EC that is discussed in the prior section. When we showed Crosetti the LHM, she told us she did not know who drafted it but said she believed it may have been titled international terrorism because the person who drafted it may have worked on that squad. She said that the LHM would only have been distributed outside the FBI with supervisory approval, and she said she did not sign it. Crosetti told us after reading the LHM that she believes it was probably drafted to alert local law enforcement about potential civil disobedience, what she characterized as "situational awareness in regards to the safety of participants and also the public." She said that the language in the LHM stating that

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[87] FBI Oversight: Hearing Before the S. Comm. On Jud., 109th Cong. 126 (2006).

"investigation has revealed" certain information about the Merton Center was just a generic statement for this type of document.

When we asked the Chief Division Counsel (CDC) about the LHM, he told us that like Berry's November 2002 EC, it was a document that he "did not like." He said that it was possible that the reference to potential civil disobedience at the federal building may make it a federal crime, but he questioned the connection to international terrorism and called that a "stretch." The CDC said that the LHM may have been appropriately intended to alert local officials to potential civil disobedience but he said he would not have reduced it to writing and the information about a potential disturbance would better have been communicated orally. He said:

> . . . as far as antiwar stances and all this other kind of stuff, just say hey there is going to be an event that there may be destruction of property or something or you know disruption of traffic or whatever may be relevant to the local law enforcement entity, but to put all of this stuff in there about you know the background of it and then tie it in with international terrorism? No. It is inappropriate.

We also showed the February 2003 LHM to four other agents and supervising agents who were on the JTTF in Pittsburgh at the time of the LHM. Each one said they did not know who drafted the LHM. Another agent who was not on the JTTF but worked in Pittsburgh at the time also told us he did not know who drafted the LHM.

### 2. OIG Analysis

The language in the LHM indicated that a JTTF "investigation has revealed" certain information about the Merton Center, including that it "has been determined to be an organization which is opposed to the United States' war with Iraq." As the routing slip acknowledged, the LHM created the impression that the Merton Center was the subject of an international terrorism investigation. This was not true. In addition, the LHM contains information about protest activity without stating what, if any, terrorist acts had occurred or might occur. Our investigation could not identify the person who drafted this inaccurate LHM or determine its source and what prompted it.

However, we did not find any evidence that the Pittsburgh Field Division had in fact opened an investigation of the Merton Center or that it made a determination that the Merton Center was an organization opposed to the war. We found no other documents connected to the LHM. The November 2002 EC, uploaded 3 months earlier, similarly focused on the Merton Center's antiwar activities, but we found no indication that the 2 documents were related or part of a coordinated focus on the Merton Center. Berry and Crosetti, the agent and

supervising agent listed the November 2002 EC, denied any knowledge of the LHM and we found no evidence to contradict their claims.

We found no evidence that this document was ever actually disseminated. It bore no signature, supervisory markings, or the name of intended recipients. In short, we concluded that the LHM was an inaccurate document that was not approved or disseminated.

## B. Surveillance Relating to the 2003 Miami Free Trade Area of the Americas (FTAA) Meeting

### 1. Facts

From November 16 to 21, 2003, the Free Trade Area of the Americas (FTAA) Eighth Ministerial Meeting took place in Miami, Florida. Attending this meeting were trade ministers from the United States and other Western Hemisphere countries. Earlier international trade meetings had drawn anti-globalization protesters, some of whom had participated in forceful or violent protest actions, including the protests at the 1999 World Trade Organization (WTO) Ministerial Conference held in Seattle, Washington.

In August 2003 the FBI conducted surveillance of a meeting organized by the Merton Center and others in Pittsburgh relating to protests being planned for the FTAA Miami meeting. In this section, we examine the FBI's conduct in connection with that activity.

#### a. Special Events Case Opened

To prepare for the FTAA Miami meeting, the FBI Miami Field Division opened a special events case. An April 4, 2003, opening EC stated that similar events had historically drawn large scale demonstrations, both by peaceful demonstrators and by individuals or groups who wanted to disrupt the meetings. The EC stated that the FTAA Miami Meeting was expected to attract an estimated 70,000 demonstrators.

Documents in the FBI's special events file also stated that groups and individuals may plan violent protests at the FTAA Miami meeting, including the same individuals or groups who participated in the 1999 WTO Seattle protests. A July 8, 2003, EC summarized intelligence the FBI received, including threats from anarchist groups to "use of puppets (posters on a stick) to attack front line riot police, and use of Molotov cocktails." Another document in the special events file stated that the FTAA Miami Meeting would be the first United States

hosted trade event since the 1999 WTO Seattle Conference and could become a terrorism target in an attempt to embarrass the United States.[88]

In a July 26, 2003, EC, the FBI's Special Events Management Unit, designated the FTAA Miami meeting a SERL III event. The MIOG, Part 1, § 300-1(4), describes SERL III events as those for which FBI Headquarters would support only limited augmentation of field division resources tailored to the actual event. The July 2003 EC stated that "although no specific threat information had been received at this time the attractiveness of the event makes it a potential target for terrorists or those individuals wanting media attention for their cause."[89]

The United States Trade Representative was selected to lead the United States delegation. In addition it was expected that the United States Secretary of Commerce would attend. The FBI's operation order stated that President George W. Bush might make an appearance at the FTAA Miami Meeting.

### b. Domestic Terrorism Full Investigation Opened

In addition to opening the special events case, the FBI Miami Field Division opened a full investigation on unknown subjects and the anti-FTAA anarchist movement in South Florida under the classification for an act of terrorism by domestic terrorists. The July 21, 2003, opening EC stated that the FTAA Miami meeting was expected to attract local anarchists and "members of well established domestic terrorist groups such as ALF/ELF will also participate in the more violent demonstrations." The EC reported that local undercover officers had made significant inroads into infiltrating local anarchist groups "whose agendas include violence aimed at the FTAA meeting

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[88] The special events file contained many references to the 1999 WTO Seattle protests. For a detailed factual recitation of the protests and the legal claims which followed, see *Menotti* v. *City of Seattle*, 409 F. 3d 1113 (9th Cir. 2005).

[89] The day before the start of the FTAA Meeting in Miami in November 2003, the FBI issued an "Intelligence Bulletin" to law enforcement agencies stating that many protesters expected to attend the FTAA were "openly planning to disrupt the conference through violence rather than merely conducting organized demonstrations." The Bulletin requested law enforcement agencies to forward any information they obtain "regarding possible terrorist threats or threats of violent or destructive civil disturbance directed against the FTAA." In response to a complaint, the Department of Justice Office of Legal Counsel (OLC) reviewed the constitutionality of the Intelligence Bulletin and a similar one the FBI had issued the previous month for another large scale demonstration. OLC stated that the bulletins limited reports to potentially illegal acts or threats of violence, and they "were limited to criminal activity that falls outside the First Amendment . . . ." OLC concluded that, "[g]iven the limited nature of such public monitoring, any possible 'chilling effect' caused by the bulletins would be quite minimal and substantially outweighed by the public interest in maintaining safety and order during large-scale demonstrations." Memorandum for Glenn A. Fine, Inspector General, from Jack L. Goldsmith, Assistant Attorney General, Office of Legal Counsel, Re: Constitutionality of Certain FBI Intelligence Bulletins (Apr. 5, 2004).

in Miami." The EC stated that the undercover officers were able to identify "local anarchist leaders, local meeting locations, as well as specific plans for importing weapons in the security zones and tactics to be employed . . . ." The EC also stated that public source information was monitored daily, resulting in the identification of other cities in which individuals are recruited to attend and disrupt the FTAA meetings.

### c. Investigative Activities Relating to the Merton Center

On July 25, 2003, the FBI Miami Field Division sent an EC to the FBI Pittsburgh Field Division reporting that an "Anti-FTAA Consulta" (conference) would be held in Pittsburgh from August 29-31, 2003, and hosted by the Pittsburgh Organizing Group (POG) and the Merton Center, for the purpose of recruiting activists to travel to Miami to disrupt the FTAA meetings. The EC attached Merton Center and POG website materials stressing the planned use of "direct action" to disrupt the FTAA. Merton Center website material stated:

> Jail: There will be a wide variety of tactics employed by groups opposed to the FTAA meetings. Some of these will likely involve the possibility of arrest. Because of this we are making arrangements to make sure that anyone arrested will have a way back to Pittsburgh. We Will Not Leave Anyone Behind!

Another Merton Center web posting was a call to action against the FTAA, making reference to the derailing of the 1999 WTO meetings in Seattle and stating that at the FTAA Miami meeting the "confrontation will be decided in the streets and the meeting rooms of Miami, and everything is at stake." POG web material included a call to "Smash the FTAA – Call for a Padded Bloc in Miami."[90] It stated: "[t]he goal of global justice movement in Miami must be to materially disrupt the summit to such a degree that it is impossible to continue any negotiation." It also stated the August 29-31 conference in Pittsburgh would continue the discussion among groups on what they can do to prepare for the FTAA meetings and "obtain the training and materials necessary to make" the FTAA protest a success.

The FBI Miami Field Division's July 2003 EC requested that the FBI Pittsburgh Field Division collect intelligence related to Merton Center and POG efforts to recruit individuals to travel to Miami to disrupt the FTAA meeting. Specifically, the Miami Division requested that Pittsburgh conduct surveillance at the conference to "collect tag information and take photographs of individuals in attendance."

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[90] The POG material described a Padded Bloc as "a contingent of people protected from police violence through the use of padding, shields, banners, and/or other materials."

We did not find any evidence in FBI files indicating that Pittsburgh Field Division personnel conducted the requested surveillance. However, according to FBI documents, the Miami Field Division sent three JTTF members to Pittsburgh to monitor the conference to learn what "violent direct actions" might be planned against law enforcement during the FTAA, to gather intelligence on "potentially destructive individuals," and to identify Miami-based subjects in attendance.

According to a post-surveillance report, when the Miami Field Division JTTF members arrived in Pittsburgh in August 2003, they met with a detective from the Pittsburgh Police Department, who gave them a driving tour of the relevant locations for the conference, including the Merton Center. The detective informed the JTTF members of the location where all the "direct action" techniques would be discussed. The detective also drove the JTTF members by the home of Nicholas Herman, who was identified as one of the POG's most vocal members, and they also pointed out another individual, Arnold Philips, who was identified as one of the POG's leaders. Both individuals had publically stated they would attend the November FTAA meeting in Miami. The detective also provided the JTTF members with information on 11 POG members, including biographical information on Herman and Philips.[91]

The next day, the JTTF members and an agent from the FBI Pittsburgh Field Division conducted surveillance near the location where the POG direct action discussions took place. The agents took photographs and video during their surveillance, presumably of individuals entering the building. The file does not indicate that the FBI conducted any surveillance of the meetings that the Merton Center hosted at its location.

A Miami Field Division Division EC dated November 17, 2003, contained information describing a short-term lease entered into by the Merton Center for space in a Miami building for use during the FTAA meeting. The EC provided descriptions and some identifying information for the three individuals who appeared at the lease signing, presumably representing the Merton Center. A subsequent EC described information the FBI had received indicating that the space would be used as a clinic for protesters who might be injured during the anti-FTAA demonstrations. One of the individuals present at the lease signing was reported to have been teaching first aid techniques to other "anti-FTAA subjects" in the leased space. Another EC indicated that the Merton Center and another organization had secured a 27,000 square foot space in a different

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[91] Philips and Herman are pseudonyms. The Pittsburgh Field Division would later open a preliminary inquiry on Philips and Herman in connection with their participation in the FTAA meeting. We discuss these preliminary inquiries, which included FBI attendance at Merton Center meetings, in Section C of this chapter.

location in Miami. The information reported in these ECs was collected during the FTAA meeting and retained in the FBI Miami Field Division's files in both the special event file and the act of terrorism full investigation file which had been opened in relation to the FTAA meeting.

The FTAA meeting took place as scheduled in November 2003, resulting in numerous local arrests for a variety of offenses including unlawful assembly, disorderly conduct, carrying a concealed weapon, battery on a police officer, and, in one instance, inciting a riot. No federal prosecutions resulted.

### 2. OIG Analysis

#### a. Predication

We concluded that there was sufficient predication for the FBI to open a special events case relating to the Miami FTAA meetings. Given the events connected to the 1999 WTO meetings in Seattle, the fact that high-level officials (including possibly the President) would be in attendance at the Miami FTAA meeting, and the threat information received by the FBI, the FBI believed that the Miami FTAA meetings represented an attractive target for a terrorist attack.

We also examined the predication for the domestic terrorism investigation initiated in Miami because the FBI conducted surveillance activities of a Merton Center sponsored conference in Pittsburgh in connection with the Miami investigation. The 2002 Attorney General's Guidelines in effect at the time provided that the FBI may open a full investigation "where the facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed." We were hindered in our analysis of the predication for the Miami domestic terrorism investigation because the FBI Miami Field Division failed to specify in the opening EC the facts and circumstance meeting the standard of reasonable indication for a federal crime. Although we believe that there was evidence that provided a reasonable indication that protesters would commit direct actions that might include violations of state or local laws regarding trespassing, vandalism, resisting arrest, or obstructing police, it was not clear what federal criminal statute the FBI relied on in opening this investigation.

We found a document in the Miami case file indicating that the Miami FBI Chief Division Counsel had concurred with the surveillance of a similar conference in a different city on the basis that the activity would violate 18 U.S.C. § 231, relating to civil disorders. Among other things, this statute prohibits "commit[ting] or attempt[ing] to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or

the conduct or performance of any federally protected function." The term "civil disorder" is defined as "any public disturbance involving acts of violence of assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual." 18 U.S.C. § 232(1).

We believe that the FBI could have articulated a "reasonable indication" that the unnamed subjects, potentially including protesters being recruited at the Pittsburgh conference hosted by the Merton Center and POG, would violate the civil disorders statute, 18 U.S.C. § 231. In light of the types of direct action protests previously used in Seattle and those advocated on the POG website, the FBI believed that protesters would attempt to impede law enforcement (such as through the use of a Padded Bloc), in a manner that would obstruct the Miami FTAA meeting, which was likely a "federally protected function."[92] Planning for obstruction of the November 2003 FTAA in Miami, including through confrontations with police, was a goal stated at the August 2003 conference held in Pittsburgh about the planned Miami protests. In addition, there was an indication that the protests could fit the definition of a "civil disorder" due to the history of the prior direct action protests in Seattle involving significant property damage. As a result, we believe that the FBI's Miami investigation could have been adequately predicated, although the FBI's Miami Field Division did not adequately describe the predication in its EC.[93]

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[92] Under 18 U.S.C. § 232(3), the term "federally protected function" includes "any function, operation, or action carried out, under the laws of the United States, by any Department, agency, or instrumentality of the United States or by an officer or employee thereof."

[93] The Attorney General's Guidelines on "Reporting on Civil Disorders and Demonstrations" were in effect from 1976 until they were repealed and partially incorporated into the 2008 guidelines. Two FBI OGC attorneys we interviewed told us it was their interpretation that the Guidelines required the FBI to request Attorney General approval to open an investigation under the federal riot statute, 18 U.S.C. § 2101, and the civil disorders statute, 18 U.S.C. § 231. The Miami investigation was not explicitly opened under the civil disorders statute, and it appears that no such approval was sought. In July 2008 the DOJ Office of Legal Counsel (OLC) sent an informal opinion to OGC that stated that the Demonstration Guidelines do not require Attorney General approval to open an investigation under the riot statute or the civil disorders statute. However the OLC attorney also said that "as a prudential matter" the FBI should consider requesting such approval before initiating investigations under these statutes. The 2008 Attorney General's Guidelines repealed the Demonstration Guidelines and requires the approval of the Attorney General, Deputy Attorney General, or the Assistant Attorney General for the Criminal Division only when the FBI collects information relating to actual or threatened disorders to assist the President in determining whether, pursuant to 10 U.S.C. § 331-33, "use of armed forces or militia is required and how a decision to commit troops should be implemented."

### b. Investigative Techniques

For similar reasons, we concluded that the Attorney General's Guidelines and FBI policies allowed the FBI to conduct surveillance at the Merton Center-sponsored conference in Pittsburgh. The FBI had a factual basis for believing that individuals who may have been planning to disrupt the Miami FTAA meetings would be in attendance at the Pittsburgh conference. The Merton Center and POG website material promoting the conference recruited persons to conduct direct actions that might violate federal law. The Merton Center website material indicated that some protesters at the FTAA would be using tactics likely to result in arrests, and that the Merton Center would ensure that arrested individuals would have transportation back to Pittsburgh.

As discussed in Chapter Two, the 2002 Attorney General's Guidelines stated that the choice of investigative techniques in an investigation is a matter of judgment and the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Further, FBI policy stated that surveillance coverage may be used to "identify and/or locate unknown subjects, victims, witnesses and locations." MIOG, Part 2, § 9-1(1)(a). The file does not indicate that the FBI conducted surveillance of the meetings held in Pittsburgh at the Merton Center building. Instead, the FBI's surveillance was focused on the location where the POG was hosting sessions on direct action disruption techniques.[94]

While not calling for violence, the Merton Center website materials stated that it would provide support to individuals who might be involved in protest activities leading to their arrest. The FBI believed that some protesters who would seek the assistance of the Merton Center might themselves have engaged in violent acts. The gathering of information about the Merton Center's lease therefore had some nexus, albeit remote, to the law enforcement mission focused on special event security and the collection of intelligence on potentially violent protesters.

## C. Pittsburgh FBI Investigations of Pittsburgh Organizing Group (POG) Members Meeting at the Merton Center 2004 – 2005

We determined that the FBI's Pittsburgh Field Division conducted investigative activities relating to individuals associated with the Pittsburgh

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[94] The special events and the full investigation domestic terrorism files, which were voluminous, contained brief references to the expected attendance of and location of Greenpeace at the FTAA meeting. One EC in the full investigation file reported information received from local law enforcement about the attendance of two PETA members at an anti-FTAA "direct action" training camp. We concluded that the retention of this information was pertinent to the FBI's special events mission and not based solely on the exercise of First Amendment rights.

Organizing Group (POG), a self-described anarchist group that the Merton Center has publicly identified as an "affiliate." Some of these individuals were also allegedly associated with the Merton Center or attended meetings at the Merton Center. We examined the Pittsburgh Field Division's activities with respect to its investigations of these individuals.

### 1. Facts

#### a. The Opening ECs

A few months after the November 2003 Free Trade Areas of the Americas (FTAA) meetings in Miami, the Pittsburgh Field Division opened two preliminary inquiries on three individuals believed to be active members of the Pittsburgh Organizing Group (POG). The opening Electronic Communications (EC) for the investigations were dated January 8, 2004, and February 4, 2004. The January 2004 opening EC named Nicholas Herman as a subject and stated he was believed to be the most "vocal/active" member of the POG and its leader. The February 2004 opening EC named Arnold Philips and Terry Waterman as subjects, "dba" (doing business as) the POG.[95] The FBI opened the preliminary inquiries under the classification for an act of domestic terrorism.

Both ECs referenced the Miami Field Division's pre-FTAA meetings domestic terrorism investigation, described above in Section III.B, regarding anarchist groups and individuals from Pittsburgh who allegedly planned to travel to Miami to disrupt the meetings and potentially engage in violence or criminal activity. According to one of the ECs, "Miami reported on 9/18/2003 that POG intended to send approximately 300 individuals to the Miami area Financial District for the FTAA event and to establish a 'padded bloc' during the event."

The opening ECs provided the following additional information on the three subjects. Philips and Herman were identified as active members of the POG by the Miami Field Division during its FTAA investigations. The January 2004 opening EC stated that Herman had a prior arrest for failure to disperse, disorderly conduct, and obstruction of traffic during an anti-war protest held in Pittsburgh on March 20, 2003.

The February 2004 opening EC also stated that Philips and Waterman had attended a workshop organized by a different protest group in another city in October 2003 to discuss the then-upcoming FTAA protest in Miami. According to FBI files, the other group (not POG) was planning to stop the FTAA meetings through demonstrations and infiltration of the meetings, if

[95] Herman, Philips, and Waterman are pseudonyms.

possible. The group was also preparing for the possibility that its members would be arrested in Miami. FBI files indicated that Waterman had been seen counter-demonstrating at a white-supremacist rally and had been identified as a member of an anti-racism group that was in the past "known to associate" with an anarchist group that "advocates societal change through any means necessary, including armed conflict." The opening EC reported that Philips and Waterman were observed at that event exiting a vehicle with a particular license number that the Pittsburgh Field Division later determined was not an active vehicle registration. FBI files indicated that Waterman had no criminal record, but that in view of his activities and group affiliations, the FBI believed that he was a member or an associate of the anarchist group.

The EC stated that an Internet search on the POG web site revealed that POG was scheduling a "Global Day of Action against War and Occupation" on March 20, 2004, in Pittsburgh. The EC described the information provided on the POG's website about this protest, including that the event would include "autonomous direct actions, teach-ins, tabling, video showings, vigils and a variety of other events."[96] According to the EC the highlight would be a "major march and rally in the neighborhood of Oakland, PA." The EC listed 10 organizations endorsing the march, including the Merton Center.

The Pittsburgh Field Division agent who served as the case agent on one of the preliminary inquiries told us that these investigations were opened at a time when the Domestic Terrorism squad was wrapping up another substantial investigation, "so work is light is what I'm saying. . . . So we are looking for work, which is why folks in POG even get on the radar." However, the Supervisory Special Agent (SSA) who supervised the preliminary inquiries denied that this was a factor in opening the ECs.

Another SSA who approved the ECs acknowledged that there was a lag of several months between Pittsburgh's receipt of the information predicating the preliminary inquiries and the opening ECs. He said the FBI had "hotter priorities" at the time, which may have explained the delay.

We asked the case agent who was assigned to one of these preliminary inquiries, as well as two SSAs with supervisory responsibilities for the cases, to explain what potential federal crimes could serve as the predicate for the preliminary inquiries. The case agent and both of the supervisors told us that a major factor was the publicly stated interest of the POG or its members to engage in "direct actions" as part of their protests. One supervisor stated that "direct action" was a "code word" used by protesters for conduct that "is often,

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[96] The FBI was authorized to conduct Internet research on POG for the purpose of preventing or detecting terrorism pursuant to Part VI.B.1 of the 2002 Attorney General's Guidelines, discussed in Chapter Two.

but not limited to, criminal activity that destroys property or causes economic loss in furtherance of ideological goals. Criminal direct actions have included vandalism, arson, attempted arson, as well as threats and assaults." He stated that the POG website referenced direct action, which he took to mean "they are planning on engaging in criminal activity which will be in violation potentially or possibly in violation of a federal statute." The supervisors identified arson, attacks on military recruiting centers or other government facilities, and bombings as types of "direct actions" that might violate a federal statute. However, neither the opening ECs nor any of the agents we interviewed identified any direct link between the POG and such acts, although both supervisors told us that the POG's advocacy of direct action raised the possibility that some members might be planning such acts.

Material on the POG website that we recently reviewed stated that POG "utilize[s] a diversity of tactics, which have typically included pickets, protests, sit-ins, street theatre, conferences, civil disobedience and non-violent direct action such as blockades and unpermitted marches. . . . As a group we absolutely never organize anything involving destruction of property or physical harm to human or non-human animals." Other materials on the POG website describe direct actions such as blockades and "lockdowns" (devices or strategies used to chain people together or to objects to prevent their being easily removed or separated by police).

The Pittsburgh Field Division Supervisory Special Agent who approved the opening ECs cited the fact that the POG advertises itself as an "anarchist" group and that the POG intended to send 300 people to Miami to establish a "padded bloc" to confront police. He said that until then, the Pittsburgh Field Division did not know anything about the POG, so the information that they could mobilize 300 people "got our attention." He noted that anarchists had conducted bombings in Pittsburgh 100 years ago and that anarchist groups in general are the subject of a domestic terrorism subprogram in Headquarters.

The case agent for the Herman preliminary inquiry cited Herman's 2003 arrest for failure to disperse, disorderly conduct, and obstruction of traffic during an anti-war protest as a fact supporting opening the preliminary inquiry on him. The case agent stated that being "willing to be arrested and engage law enforcement takes you to another level," opening the possibility that the individual might be planning more violent acts constituting federal crimes. He also stated that the POG had listed the "Bettis Atomic Energy Plant" as a potential target for direct action, and that trespassing on that property would be a federal crime.

### b. Investigative Activities

We examined the FBI's investigative activity in connection with the preliminary inquiries of Herman, Philips, and Waterman.

On February 27, 2004, two FBI agents attended a meeting of representatives from regional law enforcement agencies led by the Pittsburgh Police Department. The purpose of the meeting was to plan for security at an anti-war protest in Pittsburgh scheduled for March 20, 2004, referenced in the February 4, 2004 opening EC. Information was exchanged about POG, including the fact that the "direct action" section of the POG website advocated obstruction techniques and criminal mischief, and also described techniques for dealing with police. The meeting included discussions regarding the potential for property damage at a local university and facilities linked to government defense contracts. An EC describing the meeting stated that official parade permits for the upcoming anti-war protest had been issued "for the formal activities sponsored by the [Merton Center]." This was the only reference in this EC to the Merton Center.

On the day of the anti-war march, two FBI agents monitored "Command Post" activities and protest activities to verify the participation of the subjects, Herman, Philips, and Waterman. Herman was observed among the POG contingent. A document in the FBI file noted that during the protest activities the police did not observe any "actionable criminal activities" apart from trespass onto a university's property, which was not enforced.

The FBI file also contains a report that on April 19, 2004, during a protest outside of the Pittsburgh Convention Center where President Bush was delivering a speech, Philips and five other protesters were arrested by local police for failure to disperse, disorderly conduct, and obstructing a traffic way. Another FBI report stated that the arrested protesters were POG members. According to a contemporaneous news account, the protest was organized by the Merton Center. However, no FBI documents described the Merton Center's role in this protest, nor did they indicate that the case agents conducted any surveillance activities in connection with this protest.

On June 3, 2004, the two case agents handling the preliminary inquiries met with Pittsburgh City Police Department detectives, who provided them with a list of 11 residences, businesses, or other organizations, including the Merton Center, known to be frequented by POG members. According to a memorandum by the case agent, the detectives and the FBI agents conducted "a drive-by surveillance at each location" as part of a "familiarization process with these locations." The memorandum stated that they did not see any POG members, and noted that "several of the locations had no activity at this time." The list stated that some POG members, including Philips, were on the Board of the Merton Center or served on various Merton Center committees. It also stated that POG members may attend planning meetings for events or protests at the Merton Center.

In July 2004, the FBI's Pittsburgh and New York Field Divisions received information from the FBI Miami Field Division that at a POG meeting held in

Pittsburgh, POG members discussed plans for "direct action," including vandalism, against the Republican National Convention to be held that year in New York City. The information indicated that the POG intended to employ the "padded bloc" tactic and engage law enforcement at the Republican National Convention.

In an EC dated July 9, 2004, the case agent for the Herman preliminary inquiry obtained an extension of the preliminary inquiry. The EC described Herman as an active participant in "POG's anarchist activities and has been observed directing protest activities of 'direct action' operatives wearing black clothing and face coverings." The EC stated that these actions were primarily criminal mischief during protests, but were "viewed as distraction activities for possible more significant 'actions.'" The EC stated that many POG members are affiliated with university campus activities, and that "several are students, and regularly targeted multi-million dollar facilities that are University owned and contracted by the U.S. Government."

In an EC dated July 30, 2004, the case agent working on the preliminary inquiry of Philips and Waterman obtained an extension of the preliminary inquiry. The EC stated that the FBI had learned that Philips had used an alias and had engaged in "limited criminal activity" with other POG members, although it did not specify what that criminal activity was. The EC also referenced a Seattle Field Division EC that had identified Philips as one of many individuals arrested for protest activities during the World Trade Organization (WTO) Ministerial Conference in Seattle on November 28 to December 4, 1999.

Further information gathered for the FBI file during August and September 2004 indicated that Waterman had no criminal history but was known to the Chicago Field Division to be associated with the anarchist movement. However, local law enforcement officials in Pittsburgh indicated that they had not encountered Waterman during their investigations of local anarchists.

In October 2004, the case agent in the Herman preliminary inquiry began operating a confidential informant in connection with collecting information about members of the POG. Because of the unique issues raised by this activity, we address it separately in the next section of this report.

The FBI file contains a document from the Pittsburgh Police Department in November 2004 that informed the FBI that Philips was arrested the previous day in Pittsburgh for disorderly conduct during an anarchist rally. Philips allegedly attempted to prevent an officer from arresting another protester who had set fire to an American flag on the street.

In an EC dated January 20, 2005, the FBI closed the preliminary inquiry on Herman. The EC stated that Herman had participated in a "direct action" protest but was not involved in any known criminal activity during the investigative period. The EC stated that Herman was not observed to be present during many of the local direct action protests and appeared to be "minimizing his protest activities."

In an EC dated January 26, 2005, the FBI closed the preliminary inquiry on Philips and Waterman. The EC stated that Philips had "been involved in criminal activity, mainly in connection with his activities with the [POG], and connected to Civil Disobedience." The EC also stated that no information had been found to indicate that Waterman lives in or routinely visits Pittsburgh. The EC stated that the all logical investigation had been completed.[97]

### c. Use of a Confidential Informant

Beginning in [redacted] 2004, the FBI utilized a confidential informant to collect information regarding members of the POG who participated in meetings at [redacted]. The case agent for the Herman preliminary inquiry developed this informant, and told us that FBI agents are generally expected to develop a "network of sources." The case agent, who had recently arrived at the Pittsburgh Field Division from another FBI field office, said that his "grace period" was coming to an end and that his supervisor was asking about his source activity. The agent told us he recruited [redacted] as his source. This source was a [redacted]. According to the agent, this source was "willing to, at my behest, try and find out what he could about POG criminal activity."

At the time the source was recruited, he had charges pending against him for [redacted]. In one e-mail from the source to the case agent during the time he was acting as a source, the source described his efforts to obtain an extension on "my court date," and asked if the case agent had contacted a particular officer connected to the case. The case agent told us that he may have exchanged phone calls with the officer "after the whole matter was resolved." The case agent said that he had not made any promises to the source about taking care of the court case, and that the source's arrest "had absolutely nothing to do with [him] being my source."

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[97] In a January 28, 2005, EC, the case agent for the Philips preliminary investigation discussed an Internet article that described his attempt to interview Philips. The article named the case agent and alleged that he entered "two other normally locked doors" of Philips's apartment building to leave a note for Philips to call him. The case agent explained in the EC that he and another agent opened one unlocked exterior door and left the note on Philips's apartment door. The article, which was attached to the EC, stated that the apartment was the home of a Merton Center intern and staff member.

The agent told us that the arrangement to use this person as a source enabled him to "get into the source program," and "show some source tasking and reporting." When asked why he was tasking the source to collect information on POG at the time the Herman preliminary inquiry was winding down, the case agent said, "that tasking [was] more motivated by wishing to participate in the informant program than it [was] POG generally speaking." He also stated this was an opportunity to place an individual within the group to obtain the kind of criminal intelligence that the investigation had not been able to develop.

The case agent assigned the source to attend [redacted], 2004.[98] The agent stated that he selected this meeting for the source to attend entirely on the basis of the availability of the source at the time. He said he had no information suggesting that criminal activity would be discussed, but that his purpose for sending the source was to "get him accepted into a group for further penetration and actually into the criminal element somewhere in POG." The agent told us that he believed, "it was clear in [the source's] mind that [his role was] to try and identify criminal activity."

The case agent filed a source report dated [redacted], 2004 (the "first source report"). The report described the meeting at [redacted] and was filed in the source file and under the case number for the Herman preliminary inquiry. The report contained the following information describing the First Amendment expressions of persons in attendance, which the case agent drew from an e-mail that the source sent to him:

> Source, who is not in a position to testify, provided the following information:
>
> Source reports that a [redacted].
>
> Also in attendance were the following persons: [names and ages redacted].
>
> Meeting and discussion was primarily anti anything supported by the main stream American.[99]

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[98] It is not clear how the agent knew this meeting was connected to POG, but it appears likely that the agent found a reference to the meeting on the POG website.

[99] We made the redactions indicated in the text. The source report contained the actual identifying information regarding these individuals.

The source report did not contain any information about potential criminal activity. The case agent told us: "The only reason that document is really written is so I can get credit for source participation." He stated that he did not want to file a "negative report," so he simply described what the source told him.

At the request of the case agent, the source attended several other POG-related functions in late 2004 and early 2005, [redacted]. The source sent e-mails regarding each one to the case agent, which the case agent converted into source reports.

For example, one report indicated that on [redacted], 2004, the source observed POG members [redacted][100]

Another source report dated [redacted], 2005, (after the case agent had closed the Herman preliminary inquiry), reported [redacted].

A source report dated [redacted], 2005, of [redacted]

Another source report also dated [redacted], 2005, described a [redacted]

[100] The POG website included information about a device made with PVC pipe known as the "sleeping dragon," used for locking two protesters together.

The source reports did not contain any information about Herman, Philips, or Waterman, and did not describe any effort by the source specifically directed at obtaining information about these named subjects. The Chief Division Counsel (CDC) in Pittsburgh, told us that he was "shocked" when he reviewed the source reports in 2006, when the documents were collected for the FOIA response, because the FBI should not have been "collecting on . . . antiwar march planning sessions." He questioned whether there was any federal crime being investigated. The CDC told us that after he saw the documents he told the agent to close the source.

### 2. OIG Analysis

#### a. Predication

The 2002 Attorney General's Guidelines, which were in effect at the time, provided that the FBI may open a preliminary inquiry in response to an allegation or information "indicating the possibility of criminal activity." Our effort to determine whether this standard was satisfied with respect to the preliminary inquiries relating to the POG was hindered by the fact that the FBI's opening ECs did not specify a federal crime that the FBI deemed "possible." Nevertheless, we did not conclude that the FBI's preliminary inquiries violated the Attorney General's Guidelines, given the low predication threshold contained in the Guidelines.

According to FBI files, Herman was identified as the leader of POG and a self-described anarchist. Philips was identified in the Miami Field Division EC as a member of POG and a participant in the August 2003 Pittsburgh conference where direct action to disrupt the November 2003 FTAA in Miami was discussed. POG prominently advertised its intention of carrying out "autonomous direct actions" at an upcoming Pittsburgh anti-war protest, as well as direct actions in Miami.

However, neither the opening ECs nor the Pittsburgh Field Division agents we interviewed identified any evidence specifically linking the POG or the subjects to acts of violence. Instead, the Pittsburgh Field Division agents told us that they believed the term "direct action" as used by the POG is commonly known to encompass criminal acts. They stated that such acts may include arson, vandalism, threats, and assaults. But these are generally state or local offenses that are only federal crimes under very specific circumstances, which the opening ECs did not identify. When we interviewed the Pittsburgh FBI agents, they stated that the POG might be planning actions directed at particular facilities, such as military recruiting offices or a power plant, which could be federal crimes. However, the opening ECs contained no such indication.

The "possibility" standard in the Attorney General's Guidelines is a low threshold to meet, and it appears to permit reliance on information and inferences of the type used by the Pittsburgh Field Division to open its preliminary inquiries. The FBI had information that could be interpreted to indicate the possibility that Herman and Philips might be planning with others to engage in activities that could include federal crimes such as injury or depredation against property of the United States (18 U.S.C. § 1361), destruction of an energy facility (18 U.S.C. § 1366)(the Bettis power plant), or trespassing onto a military installation (18 U.S.C. § 1382). Therefore, although we believe the factual predication for these inquiries was thin, we did not conclude that the FBI violated the applicable predication standard.[101]

In short, due in substantial part to the fact that the only predication required to open a preliminary inquiry was "information indicating the possibility" of a federal crime, we did not find a violation of the predication standard in the Attorney General's Guidelines.[102] However, these cases illustrate the broad scope of the FBI's authority under the Attorney General's Guidelines to open preliminary inquiries based on extremely limited information, including information about the First Amendment expressions of subjects. Moreover, because of the easily attainable and speculative "possibility" standard, these cases also demonstrate the importance of the FBI adhering to the Guidelines requirements that federal criminal offenses are suspected and that such offenses be documented, along with the underlying predicating facts, to minimize the risk of opening unpredicated investigations that could improperly intrude upon and potentially have a chilling effect on constitutionally protected activities and expression.

We next considered whether the FBI's decisions in July 2004 to extend the Herman and Philips preliminary inquiries for 180 days complied with the Attorney General's Guidelines and FBI policy. FBI policy required that an investigation with potential impact on First Amendment activity "not be

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[101] We believe the predication as to the third subject, Waterman, was weaker than for the other two subjects. Like the other subjects, Waterman was identified in the opening EC as "dba" the POG. However, the only connection between Waterman and the POG stated in the opening EC was that Waterman had been seen with Philips at a meeting of a different group (not POG), in another city, that was also planning to attempt to stop the Miami FTAA meetings by means that the group anticipated might result in arrests. Although there were other facts developed in a different investigation potentially linking Waterman to an anarchist group other than the POG, the facts linking Waterman to the POG or Pittsburgh were extremely thin. The Pittsburgh investigation did not relate to the other anarchist group. Although the FBI Field Division in the other city had an open investigation relating to the other anarchist group, Waterman was not a named subject of that investigation. Accordingly, we question whether there was a basis for FBI Pittsburgh open a preliminary inquiry as to Waterman.

[102] By contrast, we do not believe that adequate predication ever existed to open a full investigation of these subjects under the "reasonable indication" standard.

permitted to extend beyond the point at which its underlying justification no longer exists." MIOG, Introduction, Part 1-4(2).

During the initial preliminary inquiry period, Philips and other POG protesters were arrested in April 2004 by local police for actions taken during a protest of a speech by President Bush in Pittsburgh, such as obstructing traffic, disorderly conduct and failure to disperse. The EC requesting an extension on the Herman preliminary inquiry stated that this type of criminal activity is "viewed as distraction activity for possibl[y] more significant actions." Further, 2 weeks before the Pittsburgh Field Division requested an extension of the Philips preliminary inquiry, the Pittsburgh Field Division received information from the Miami Field Division that POG members had recently discussed plans for "direct action," including vandalism, against the Republican National Convention to be held that year in New York City. Given these facts, and again due to the low threshold required for predicating a preliminary inquiry, we did not conclude that the FBI's decision to extend the preliminary inquiries violated the Guidelines or FBI policy because there remained a continuing "possibility" that Herman or Philips would commit a federal crime. As noted in footnote 101 above, the FBI had little or no information linking Waterman to POG or Pittsburgh at the time the preliminary inquiry was opened. No additional information was developed during the investigation. Accordingly, we do not believe the preliminary inquiry should have been extended as to Waterman following its initial expiration.

We also considered whether these preliminary inquiries were properly classified under the FBI's "Acts of Terrorism" classification. As previously noted, beginning in 2003, FBI policy permitted the use of this classification for investigations of individuals who seek to further political or social goals through activities that involve the use of force or violence and violate federal law. We found scant evidence beyond the POG's advocacy of "direct action" protest techniques supporting the "force or violence" element of this test, and we therefore question whether the preliminary inquiries should have been classified as domestic terrorism investigations.

**b. Source Activity**

We also analyzed the FBI's use of the confidential source to attend the meetings and protests involving POG members. According to the agent, these events were open to the public and advertised on the Internet.

We do not believe that the FBI satisfied the applicable tests for sending its source to the POG meetings. The case agent acknowledged that his primary purpose in sending his source to the events was to document his participation in the FBI source program and to establish statistics. The weak connection between these assignments and the preliminary inquiry is highlighted by the

fact that the agent continued sending the source to the POG events even after the preliminary inquiry of Herman was closed.

We also note that after the preliminary inquiry was closed, an alternative basis for the FBI to attend the POG events could have been Part VI.A.2 of the Attorney General's Guidelines, which authorized the FBI to attend public events for the purpose of detecting or preventing terrorist activities. According to FBI guidance, a source operating under the FBI's direction can only be directed to attend an event that an agent would also be permitted to attend. The Part VI.A.2 "purpose test" was an extraordinarily low threshold to satisfy and did not require the FBI to have a factual basis for believing that POG was involved in terrorism. It only required that the FBI's purpose be "detecting or preventing terrorism." Moreover, Part VI authorities were available even in the absence of a named subject or a predicated investigation of any kind.

Yet, the evidence indicated that the primary purpose for the source assignments was not the detection or prevention of terrorism but rather to enable the case agent to "get into the source program," and "show some source tasking and reporting." Tellingly, the case agent admitted that the source tasking was "more motivated by wishing to participate in the informant program than it [was] POG generally speaking." We do not believe that the desire to establish performance statistics is an appropriate basis for using the sensitive and intrusive investigative technique of instructing a confidential source to attend political discussions or protest marches. We found that the case agent's claim that the source was collecting information regarding potential crimes was not his primary purpose.

We were also concerned by the Pittsburgh case agent's use of [redacted] as a confidential source. Although compliance with source policies was outside the primary scope of this review, we believe that the agent's recruitment of this source was questionable practice. For example, FBI policy states that "FBI personnel directing, overseeing the direction of, or closely involved with the operation of a CHS [confidential human source] may never . . . [s]ocialize with the CHS, except to the extent necessary and appropriate for operational reasons . . . ."[103] Yet, the case agent had a long-standing and continuing social relationship with the source, which included the source providing computer assistance to the agent. In addition, FBI policy states that "FBI personnel directing, overseeing the direction of, or closely involved with the operation of a CHS may never . . . [i]nterfere with, inappropriately influence, or impede any criminal investigation, arrest, or prosecution of that CHS or any civil action in which the CHS is a litigant or witness."[104] Although the case agent provided a vague account of his efforts to assist the source with

[103] *FBI Confidential Human Source Policy Manual* 1.12. Prohibitions.

[104] Id.

resolving the [redacted] charge against him, we believe that this involvement raised significant questions about whether the agent complied with FBI policy. We also found no indication in FBI files that these questions were addressed in connection with approving or supervising the agent's operation of this source.

### c. Collection and Retention of Information about First Amendment Activities

The source reports included information regarding the First Amendment activities of POG members. In fact, the first source report filed in the Herman preliminary inquiry contained virtually no information other than information about First Amendment expressions of participants in a political discussion group in the Merton Center. This report had no apparent connection to any actual or potential crime and focused solely on the identity of the participants and the content of their speech.

As noted above, the source's assignments were the product not of genuine investigative activity but primarily were based on the agent's effort to participate in the source program. The problems stemming from his actions were compounded by the collection and retention of First Amendment information in the source reports that resulted from this activity.

Among other things, the source reports raise significant questions under the Privacy Act and FBI policy. As discussed in Chapter Two, the Privacy Act prohibits agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity." This principle was repeated in the 2002 Attorney General's Guidelines and Section 1-4(4) of the MIOG, Introduction. As noted above, we do not believe that the source's attendance at the POG events was an authorized law enforcement activity. Moreover, even if the assignment had been appropriate, much of the information collected by the source should have been excluded from FBI files. The first source report was limited to identifying information about the participants in a political discussion together with characterizations of the content of the speech of the participants. No information remotely relevant to actual or potential criminal activity was collected. We do not believe that any of the information recorded in the report regarding the Merton Center political discussion was pertinent to the Herman preliminary inquiry or any other authorized law enforcement activity.

The subsequent source reports also raised Privacy Act issues. One report identified certain individuals and described how they exercised their First Amendment rights by participating in a "peaceful anti-war protest." Three reports related to planning meetings held at the Merton Center for an anti-war protest, as well as a report on the protest itself. These reports included

identifying information about a particular person allegedly active in POG. These reports contained precisely the sort of First Amendment information protected under the Privacy Act. Although the Privacy Act permits the collection and retention of such information "within the scope of an authorized law enforcement activity," as noted above we do not believe that the source's attendance was properly authorized.

With one exception, none of these reports contained anything of apparent evidentiary value.[105] Rather, the agent recruited a friend of his son and gave him surveillance assignments with at best thin relevance to any open investigation or to preventing terrorism. In addition, when creating a written record of his source's activities, the agent paid little or no attention to the First Amendment implications of what he recorded. The resulting reports raised significant questions under the Privacy Act, the Attorney General's Guidelines, and the MIOG.

Even if the FBI's conduct did not violate the Privacy Act, we are concerned by the lack of justification for the FBI's activities in this matter and the resulting implications for the First Amendment rights of individuals. The FBI established a confidential source to attend political meetings and protests and collect information that was almost exclusively focused on the First Amendment activities of persons who were not the subject of any investigation. Although the source was nominally operated in connection with a thinly predicated preliminary inquiry, the source collected no information regarding the named subject of that inquiry and continued to collect and report information on First Amendment activities after the inquiry was closed.

## IV. CDC Response To Merton Center Document Release

Finally, we believe that the FBI's Chief Division Counsel (CDC) for the Pittsburgh Field Division took prompt and appropriate action when he read the documents related to the FBI's investigation of the Merton Center. The CDC told us he was "taken aback" when he first read the Merton Center documents released in response to the FOIA request, including the 2002 EC, the 2003 Letterhead Memorandum, and the source reports relating to the POG meetings. The CDC took immediate action to address the concerns he spotted. He told us he brought his concerns to the Pittsburgh Field Division's Special Agent in Charge and Assistant Special Agent in Charge. After the FOIA release in March 2006, the CDC conducted a series of PowerPoint training sessions with the

[105] One report described the conduct of one participant who opened the door to a military recruiting office while carrying a bag containing PVC pipe, which the case agent told us he thought might have implied a bomb.

Pittsburgh Field Division agents on FBI investigative activities and the First Amendment.

## CHAPTER FOUR
## INVESTIGATIVE ACTIVITIES DIRECTED AT PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS

### I. Background

Founded in 1980 by Ingrid Newkirk, People for the Ethical Treatment of Animals (PETA) states that it is the largest animal rights organization in the world. PETA has been based in Norfolk, Virginia since 1996 and has affiliates in the United Kingdom, Germany, the Netherlands, India, and Asia. According to its website, PETA operates on the principle that "animals are not ours to eat, wear, experiment on, or use for entertainment." PETA primarily focuses its efforts on four areas that it believes create the largest and most intense amount of suffering among animals: factory farms, laboratories, the clothing trade, and the entertainment industry. PETA focuses attention on these and other causes through public education, investigative work, congressional and celebrity involvement, and consumer boycotts. PETA is registered with the Internal Revenue Service as a nonprofit, tax-exempt organization.

In May 2001, the FBI's Domestic Terrorism Operations Unit drafted a report summarizing information that the FBI had collected about PETA through various authorized investigations involving animal and environmental rights extremists. The report stated that PETA disavows any connection to terrorism or criminal activity, but that it does provide "what can be considered at least tacit support for the [Animal Liberation Front][106] and its illegal activity," and that several leading PETA members have expressed support for ALF activities and refused to condemn them. The report stated that PETA had financed or contributed to the legal defense funds of some animal rights extremists charged with crimes.[107]

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[106] According to FBI documents, the Animal Liberation Front, or ALF, is a loosely organized movement whose goal is to end animal abuse and exploitation. Described as the radical arm of the animal rights movement, ALF carries out "direct actions" against entities that ALF activists believe are exploiting animals for research or economic gain. The closely associated and similarly structured Earth Liberation Front, or ELF, has as its goal to stop the destruction of the natural environment and the exploitation of Earth's resources. The FBI considers each organization a domestic terrorism group and commonly refers to them in documents jointly as ALF/ELF.

[107] The report provided two such examples. The first concerned the legal defense for Rodney Coronado, a member of ALF arrested and convicted for a 1992 arson of a research laboratory at Michigan State University. According to the report, PETA contributed more than $45,000 to Coronado's defense. The second example concerned PETA's contribution to the legal defense of Roger Troen, an animal rights activist arrested for an October 1986 arson at the University of Oregon.

According to the FBI report, FBI investigations had revealed "a potential ongoing relationship between PETA and the ALF/ELF activities," and cited as an example PETA's sponsorship of "internships" for animal rights activists that would serve to launch the recipients into prominent positions within the animal rights movement. The report also stated that it was believed PETA had been involved in target selection for past ALF/ELF attacks and that PETA was alleged to have established a faction within PETA to secretly support ALF/ELF activities. In addition, the report said law enforcement officials "have long suspected that PETA provides financial assistance to ALF/ELF activities and/or cells" and that some recent investigative activity supported this suspicion.[108] The report indicated that some of the information about the relationship between PETA and ALF/ELF was based on reporting from human sources and from the FBI's investigation of Coronado following the arson at Michigan State University.

The PETA website states that the animal rights movement is nonviolent and holds as a principal tenet that no animal – human or otherwise – should be harmed. On the specific issue of ALF and the millions of dollars in property damage caused by individuals claiming affiliation with ALF, the PETA website states:

> Throughout history, some people have felt a need to break the law to fight injustice. The Underground Railroad and the French Resistance are examples of movements in which people broke the law in order to answer a higher morality. The ALF, which is simply the name adopted by people who act illegally on behalf of animal rights, breaks inanimate objects such as stereotaxic devices and decapitators in order to save lives. ALF members burn empty buildings in which animals are tortured and killed. ALF "raids" have given us proof of horrific cruelty that would not have otherwise been discovered or believed and have resulted in criminal charges being filed against laboratories for violations of the Animal Welfare Act. Often, ALF raids have been followed by widespread scientific condemnation of the practices occurring in the targeted labs, and some abusive laboratories have been permanently shut down as a result.

We reviewed the FBI's activities related to PETA because it was one of the groups featured in news articles that, beginning in December 2005, reported that the FBI had monitored the activities of domestic advocacy groups.

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[108] The report cited as an example PETA's alleged $50,000 contribution to an ALF/Animal Defense League member for the production of a documentary that might have included footage of criminal activity. In addition, according to the report, a source told the FBI that an animal rights group in Utah was required to submit "direct action" proposals to PETA in order to receive funding for the activity.

## II. Specific Activities Relating to People for the Ethical Treatment of Animals

Between 2001 and 2006, the FBI's field office in Norfolk, Virginia (Norfolk Field Division) initiated preliminary or full investigations of [redacted] members of PETA and a preliminary terrorism enterprise investigation of PETA as an organization. Each of the investigations of the PETA members was opened under the FBI's "266" investigative classification, which at the time was designated for "any investigation of a criminal act which involves an individual or individuals affiliated with a domestic terrorist group." The investigation of the PETA organization was opened under the "100" classification, which is reserved for investigations of domestic terrorist groups authorized by the provisions of the general crimes guidelines on terrorism enterprise investigations.[109]

The first PETA-related investigation that the Norfolk Field Division initiated was directed at Alex Collins, [redacted].[110] This was the longest and most expansive of the FBI's PETA investigations we reviewed. The case lasted nearly 6 years, from May 2001 to April 2007, and overlapped with the terrorism enterprise investigation of PETA as an organization, which opened in August 2003 and closed in February 2005. We describe and analyze the predication and classification of these two cases first, and then do the same for the other [redacted] members of PETA who were investigated by the Norfolk Field Division between 2001 and 2006.

### A. Alex Collins

#### 1. Facts

The FBI Special Agent who was the case agent for most of the Collins investigation had transferred to the Norfolk Field Division from the FBI's field office in Atlanta, Georgia in January 1998. As the only agent in the Norfolk Field Division assigned to work on domestic terrorism matters, he was

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[109] As described in Chapter Two, the 1989 Attorney General's Guidelines referred to terrorism enterprise investigations as "domestic security/terrorism investigations" and stated that they were "focused on investigations of enterprises other than those involved in international terrorism, whose goals are to achieve political or social change through activities that involve force or violence." The 2002 Guidelines expanded the predicate to open a terrorism enterprise investigation, stating that this type of investigation may be initiated when facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of: (1) furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law, (2) engaging in "international terrorism" or "domestic terrorism" as defined in federal law, or (3) committing any federal criminal offense listed in the federal law that defines the "federal crime of terrorism" or a pattern of racketeering activity involving any of the listed offenses.

[110] Alex Collins is a pseudonym.

responsible for assessing the domestic terrorism threat in the Norfolk Field Division's territory and identifying potential sources of information. The agent reviewed past complaints the FBI had received and civil rights investigations that had been conducted, spoke with officers of state and local law enforcement departments, and attended domestic terrorism conferences conducted by the FBI. He said that PETA was one of the organizations that local law enforcement and agents in other FBI field offices identified as possibly being involved in criminal activities, including funneling money to ALF.

The agent conducted additional research about PETA by focusing on the organization's leadership and locating in FBI investigative files multiple references to some individuals, including Collins, and their connection to criminal investigations. Based on the agent's research, the Norfolk Field Division initiated a full investigation of Collins on May 10, 2001. The opening Electronic Communication (EC) for the case stated that the FBI had considered ALF a terrorist organization since 1987 and that "[p]ast FBI investigations conducted to date developed evidence that members of the ALF were connected to or directed by PETA." The examples cited in the EC were the 1992 arson of a laboratory at Michigan State University[111] and a 1997 raid of several fur farms in Wisconsin by ALF members.[112] The EC also asserted that PETA was believed to hire interns for the sole purpose of committing criminal acts at protests.

With respect to Collins specifically, the EC stated that the Norfolk Field Division had received source information (obtained from other FBI field offices) indicating that Collins [redacted] the North American ALF, that Collins was ALF's [redacted], and that Collins traveled to [redacted] each year [redacted] at which attendees are taught how to maximize economic damage to businesses through protests, raids, and

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[111] During the investigation of the 1992 arson, a search warrant was served on the private residence of a PETA employee. The search recovered a briefcase belonging to then-PETA [redacted]. The briefcase contained, among other items, false identification [redacted], a credit card issued under one of [redacted] aliases, surveillance logs, lock-picking devices, code words for a university research facility, and [redacted] advising of a possible raid on a fox farm on Pennsylvania. The search of the residence also recovered approximately $2,000 contained in an envelope [redacted]. The search also found various pieces of equipment, including night-vision goggles, two-way radios, ski masks, and rubber gloves.

[112] The investigation of the raid determined that the two individuals who conducted the raid called PETA's anti-fur coordinator prior to the raid occurring. In addition, the two participants, after being indicted, contacted another individual at the telephone number subscribed to by the PETA anti-fur coordinator and obtained prepaid transportation from Wisconsin to Washington, D.C. This same contact provided one of the participants a prepaid airline ticket from Newark, New Jersey, to London, England, and contact information for a safe house.

arson.[113] The EC also asserted that Collins, [redacted], was providing financial support to members of ALF and other animal rights extremists to conduct "direct actions," a term the FBI generally defined as criminal activity designed to cause economic loss or to destroy property or operations. The EC did not provide any examples of this financial support. The EC also noted that multiple businesses within the Norfolk Field Division's territory had been targeted by animal rights activists with graffiti, glued doors, and anti-meat posters.

In addition, the opening EC cited examples of public statements Collins had made in the past, such as [redacted] This interview, according to the EC, "gave further insight into PETA's alliance with ALF[.]" The EC noted that Collins had several misdemeanor arrests "that appear to be relative to animal rights actions."

The EC did not identify any specific federal crime that Collins had committed, was committing, or might commit in the future. Rather, the EC cited a statute that was violated by the activities attributed to ALF. This statute, the Animal Enterprise Protection Act, 18 U.S.C. § 43, was cited in subsequent investigative documents in the Collins case file and was relied upon to support the predication for other PETA-related investigations, including the terrorism enterprise investigation of PETA as an organization opened in August 2003.[114] At the time of the Collins investigation, this statute provided that, "[w]hoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce, for the purpose of causing physical disruption to the functioning of an animal enterprise; and intentionally causes physical disruption to the functioning of

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[113] This information is described in more detail in a memorandum discussed in Section II.B. below, which was prepared by the Norfolk Field Division in support of its opening a preliminary terrorism enterprise investigation of PETA as an organization.

[114] For example, on June 15, 2001, the Norfolk Field Division requested that FBI Headquarters send leads to various FBI Legal Attaché offices for any information [redacted] might have about Collins and PETA. In the EC to FBI Headquarters making the request, the Norfolk Field Division asserted its belief that Collins, PETA, and the organization's members were engaged in a criminal conspiracy "to commit crimes across state lines, thereby affecting commerce, lawful businesses, public policy, and government approved financial programs by use of force, extortion, coercion, threats, violence, and arson that have resulted in the destruction of personal and real property, personal injury, and human death (overseas), thereby constituting Federal crimes by violating the Animal Enterprise Protection Act, Title 18 U.S. Code, Section 43; the Hobbs Act, 18 U.S. Code, Section 195; and the Racketeering Influenced Corrupt Organizations Act (RICO), 18 U.S. Code, Section 1961."

an animal enterprise by intentionally stealing, damaging, or causing the loss of, any property (including animals or records) used by the animal enterprise" shall be punished as provided by the statute. 18 U.S.C. § 43(a). The statue defined "animal enterprise" as "a commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing." 18 U.S.C. § 43(d)(1)(A). The definition also included zoos, aquariums, circuses, rodeos, and other businesses, events, and competitions. 18 U.S.C. § 43(d)(1)(B), (C).[115]

Approximately 1 month after the Collins investigation was opened, the Domestic Terrorism Operations Unit at FBI Headquarters in Washington, D.C., sent an EC to the Norfolk Field Division recommending that the case be changed from a full investigation to a preliminary inquiry.[116] According to the Headquarters EC, dated June 19, 2001, the information in the Norfolk Field Division's opening EC indicating that Collins travels to [redacted] and that Collins financially supported direct actions carried out by members of ALF was 2 years old, and the source that provided the information to the FBI about Collins [redacted]. The EC stated that the information contained in the opening EC did not appear to "warrant" a full investigation and that the case should be converted to a preliminary inquiry.

However, the case agent responsible for the Collins matter told us that based upon what he viewed as a long association between PETA and ALF, he did not believe that the passage of 2 years detracted from the information's relevance to the predication determination. The Norfolk Field Division therefore declined to implement FBI Headquarters suggestion to convert the matter from a full investigation to a preliminary inquiry.[117]

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[115] The Animal Enterprise Protection Act was amended in 2006 by the Animal Enterprise Terrorism Act, Pub. L. No. 109-374 (2006). Among other changes, the 2006 Act broadened the definition of "animal enterprise" and expanded the statute's coverage to address a tactic referred to as "tertiary targeting" in which animal rights activists target the property of a person or other entity "having a connection to, relationship with, or transactions with an animal enterprise."

[116] As discussed in Chapter Two of this report, under the 1989 and 2002 investigative guidelines the FBI could initiate a full investigation "when facts and circumstances reasonably indicate that a federal crime has been, is being, or will be committed." A preliminary inquiry could be initiated "when there is information or an allegation which indicates the possibility of criminal activity and whose responsible handling requires some further scrutiny beyond checking initial leads."

[117] As discussed below, the practical effect of not converting the matter to a preliminary inquiry was that the investigation did not have to be reauthorized at fixed intervals. The Attorney General's 1989 Guidelines required that preliminary inquiries be completed within 90 days after initiation, and provided for 30-day extensions with approval from FBI Headquarters. The 2002 Guidelines required that preliminary inquires be completed within 180 days after (Cont'd.)

The primary focus of the Collins investigation was to uncover evidence of Collins's financial support to individuals affiliated with ALF or to other animal rights activists involved in criminal activities. At the Norfolk Field Division's request, the U.S. Attorney's Office for the Eastern District of Virginia agreed to open a case on Collins. Beginning in October 2002, the FBI case agent obtained financial records concerning Collins. The Norfolk Field Division also continued to solicit information from other FBI field offices about Collins and requested various FBI Legal Attaché offices to seek information about Collins from [redacted].

Although Collins was the named subject of the Norfolk Field Division's case, the investigative activity described above extended to PETA as an organization. As discussed below, the Norfolk Field Division opened a preliminary inquiry on PETA as a terrorism enterprise in August 2003.

The case agent told us that every source report and document that he reviewed indicated that Collins [redacted] and likely [redacted]. From the agent's perspective, Collins and PETA were [redacted]. Thus, according to the agent, it was reasonable to obtain financial records on the organization and request information about PETA's possible involvement in criminal activities from [redacted]. Many investigative documents in the case file that we reviewed reflected this approach.[118] The financial and other information collected on Collins, PETA, and several other subjects (described below) was regularly provided to FBI Headquarters for financial and link analysis.

On January 16, 2003, the Norfolk Field Division added Jerry Robinson as a subject in the investigation.[119] The case caption also was changed to include the organizations [redacted] These organizations were PETA, the Foundation to Support Animal Protection, and the Physician's Committee for Responsible Medicine. According to PETA's website, the Foundation to Support Animal Protection (also known as the PETA Foundation) was formed in 1993 to provide general and administrative support

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initiation, and provided for 2 90-day extensions based on Special Agent in Charge approval and subsequent extensions with FBI Headquarters approval only. By contrast, full investigations could remain open indefinitely.

[118] For example, on April 11, 2002, Norfolk Field Division provided various documents to FBI Headquarters with the request that appropriate units analyze the information "to assess whether PETA is involved in money laundering, financial institution fraud or tax fraud; as well as, the financing of ALF/ELF terrorist groups in furtherance of PETA's social and political objectives."

[119] Jerry Robinson is a pseudonym.

services – such as accounting, legal services, and database management – to PETA and other charitable protection organizations. The Physician's Committee for Responsible Medicine states on its website that it is a nonprofit organization that promotes preventive medicine, conducts clinical research, and encourages higher standards for ethics and effectiveness in research. Robinson [redacted].

The January 16, 2003, EC documenting the change to the Collins case described the Foundation to Support Animal Protection as a nonprofit, tax-exempt organization operating out of PETA's offices in Norfolk, Virginia, that has "quietly funneled over $4 million in tax-exempt donations from PETA to various 'front' groups in recent years," the Physician's Committee for Responsible Medicine being "the most notable example[.]" The EC stated that the Foundation to Support Animal Protection's [redacted] and described some financial arrangements among the organizations, such as the Foundation to Support Animal Protection paying the mortgage for PETA's headquarters. The EC asserted that "[t]he major purpose of [the Foundation to Support Animal Protection] appears to be to enable PETA and the Physician's Committee for Responsible Medicine to evade public recognition of their relationship, the real extent of their direct mail expenditures, and the real extent and nature of their assets." We determined that the passage in the EC that contains this assertion and the description of the financial arrangements among PETA, the Physician's Committee for Responsible Medicine, and the Foundation to Support Animal Protection tracks verbatim a passage from a report published in November 2002 by a group called Animal People. Animal People's report was publicized by Americans for Medical Progress (AMP), a nonprofit organization that, according to its website, "protects society's investment in research by nurturing public understanding of and support for the humane, necessary and valuable use of animals in medicine." However, the EC did not attribute any of its contents to the Animal People report or to AMP's news service.

Regarding Robinson, the EC stated that [redacted]

[redacted][120]

The EC did not identify any criminal activity associated with Robinson. The agent said he believes that he added Robinson as a subject based on the financial transfers the agent saw involving PETA, the Foundation to Support Animal Protection, and the Physician's Committee for Responsible Medicine, combined with information – later determined to be erroneous – indicating that [redacted]. However, the agent told us that he could not recall any criminal activity Robinson specifically was suspected of being involved with. We also note that approximately 6 months before Robinson was added as a subject, a preliminary review conducted by FBI Headquarters of some limited financial and public source information provided by the Norfolk Field Division made the observation that "while . . . there is connectivity between PETA and [the Physician's Committee for Responsible Medicine], transferring money from one charity to another is a common practice tolerated by the IRS."

The FBI's analysis of the financial records obtained over the course of the Collins investigation – the primary focus of the FBI's case – did not identify any illegal activity. The most notable finding was a PETA tax record indicating that on April 20, 2001, PETA donated $1,500 to the North American Earth Liberation Front (NAELF). PETA publicly acknowledged in 2002 making the donation, which has been claimed by some organizations to be evidence of PETA's support of domestic terrorism.[121] According to PETA's General Counsel, however, the donation was made to assist NAELF's press officer "with legal expenses related to free speech."

The remainder of the FBI's investigative efforts in the Collins case – essentially collecting a substantial amount of public and nonpublic information, interviewing former PETA employees, and performing some link analysis – were sporadic and, based on our review, did little to advance the

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[120] According to FBI records, Stop Huntingdon Animal Cruelty is an international campaign begun in 1999 by animal rights activists to shut down Huntingdon Life Sciences, Europe's largest animal research laboratory. Huntingdon Life Sciences has offices in New Jersey. The campaign targets Huntingdon Life Sciences directly, as well as affiliated companies. An FBI official testified before Congress in 2005 that Stop Huntingdon Animal Cruelty tactics have included "bombings, death threats, vandalism, office invasions, phone blockades, and denial-of-service attacks on [] computer systems." In March 2006, a federal jury in Trenton, New Jersey convicted several members of Stop Huntingdon Animal Cruelty, [redacted], for conspiracy to violate the Animal Enterprise Protection Act, 18 U.S.C. § 43.

[121] See, e.g., David Martosko, Director of Research, Center for Consumer Freedom, before the Committee on Environment and Public Works, U.S. Senate, concerning "Environmental and Animal Rights Terrorism and Its Above-Ground Support System" (May 12, 2005).

investigation. The case agent told us that PETA's size made it a difficult case for a single agent to handle, especially one who had other responsibilities and investigations. The agent said he unsuccessfully requested FBI Headquarters to assign an analyst to the PETA case because he did not have regular analytical support in the Norfolk Field Division during the investigation.

On December 18, 2006, Robinson was removed as a subject from the investigation. According to the closing EC, "no nexus to terrorism has been associated with [Robinson]." Approximately 5 months later, on April 19, 2007, the Collins investigation was closed. The closing EC stated:

> FBI Norfolk has been unable to determine any direct connection between [Collins] and ALF. [Collins] has stated publicly that [Collins] supports ALF and the liberation of all animals; however, at this time there is no evidence to show any criminal activity conducted by [Collins] on behalf of ALF. A financial analysis was conducted on [Collins] to determine if [Collins] had funded ALF or any extremist animal rights organizations. The analysis provided negative results.

The agent who opened the Collins case told us that he was on a temporary duty assignment when the case was closed but did not disagree with the decision. He said that he thinks the case remained open for as long as it did – 6 years – because the office sporadically received information relating to PETA – though "it never amounted to anything that was significant" – and that it was easier to leave it open than to reopen it when information was received. The agent also said a point came when his involvement in the case essentially ended and he asked a new agent to the office to review the case with some "fresh eyes." The case was closed following that review. The Norfolk Field Division did not refer any part of the case to the U.S. Attorney's Office for prosecution.

As discussed in Chapter Two of this report, a significant consequence of the FBI's investigation classifications is that individuals identified as subjects in full investigations and preliminary inquiries in domestic terrorism matters can be placed on watchlists, such as the Violent Gang and Terrorist Offender File (VGTOF), a database that provides identifying information about such individuals to law enforcement personnel with whom they come in contact (through a traffic stop, for example). From January 2002 to June 2002, FBI policy required field offices to enter the subjects of domestic terrorism investigations and preliminary inquiries into VGTOF. Collins and Robinson were each added to VGTOF on February 1, 2002. As a result, the Norfolk Field Division received several alerts from the U.S. Customs Service relating to Collins's and Robinson's foreign travel. According to the records we reviewed in the investigative file, in most instances the FBI collected only itinerary information related to the travel, and did not request that Collins or Robinson

be searched, inspected, or questioned. However, according to a [redacted] he was questioned and delayed at airports by customs officers on 12 occasions from January 2003 to September 2005 during international travel.[122]

In at least one instance, Collins and Robinson traveling together were subjected to a thorough secondary inspection as a result of the alert. On [redacted] 2003, an inspector with the Bureau of Immigration and Customs Enforcement (ICE) assigned to [redacted] Airport contacted the FBI's field office in [redacted], to alert the FBI that Collins and Robinson were arriving on a flight and to request guidance about what, if any, inspection the FBI wanted ICE to perform. The FBI agent who received the call was unable to speak with the Norfolk Field Division case agent and therefore requested that ICE conduct a thorough secondary inspection that included copying Collins's and Robinson's personal documents and interviewing each for information about their overseas travel. According to ICE, the secondary inspection took approximately 30 minutes and the results were forwarded to the FBI.

On August 22, 2005, the Norfolk Field Division submitted paperwork to FBI Headquarters to modify Collins's and Robinson's VGTOF status. The Norfolk Field Division requested that Collins and Robinson be removed from the database that was causing them to be subjected to additional customs inspection during international flights. This modification did not remove Collins and Robinson from VGTOF. That step, according to the case file, was taken upon closure of the case, on December 19, 2006, with respect to Robinson, and on April 19, 2007, with respect to Collins.[123] However, the modification did not end the travel alerts the FBI received relating the Collins's and Robinson's international travel because each apparently remained in at least two government databases that can cause travelers to be screened – the Terrorist Identities Datamart Environment and the Treasury Enforcement

[122] Several years before [redacted]

[123] On June 14, 2007, Norfolk Field Division resubmitted the request that Collins be removed from VGTOF. It appears this was done to comply with a requirement that VGTOF forms be submitted in a new electronic format.

Communications System.[124] According to documents we reviewed, the FBI received travel information relating to five international trips that occurred after August 2005 – one in late 2005 and two in 2006 taken by Robinson, one in 2006 taken by Collins, and one in 2006 taken by Robinson and Collins traveling together. The FBI's investigations of Robinson and Collins were still open when the FBI received this travel information.

### 2. Collection and Retention of Information about First Amendment Activities

The Norfolk Field Division opened three confidential human sources in connection with and during the Collins and PETA investigations. The first of these sources was opened specifically to collect information about persons affiliated with PETA and was "instructed to only attempt to identify members of [ALF] and or [ELF] or those providing funds to the ALF/ELF to commit criminal acts in furtherance of their social or political objectives." According to FBI documents, the source was expressly told "not to pursue gathering intelligence on anyone who is simply expressing their first amendment freedoms."

While working with the FBI, this source maintained regular contact with employees and members of PETA and attended conferences and protests where PETA activists were present, [redacted]. The source also provided some assistance to other FBI field offices in their investigations of animal rights extremists.

The second source opened by the Norfolk Field Division assisted investigations related to [redacted] being conducted by other FBI field offices and did not collect information for the Norfolk Field Division related to Collins or PETA.

The third source was [redacted]. The Norfolk Field Division tasked this source with providing information relating to the structure of PETA and current and former PETA employees, and about animal rights extremists with whom the source had contact. This source also assisted a national terrorism enterprise investigation of "animal rights extremism/eco-terrorism" being conducted by FBI Headquarters by, for example, attending a national animal rights conference to attempt to network with individuals possibly involved in criminal activities.

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[124] The Terrorist Identities Datamart Environment is the U.S. government's central repository of information on individuals known or suspected to be involved in international terrorism. The Treasury Enforcement Communication System serves as the principal information system supporting border management and the law enforcement mission of the Department of Homeland Security's U.S. Customs and Border Protection, as well as other federal law enforcement agencies.

Based upon our review of documents in the Norfolk Field Division's investigative files and source files, the FBI did not appear to record information through any of these sources about individuals solely based on the exercise of First Amendment activities. Rather, the reporting from these sources generally concerned individuals who themselves were subjects or who had some connection to subjects of other FBI investigations, or individuals the FBI might have an investigative interest in.

### 3. OIG Analysis

We concluded that the FBI did not violate the Attorney General's Guidelines when it opened an investigation on Collins concerning her connections to animal rights activists that engaged in criminal acts. However, we also believe, as did FBI Headquarters, that the matter should have been opened as a preliminary inquiry rather than a full investigation. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations in effect at the time of the investigation (the 1989 Guidelines) stated that a preliminary "inquiry" may be opened in response to an allegation or information indicating the "possibility" of criminal activity. A preliminary inquiry "allows the government to respond in a measured way to ambiguous or incomplete information and to do so with as little intrusion as the needs of the situation permit." The information in such a circumstance does not need to rise to the level of a "reasonable indication" of criminal activity – the standard for a full investigation – but its "responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads."

At the time the Collins investigation was opened, the case agent had dated information that Collins had [redacted] and funded some of the "direct actions" of ALF. ALF was an entity designated a domestic terrorist group by the FBI and responsible for millions of dollars in property damage to various "animal enterprises." It was also alleged that Collins traveled to [redacted] that instructed animal rights activists about maximizing economic damage to businesses with techniques that included raids and arson.[125]

[125] Yet, the case agent's opening EC did not identify any specific federal law that Collins possibly violated or would violate, although other documents in the case file identified several possibilities, including 18 U.S.C. § 43 (Animal Enterprise Protection Act). As noted earlier, this statute prohibits individuals from traveling in interstate or foreign commerce, or using any facility (a means of transportation or communication) of interstate commerce, for the purpose of damaging or interfering with the operations of an animal enterprise, and in fact intentionally causing such damage.

However, as FBI Headquarters noted in its EC to the Norfolk Field Division, the information was 2 years old. In addition, the reliability of the source for the information was not indicated and the allegations were conclusory and lacking in detail. In short, like FBI Headquarters, we do not believe a full investigation was warranted under these circumstances.

The Norfolk field Division's decision to open the matter as a full investigation rather than a preliminary investigation had consequences for the length of this investigation. The 1989 Guidelines required that preliminary inquiries be completed within 90 days after initiation, and provided for 30-day extensions with approval from FBI Headquarters. The 2002 Guidelines required that preliminary inquires be completed within 180 days after initiation, and provided for 2 90-day extensions based on Special Agent in Charge approval and subsequent extensions with FBI Headquarters approval only. By contrast, full investigations could remain open indefinitely. As explained below, we believe the case would not have remained open for as long as it was – 6 years – had it been initiated as a preliminary inquiry and therefore been subject to review and reauthorization at fixed intervals.

We also believe that there was sufficient support for opening an investigation on Jerry Robinson in January 2003, but we again believe a full investigation was not warranted. According to the case agent, the grounds for adding Robinson as a subject included information that [redacted] – Foundation to Support Animal Protection and Physician's Committee for Responsible Medicine – with financial ties to PETA, an organization the FBI suspected of directing and funding unlawful activities of animal rights extremists; and [redacted]. We believe that such information was tenuous and did not provide much support for the belief that Robinson was involved in any activity that violated federal law.

We also concluded that the January 16, 2003, EC that added Robinson as a subject to the Collins case failed to comply with FBI policy requiring that "if an individual, group, or activity has been characterized in a certain manner by the originators of information collected in the course of an investigation, FBI records . . . should reflect that the characterization was made by another party, not the FBI." MIOG Introduction, § 1-4(5). As noted above, we determined that a passage in the EC that described and characterized the financial arrangements among PETA, the Physician's Committee for Responsible Medicine, and the Foundation to Support Animal Protection tracked verbatim a passage from a report published in November 2002 by a group called Animal People, which was in turn publicized by Americans for Medical Progress

through its news service. The EC did not attribute any of its contents to either of these entities. We also believe, wholly apart from this particular FBI policy, that relying on – without any attribution – the analysis of a non-FBI party with a diametrically opposed viewpoint from the target of an FBI investigation is a practice that can undermine the credibility of the investigation.

We also do not believe there was sufficient factual basis at any point during the case that warranted the FBI opening a full investigation on either Collins or Robinson, and found that the investigations of Collins and Robinson should have been closed earlier than they were. Based on our review of the case file, by the end of 2003, the financial analyses that had been performed did not identify any illegal activity, the leads sent to [redacted] did not produce evidence of criminal acts tied to Collins or Robinson, and the effort to develop useful information from human sources was not successful. The investigation identified associations among animal rights activists and organizations, including activists and groups who had been or were believed to be involved in criminal acts, but we do not believe these linkages were sufficient to have found there was a "reasonable indication" that Collins or Robinson had violated or would violate any federal law.

As discussed in the next section, the preliminary inquiry of PETA as an organization – classified as a terrorism enterprise investigation – remained open for approximately 15 months. The authority for the preliminary investigation of PETA was not extended when it expired in November 2004. Because the case against PETA and the Collins investigation essentially were conducted by the Norfolk Field Division as a consolidated case, we saw no basis for the Collins investigation to remain open for over 2 years after the terrorism enterprise investigation of PETA was closed.[126]

We believe that had the Collins case been conducted as a preliminary inquiry, and therefore been subject to the requirement that such cases be renewed at defined intervals, it likely would not have continued for the 6 years that it did, a period that we found unreasonable and inconsistent with FBI policy requiring that an investigation with potential impacts on First

[126] The case agent who initiated the Collins case told us that he believes the investigation remained open as long as it did in order to have a new agent to the office review the evidence with "fresh eyes." The case agent also said that in hindsight it might have been easier to close the case and reopen it if something developed, although he thought the case remained open in part because the office continued to receive sporadic information about PETA. We do not believe either of these explanations warranted keeping the investigation open as long as it was. A fresh review of the case did not require that it remain open, and the case agent himself acknowledged – and our review of the case file confirmed – that the sporadic information about PETA that Norfolk Field Division received in the later stages of the investigation "never amounted to anything that was significant."

Amendment activity "not be permitted to extend beyond the point at which its underlying justification no longer exists." MIOG Introduction, § 1-4(2).

The Collins case also illustrates the impact a lengthy investigation can have on individuals who are subjects of FBI preliminary and full investigations. Because this case was classified as a domestic terrorism matter, Collins and Robinson were placed in the VGTOF database and then on a federal watchlist. As a result, the FBI collected information about Collins's and Robinson's travel activities for several years. At least one time that they returned to the country, they were both subjected to a secondary inspection that included copying their personal documents. The FBI's Norfolk Field Division submitted paperwork in August 2005 to have Collins and Robinson removed from the international travel watchlist, but this did not occur and the FBI continued to receive information relating to their travel through 2006.

The FBI finally removed Collins and Robinson from VGTOF when the investigation as to each was closed – on December 19, 2006, with respect to Robinson, and on April 19, 2007, with respect to Collins. We concluded that the investigations remained open "beyond the point at which [the] underlying justification no longer exists." Consequently, Collins and Robinson remained in the VGTOF database substantially longer than they should have.

### B. PETA – Terrorism Enterprise Investigation

In this section, we examine the FBI Norfolk Field Division's decision to open a preliminary inquiry on PETA as a terrorism enterprise.

According to the May 2002 Attorney General's Guidelines, a "terrorism enterprise investigation" refers to an investigation that focuses on an enterprise that seeks to further political or social goals through activities that involve force or violence, or that otherwise aims to engage in terrorism or terrorism-related crimes. A terrorism enterprise investigation is concerned with the entire enterprise, rather than just individuals and specific acts, and examines the structure and scope of the enterprise as well as the relationships of the members.

The 2002 Guidelines made an important change to terrorism enterprise investigations that is relevant to the Norfolk Field Division's investigation of PETA: the guidelines authorized the FBI to use preliminary inquiries to determine whether a full terrorism enterprise investigation of a group was warranted. Under the 1989 Guidelines, a preliminary inquiry could only be used in connection with individual crimes, not to determine whether to open a broader investigation of groups involved in terrorism. Therefore, under the 1989 Guidelines the "reasonable indication" standard for opening a full investigation applied to initiating any terrorism enterprise investigation, but under the May 2002 Guidelines a preliminary inquiry could be opened based

on information indicating the "possibility" of a group's involvement in terrorism.

### 1. Facts

From approximately December 2002 through September 2004, the Norfolk FBI case agent who had opened the Collins investigation also attempted to obtain approval to initiate a full terrorism enterprise investigation on PETA. The agent drafted on at least three occasions documents that included what he believed to be sufficient predication to establish that there was a "reasonable indication" PETA as an organization was involved in terrorism. The drafts were reviewed and edited in the Norfolk Field Division by the agent's supervisor and the Division's Chief Division Counsel, and at FBI Headquarters by personnel in the Domestic Terrorism Operations Unit and Office of the General Counsel. Based on our review of e-mails and edited drafts, it appeared that the FBI had concerns about the lack of current information indicating PETA's involvement in any terrorism-related activity, the strength of the evidence indicating such involvement, and the sheer length of the agent's drafts (the page length ranged from 20-40 pages). The consensus appeared to be that the initiation document should be more focused and drastically shortened, and that consideration should be given to opening the case as a preliminary inquiry.

As a result, in the summer of 2003, a second agent in the Norfolk Field Division was asked to review the case agent's drafts and distill the information into a shorter statement of predication for FBI Headquarters' consideration. The second agent told us that he pulled and verified those key facts from the drafts that he wanted to use and then drafted a new predication memorandum. The Norfolk Field Division Special Agent in Charge approved the memorandum and on August 20, 2003, the Norfolk Field Division again requested FBI Headquarters concurrence to initiate a full terrorism enterprise investigation on PETA.[127]

The 3½-page memorandum began by stating PETA was suspected of providing financial and logistical support to ALF/ELF. The memorandum provided some background information about the groups and listed three pieces of information to support the opening of an investigation of PETA: (1) a May 2002 public acknowledgement by a PETA spokesperson that PETA provided funds to ELF; (2) a check from PETA dated May 25, 2001, in the amount of $1,500 made payable to the North American Earth Liberation Front; and (3) PETA tax records for 1999 indicating contributions to "several small,

[127] FBI policy at the time provided that a full terrorism enterprise investigation could be authorized by a Special Agent in Charge only with the concurrence of the appropriate FBI Headquarters official, which was the Counterterrorism Division Section Chief with program responsibility for the type of case being opened.

militant grassroots animal rights organizations," some of whose members are "key ALF/ELF members and/or are subjects of ongoing FBI investigations." The memorandum briefly identified some of these members and their links to PETA.[128]

The memorandum also asserted that "PETA's officers and employees have a history of criminal activities relating to animal rights activities/ extremism, which suggests PETA's involvement in directing and controlling animal rights campaigns through harassment, threats of violence, vandalism, and extortion[.]" The memorandum identified several incidents that purportedly illustrated this involvement:

- In February 1999, a source of unknown reliability advised that Collins was training people to carry out terrorist attacks.
- In April 2001, a source of known reliability advised that Collins [redacted] and that Collins travels to [redacted] where attendees are instructed on protest techniques, including arson and bombings, that cause maximum economic damage to business.
- In January 1999, three PETA activists were arrested in connection with a protest of a government pork purchase program at which hay bales were burned on the steps of the U.S. Capitol Building.
- In February 2000, two PETA activists assaulted the CEO of Proctor & Gamble with a tofu pie and pled guilty to state charges.
- In May 2000, a PETA activist assaulted the Secretary of Agriculture with a pie at the National Nutrition Summit.
- In November 2002, several PETA activists were arrested for disorderly conduct in connection with threatening and harassing a Victoria's Secret model for modeling fur.

According to the memorandum, PETA's possible violations of federal law included 18 U.S.C. § 43, Animal Enterprise Terrorism; 18 U.S.C. § 1951, the Hobbs Act; and 18 U.S.C. § 2339A, Providing Material Support to Terrorists.

On September 25, 2003, following discussions with the Norfolk Field Division personnel, FBI Headquarters requested that a new opening

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[128] Based on our review of the investigative file, we believe the first two items the EC cited as indications of PETA's support of ALF/ELF are related and do not represent independent examples. PETA's May 2002 public acknowledgement that it provided funds to ELF was in specific reference to the disclosure of the $1,500 check.

communication be submitted to open the case on PETA as a preliminary inquiry instead of as a full terrorism enterprise investigation.

According to the Norfolk agent who drafted the initial communication, converting the case to a preliminary inquiry was not a point of contention with the Norfolk Field Division, primarily because the change was not expected to have a practical effect on how the investigation was conducted. The agent told us that there was little difference between a preliminary inquiry and a full investigation under the 2002 Guidelines in terms of the investigative techniques that could be used. The Norfolk Chief Division Counsel similarly recalled that the PETA case did not look like a matter that was going to involve techniques that could only be employed in a full investigation, such as electronic surveillance.[129] However, a preliminary inquiry, unlike a full investigation, was required by the 2002 Guidelines to be renewed at fixed intervals "based on a statement of the reasons why further investigative steps are warranted when there is no 'reasonable indication' of criminal activity." A full investigation did not have to be renewed in this manner and, as in the Collins case described earlier, could remain open for a long period of time.

The Norfolk Field Division, relying on the identical predication contained in the original memorandum, submitted an opening EC to FBI Headquarters on November 13, 2003, advising that the case on PETA was being converted to a preliminary inquiry.[130]

In the preliminary investigation, the FBI collected and analyzed PETA financial records, and identified and interviewed former PETA employees about their experiences with the organization. Many of the ECs documenting the investigative activity referenced both the preliminary inquiry terrorism enterprise investigation and the Collins investigation, and the U.S. Attorney's Office treated the investigations as a single matter. In fact, the only significant difference between the two investigations was the requirement that the PETA preliminary inquiry be periodically reauthorized.

As noted above, the 2002 Attorney General's Guidelines and the FBI's implementing policies provide that an FBI Special Agent in Charge may authorize a preliminary inquiry terrorism enterprise investigation for a period not to exceed 180 days, and may renew or extend the inquiry an additional 180 days. After that 360-day period, if the field office seeks to continue the

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[129] The 2002 Guidelines permitted the use of all lawful investigative techniques in a preliminary inquiry, except mail openings and nonconsensual electronic surveillance (or any other investigative technique covered by Chapter 119 of Title 18, United States Code (Wire and Electronic Communications Interception and Interception of Oral Communications)).

[130] Under FBI policy at the time, preliminary inquiry terrorism enterprise investigations could be authorized by the Special Agent in Charge and did not require concurrence from FBI Headquarters.

investigation as a preliminary inquiry – instead of converting the case to a full investigation – the field office must articulate the justification for an extension to FBI Headquarters and obtain its approval.

The PETA preliminary inquiry received three 90-day extensions: the first two extensions were authorized by the Special Agent in Charge, and the third extension was authorized by FBI Headquarters.[131]

The EC setting forth the justification for the first extension, dated February 23, 2004, stated that as part of the financial investigation of PETA, agents were still awaiting records from a particular company. The EC stated that it was expected these records would create investigative leads overseas to identify the recipients of certain PETA wire transfers. The EC also stated that agents had identified a disgruntled former PETA employee who appeared cooperative and possibly in possession of relevant information, and the FBI was in the process of making arrangements to debrief a second former employee who might have knowledge of criminal actions by PETA.

The EC setting forth the justification for the second extension, dated May 26, 2004, stated that agents had identified over $100,000 in wire transfers between PETA and a firm in London, England that provides "ethical/ environmental design" consulting. According to the EC, the directors of the firm were associated with [redacted]. The EC also summarized the results of agents' interviews of the two former PETA employees referenced in the EC that sought the first 90-day extension. The first individual did not provide any evidence of criminal activity and identified another former employee who might be receptive to an interview. The second individual, who worked for PETA from [redacted] claimed to have observed acts of vandalism by PETA employees, and encouraged by Collins, which targeted fast food restaurants and butcher and fur shops. This individual also claimed that PETA's co-founder made statements indicating that PETA was formed as cover for ALF and that the groups were one and the same. This individual also identified several other former PETA employees who might speak with the FBI. The FBI subsequently administered a polygraph examination of this source to assess the veracity of his statements linking PETA and ALF. During the examination, the source retracted some statements, modified others, and was ultimately determined by the examiner to be "deceptive."

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[131] The preliminary inquiry was considered officially opened on August 29, 2003, and was set to expire on February 28, 2004. The first 90-day extension authorized by the Special Agent in Charge extended the case to May 28, 2004, and the second extension carried the case to August 28, 2004. FBI Headquarters then authorized a third 90-day extension. That extension expired on November 28, 2004, and the case was closed.

The EC justifying the second extension also cited cases in two other FBI field offices that contained suggestions of PETA's involvement in criminal activity. In one case, a PETA employee was detained sometime in June 2003 with a bag containing items, including a pistol, ski mask, rope, bolt cutters, and flashlight. In the other case, agents determined that a vehicle observed in a driveway to a residence that Stop Huntingdon Animal Cruelty recently moved into was registered to PETA. Agents in this case also [redacted] during which the leader of Stop Huntingdon Animal Cruelty said PETA was, as stated in the EC, "a good group and helped out a lot."

The PETA investigative file indicates that the Norfolk Field Division intended to close the case at the conclusion of the second 90-day extension because there was not enough information to justify converting the case to a full terrorism enterprise investigation. However, as the Norfolk Field Division was in the process of drafting a closing EC, personnel at FBI Headquarters called the office and advised that it would grant an additional 90-day extension for the preliminary inquiry. According to the EC from FBI Headquarters documenting the extension, the decision was based on (1) the potential links between PETA and Stop Huntingdon Animal Cruelty as described in the EC for the second extension, and (2) [redacted]. In an EC confirming the 90-day extension, the Norfolk Field Division summarized the investigative activities it expected to conduct during the period: identify and interview additional disgruntled former PETA employees, monitor the Stop Huntingdon Animal Cruelty investigation for additional links to PETA, and maintain contact with the [redacted].

The third extension was set to expire on November 28, 2004. Several days before this date, the Norfolk Field Division submitted an EC to FBI Headquarters requesting what would be the fourth 90-day extension. The only new information contained in the EC was an interview with a former PETA employee who had described some suspicious activity by senior PETA management [redacted] and indications of telephonic contact between the Physician's Committee for Responsible Medicine and the girlfriend of an animal rights

activist on the day and immediately after the activist disappeared and became a fugitive.[132]

FBI Headquarters did not immediately act on the fourth extension request, and on January 4, 2005, the case agent reported to Headquarters two developments that might affect the extension decision. First, [redacted]. Second, the FBI developed a former PETA employee as a source. Later in January 2005, FBI Headquarters counterterrorism personnel and representatives from the FBI Office of General Counsel met to discuss how the case should proceed. They concluded that they could not support a fourth extension and that there was not sufficient evidence of PETA's involvement in any federal criminal violations to warrant converting the case to a full terrorism enterprise investigation. As a result, the Norfolk Field Division closed its investigation.

### 2. OIG Analysis

We concluded that the FBI did not violate the Attorney General's Guidelines when it opened a preliminary inquiry on PETA in August 2003 to determine whether grounds existed to initiate a broader, terrorism enterprise investigation of the organization. Under the 2002 Guidelines, a terrorism enterprise investigation could be initiated when facts or circumstances "reasonably indicated" that two or more persons were engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involved force or violence and violation of federal criminal law. Thus, a preliminary inquiry could be initiated when information or allegation indicated the "possibility" of such activity.

In the PETA preliminary inquiry, the second element required that the activities used to further a political or social goal involve force or violence. The opening memorandum for the PETA preliminary inquiry stated PETA was suspected of funding and directing individuals affiliated with ALF/ELF and other extremist animal rights groups and individuals, entities that have engaged in unlawful acts resulting in millions of dollars in property damage.[133] While the memorandum did not provide specific examples of these activities, ALF-attributed "direct actions" involved the destruction of property of animal enterprises. In addition, other groups and their members identified in the

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[132] As described earlier, the Physician's Committee for Responsible Medicine is the nonprofit organization [redacted] Jerry Robinson. The fugitive animal rights activist, Daniel Andreas San Diego, was wanted at the time for his alleged involvement in the bombings of two corporate offices in California with ties to Huntingdon Life Sciences. San Diego was indicted on federal charges in July 2004 and currently is on the FBI's list of Most Wanted Terrorists.

[133] According to the opening memorandum, ALF and ELF in 1993 claimed solidarity in action, and since 1987 individuals affiliated with the groups were responsible for unlawful acts that resulted in more than $50 million in damages.

opening memorandum were subjects of FBI investigations for their involvement in criminal activities that included destruction of property.

The third element in the 2002 Guidelines also required that the activities violate federal criminal law. The opening memorandum for the PETA case cited three criminal statutes, including 18 U.S.C. § 43. As previously described, this statute prohibits individuals from traveling in interstate or foreign commerce, or using any facility of interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise and in fact intentionally causing such damage. The opening memorandum alleged an effort by PETA to fund and direct on a national level unlawful acts that included the destruction of property of animal enterprises. Such an effort, if proven, could violate 18 U.S.C. § 43. We therefore concluded that the FBI's opening of a preliminary inquiry on PETA did not violate the Attorney General's Guidelines or FBI policy.

We also considered whether there was a sufficient factual basis for the three 90-day extensions authorized in the PETA preliminary inquiry. The investigative guidelines in effect at the time provided that an extension to a preliminary inquiry may be granted "based on a statement of the reasons why further investigative steps are warranted when there is no 'reasonable indication' of criminal activity." We believe the first two extensions did not violate the guidelines, but we questioned the third extension. At the time of the first extension, FBI agents were awaiting additional subpoenaed financial records that they believed might create investigative leads overseas. The agents also had identified a disgruntled former PETA employee who appeared cooperative and possibly in possession of relevant information, and were in the process of making arrangements to debrief a second former employee who might have knowledge of relevant criminal activity. The 90-day extension provided the agents additional time to continue these lines of investigation.

The EC that requested the second extension highlighted some wire transfers between PETA and a London environmental firm, although it did not identify any anticipated follow-up investigation. The request also summarized the results of interviews with the two former PETA employees referenced in the first request for an extension. One witness did not provide any information about possible violations of federal law, but did identify another disgruntled former PETA employee who might speak with the FBI. The other witness initially provided agents some potentially useful information; however, when a polygraph examination was administered, the witness retracted some statements, modified others, and was ultimately determined by the examiner to be "deceptive." The EC also reported on some recent connections to PETA that were identified in two pending investigations in other FBI offices, including in connection with the indictment of the Stop Huntingdon Animal Cruelty organization. On balance, we concluded that because of the potential additional witness identified by the former PETA employee and PETA's

connections to Stop Huntingdon Animal Cruelty, follow-up by the FBI was consistent with the Attorney General's Guidelines.

As discussed above, the Norfolk Field Division was prepared to close the preliminary inquiry on PETA when the second extension expired because it did not believe there was sufficient information to justify converting the case to a full terrorism enterprise investigation. However, FBI Headquarters advised that it would approve another 90-day extension because of the information about PETA's connections to Stop Huntingdon Animal Cruelty that were cited in support of the second extension, as well as because of a [redacted]. The rationale for keeping the Norfolk Field Division's preliminary inquiry open was to monitor the Stop Huntingdon Animal Cruelty case for any additional connections to PETA and to [redacted]. While this rationale might technically satisfy the requirement for an extension, we questioned whether either of the purposes – neither of which involved investigative steps or even required the existence of an open case – was consistent with FBI policy requiring that an investigation with potential impacts on First Amendment activity "not be permitted to extend beyond the point at which its underlying justification no longer exists."

We agreed with FBI Headquarters' conclusion at the expiration of the third extension that there was not a sufficient factual basis to convert the preliminary inquiry to a full terrorism enterprise investigation, and that it was appropriate after 15 months of investigation for the FBI to close the case.

### C. Patrick Lewis

#### 1. Facts

The Norfolk Field Division also initiated a full investigation of Patrick Lewis, [redacted], on June 28, 2002.[134] The opening EC began, "Past FBI investigations have developed evidence that PETA had directed or is connected to members of [ALF]," and again cited the case of the 1992 arson of a Michigan State University laboratory. The EC identified Lewis as [redacted] in the organization. The EC cited multiple arrests of Lewis, including a [redacted].[135] The EC also cited statements Lewis made at the 2001 Animal Rights National Conference in

[134] Patrick Lewis is a pseudonym.

[135] According to the EC, Lewis and other activists [redacted].

McLean, Virginia. According to the EC, Lewis [redacted]

The EC concluded, "Many of the acts of violence by animal rights groups are the direct result of a criminal conspiracy by Collins, Lewis, and their followers, to commit crimes against state lines, thereby affecting commerce, lawful businesses, public policy, and Government approved financial programs by use of force, extortion, coercion, threats, violence, and arson. These acts of violence have resulted in destruction of personal and real property, personal injury, and death (overseas), thereby constituting Federal crimes by violating the Animal Enterprise Protection Act, Title 18 United States Code (USC), Section 43; the Hobbs Act, Title 18, USC, Section 195; and the Racketeering Influenced Corrupt Organizations Act (RICO), Title 18, USC, Section 1961."

Early steps in the FBI's full investigation of Lewis included [redacted]. FBI agents learned that Lewis's and PETA's telephone numbers [redacted]. They also determined that in [redacted].

According to the investigative file, there were indications that Lewis was involved in funding other animal rights activists implicated in criminal activities. For example, Lewis's name appeared on a list of "funding sources" discovered during a search of the residence of a former ALF spokesperson.

The investigative file also noted additional statements made by Lewis. For example, [redacted]

On October 6, 2003, the Norfolk Field Division changed the status of the Lewis investigation from "pending" to "pending inactive" because "other investigative initiatives" involving Lewis – the preliminary inquiry on PETA as a terrorism enterprise – had been initiated. Nearly 2 years later, on June 29, 2005, the Norfolk Field Division closed the Lewis investigation because "no current evidence indicates that [Lewis] is presently involved in any terrorist activity[.]"

We determined that Lewis was entered into the VGTOF watchlist on February 1, 2002, several months before he was officially identified as a subject of an investigation. Our review of case files identified several instances of the FBI collecting information about Lewis's activities as a result of his being entered into VGTOF. For example, in [redacted] a company targeted by PETA for alleged cruelty to animals. The FBI also received information about a 2004 international flight and 2005 domestic flight Lewis took.

On March 15, 2005, the Norfolk Field Division submitted paperwork to FBI Headquarters to request his removal from the database that could cause him to be subjected to additional inspection during air travel. This action did not remove Lewis from VGTOF. The FBI told the OIG that Lewis in fact was removed from the VGTOF watchlist, although it could not locate the paperwork or identify when this occurred.

### 2. OIG Analysis

We concluded that the FBI did not violate the Attorney General's Guidelines when it opened an investigation on Lewis in June 2002. We believe it is a close question whether there was a sufficient basis to open a full investigation rather than a preliminary inquiry. The opening EC identified Lewis [redacted] in PETA who demonstrated a willingness to engage in unlawful destruction of property and who had recently made provocative statements in support of violent action [redacted] directed at various animal enterprises [redacted]. However, Lewis's only conviction occurred in [redacted], nearly a decade before the Norfolk Field Division case was opened. We question whether the information available at the time the case was opened provided a "reasonable indication" of a violation of federal law that would support initiating a full investigation.

While investigative steps used by the FBI were permissible under the applicable guidelines both for preliminary inquiries and full investigations, opening a full investigation rather than a preliminary inquiry affected the

duration of the case. Moreover, the FBI's decision to place the case on "pending inactive" status in October 2003 had the effect of unnecessarily extending the matter nearly 2 years.

### D. Randy Carter

#### 1. Facts

The Norfolk Field Division initiated a preliminary investigation of Randy Carter on August 5, 2002.[136] According to the opening EC, the Norfolk Field Division received information from the FBI's field office in Portland, Maine that Carter had moved to Norfolk from [redacted]. The EC indicated that Carter had been arrested on several occasions for activities related to animal rights. The first arrest occurred in [redacted] when Carter was arrested by the [redacted] on charges of [redacted]. According to the EC, Carter participated in a protest in which activists [redacted].

A second arrest occurred in [redacted] in [redacted] when, according to the EC, Carter attempted to [redacted]. Carter also was arrested in [redacted] for vandalism associated with protest activities, and again in [redacted] for trespassing and refusing to disperse in connection with protest activities. The EC did not provide the disposition of any of the arrests.

The EC indicated that [redacted], Carter listed his place of employment as PETA, and that based on the information provided by the jurisdictions where he was arrested, Carter "has been identified as being employed by PETA with a history of violence and arrests during animal rights activities." The Norfolk Field Division initiated a preliminary investigation to assess whether Carter was involved in any criminal activity.

The Norfolk Field Division's investigation obtained Carter's [redacted]. According to investigative records, the FBI determined that Carter was employed by PETA as an "activist liaison," that he was a well known animal rights activists "intimately involved" in the activities of Stop Huntington Animal

[136] Randy Carter is a pseudonym.

Cruelty, and that he is "affiliated with" the Animal Defense League and the Coalition to Abolish the Fur Trade.

The Norfolk Field Division administratively closed the preliminary investigation of Carter on February 24, 2004. The closing EC noted that "no further investigative leads or actions have taken place since the expiration of the preliminary investigation status," which would have been May 5, 2003, 180 days after the case was initiated. The case file does not contain any indication that Carter was entered into or removed from VGTOF. At the time the Carter case was opened, FBI field offices were not required to enter subjects of domestic terrorism preliminary inquiries into VGTOF.

### 2. OIG Analysis

We concluded that the FBI's opening of a preliminary inquiry on Carter in August 2002, while tenuous, did not violate the Attorney General's Guidelines. The opening EC identified arrests of Carter since [redacted] in connection with animal rights protests, two of which occurred in different states and involved some degree of property damage. However, it took more than a year from when the preliminary inquiry expired for the FBI to close the case. We question the reason for such a delay, and believe the case should have been closed upon expiration of the preliminary inquiry.

## E. Cheryl Peterson

### 1. Facts

The Norfolk Field Division initiated a preliminary investigation of Cheryl Peterson on August 23, 2002.[137] According to the EC opening the case, Peterson was a PETA [redacted] who had been involved in several incidents, including a [redacted] incident in which Peterson [redacted]. The EC also asserted that Peterson was involved in the planning and organization of [redacted]. Neither the EC nor any other document we reviewed indicated whether Peterson was among those arrested at this event.

The EC also described two additional events involving Peterson. [redacted]

[137] Cheryl Peterson is a pseudonym.

[redacted].

The second incident the EC described involved a [redacted]

The EC concluded that based on these activities, together with the fact that Peterson was [redacted] a preliminary inquiry was warranted "to determine the extent of Peterson's criminal activities."

Similar to other matters we describe in this chapter, the Norfolk Field Division [redacted]. According to the investigative file, the Norfolk Field Division determined that Peterson was considered [redacted] at which, according to an FBI source, instruction was provided about making bombs and incendiary devices.

The Norfolk Field Division administratively closed the preliminary investigation of Peterson on February 24, 2004. The closing EC noted that "no further investigative leads or actions have taken place since the expiration of the preliminary investigation status," which was May 23, 2003, 180 days after the case was opened.

Peterson was placed on the VGTOF watchlist on February 1, 2002, several months before she was officially identified as a subject of the preliminary investigation. On June 14, 2007 – over 3 years after the investigation was closed – the Norfolk Field Division submitted paperwork to FBI Headquarters requesting that Peterson be removed from VGTOF. Our review of case files identified multiple alerts the Norfolk Field Division received from 2003 to 2005 relating to Peterson's domestic and foreign air travel. In some instances, the FBI collected copies of Peterson's travel documents; in others, no information was collected other than her flight information.

### 2. OIG Analysis

We believe that, under the Attorney General's Guidelines, the information contained in the opening EC did not provide a sufficient factual basis to open a preliminary inquiry on Peterson in August 2002. Unlike in the Lewis case, there is no indication that Peterson made statements advocating force or

violence, and the only information indicating Peterson's involvement in unlawful acts was one, or possibly two, arrests several years ago for protest activities not uncommon for animal rights activists. Under the guidelines in effect at the time, preliminary inquiries "allow[ed] the government to respond in a measured way to ambiguous or incomplete information" in order to assess whether a full investigation was warranted. We found nothing to indicate that Peterson's previous arrests were sufficient to justify the opening of an FBI preliminary inquiry.[138]

We also found that the Norfolk Field Division failed to comply with FBI policy requiring that a domestic terrorism subject be removed from VGTOF and other watchlists when the case was closed. The Peterson preliminary inquiry was closed in February 2004, yet the Norfolk Field Division did not seek to remove the individual from VGTOF until June 2007, more than 3 years later. As a result, during these 3 years, the FBI collected information about Peterson's travel activities that it would not have if Peterson's VGTOF status had been closed in accord with FBI policies.

### F. Bruce Turner

#### 1. Facts

The Norfolk Field Division initiated a preliminary investigation of Bruce Turner on August 31, 2005.[139] According to the EC opening the case, an FBI source advised that Turner was a "hardcore" animal rights activist employed in PETA's [redacted]. The source told the FBI that because Turner's [redacted] the source believed Turner supported ALF activities. The source also told the FBI that Turner was in [redacted] at the time [redacted].

The Norfolk Field Division conducted records checks that indicated Turner had [redacted] in Norfolk and that he was arrested in [redacted] in [redacted] for burglary and disorderly conduct.[140] Turner's name was also referenced in FBI investigative files, including information indicating Turner's

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[138] According to a January 2, 2003, EC contained in the Peterson investigative file, the Norfolk Field Division obtained information indicating that in [redacted] that provided instruction on illegal protest activities. There was insufficient information in the file about this allegation for us to determine that a preliminary inquiry was warranted on this basis.

[139] Bruce Turner is a pseudonym.

[140] The arrest report indicated that Turner was arrested in connection with his protest [redacted]. Turner pled "no contest" to a misdemeanor and was sentenced to [redacted].

participation [redacted] at World Vegan Day and his involvement with an organization supporting an animal rights activist who had been convicted in 2000 on a misdemeanor obstruction charge in connection with an animal rights demonstration.

The Norfolk Field Division initiated a preliminary investigation based on this information "to determine [Turner's] involvement in criminal activity and any affiliation with domestic terrorist groups such as ALF." Early investigative efforts included verifying Turner's residence and receiving additional information from the FBI source about Turner, such as [redacted] and his activities as a PETA employee and animal rights activist. The Norfolk Field Division's query of [redacted] had been in contact with other numbers subscribed to by individuals who, according to FBI investigative files, were prominent animal rights activists. Two of these individuals were the subjects of domestic terrorism investigations in other FBI field offices.

On November 22, 2005, the Norfolk Field Division sent a letter to the U.S. Attorney's Office for the Eastern District of Virginia, requesting that the office open a case on Turner and assign an Assistant United States Attorney to the matter. The letter described the information the investigation had gathered about Turner's criminal record and affiliation with known animal rights extremists. On November 27, 2005, the U.S. Attorney's Office orally advised the Norfolk Field Division that it would not open a file on Turner at that time because the information provided in the November 22, 2005, letter did not meet the office's threshold for opening a criminal case. The U.S. Attorney's Office advised that additional evidence linking Turner to domestic terrorism organizations was needed before a case could be opened.

The Norfolk Field Division's preliminary investigation continued for several months. Investigative activity included additional records checks, a review of public source information about Turner, and a request to a unit at FBI Headquarters to analyze two e-mail addresses used by Turner to identify possible links to other FBI domestic terrorism subjects. The Special Agent in Charge of the Norfolk Field Division authorized a 90-day extension of the preliminary investigation, effective February 26, 2006. According to the EC requesting the extension, the FBI source that had been providing second-hand information about Turner was having little success meeting with him directly, but was continuing to try.

On May 16, 2006, near the conclusion of the 90-day extension, the Norfolk Field Division sent an EC to FBI Headquarters advising that the Turner investigation was being closed. The EC summarized the investigation that had been conducted and gave as the reason for closure the belief that Turner had left the Norfolk Field Division's jurisdiction. According to the EC, because

Turner traveled extensively as part of his employment with PETA and did not have a new permanent residence, there was no specific FBI field office to notify. The case file does not contain any indication that Turner was entered into or removed from VGTOF.[141]

### 2. OIG Analysis

We concluded that the FBI preliminary inquiry on Turner did not violate the Attorney General's Guidelines. Turner was identified by a source as a "hardcore" animal rights activist and [redacted] in a manner referring to the Animal Liberation Front. Additional information indicated that Turner had traveled to two states to participate in protests, one that resulted in his arrest and another that possibly could have resulted in property damage to an animal enterprise.

We also concluded that there was a factual basis for the Norfolk Field Division to authorize a 90-day extension for the preliminary inquiry. When the investigation did not obtain any further evidence of criminal activity, the FBI closed the investigation.

[141] At the time the Turner case was opened, FBI field offices were not required to enter subjects of domestic terrorism preliminary inquiries into VGTOF.

## CHAPTER FIVE
## INVESTIGATIVE ACTIVITIES DIRECTED AT GREENPEACE

### I. Background

According to the Greenpeace International website, Greenpeace was founded in 1971 by a small group of activists who leased a fishing vessel and sailed to Amchitka Island in Alaska to "bear witness" to the United States' underground nuclear testing at Amchitka Island, which was home to 3000 endangered sea otters, bald eagles, peregrine falcons and other wildlife. Their stated mission was to attempt to place themselves in harm's way in order to protest nuclear testing off the coast of Alaska.

Greenpeace International, which is based in Amsterdam, the Netherlands, now focuses on global environmental campaigns. Greenpeace International coordinates the activities of 41 "National/Regional Offices" located throughout the world including the United States (Greenpeace U.S.A.). According to its website, the National/Regional offices are largely autonomous in carrying out campaigns within their local areas and in obtaining the necessary financial support to carry out that work.

The most recent annual report for Greenpeace U.S.A. (2008-09) describes the organization's mission as follows:

> Greenpeace is an independent campaigning organization that uses peaceful protest and creative communication to expose global environmental problems and promote solutions for the future. With 46 offices located throughout the world, Greenpeace works to protect our oceans and ancient forests, and to end toxic pollution, global warming, nuclear threats, and genetic engineering. Since 1971, Greenpeace has been the leading voice of the environmental movement by taking a stand against powerful political and corporate interests whose policies put the planet at risk.

We limited our review to FBI investigative activities impacting Greenpeace U.S.A. ("Greenpeace"). We selected Greenpeace because it was one of the groups that had been featured in the news articles that, beginning in December 2005, reported that the FBI had improperly monitored the activities of domestic advocacy groups. As noted in Chapter One, many of these new articles were based upon information contained in document disclosures resulting from the FOIA requests to the FBI.

## II. Specific FBI Activities Relating to Greenpeace

Our review of FBI files identified several investigations in which individuals associated with Greenpeace were identified as subjects and the predication for those investigations was unclear. In the next sections, we analyze the predication for the investigations, as well as related issues.[142]

### A. FBI Anchorage Division Investigations of Individuals Associated with Greenpeace – 1999 – 2002

The FBI's Anchorage Field Division opened a series of related investigations of individuals associated with Greenpeace during 1999 – 2002. The FBI initially focused on plans by several members of Greenpeace to disrupt British Petroleum/Amoco (BP) energy development projects in Alaska. Later the scope of the investigation expanded to include alleged plans by Greenpeace members and others to protest or disrupt Strategic Missile Defense Initiative activities in Alaska and at another location outside the United States. We examined whether the investigations were adequately predicated and whether the collection and retention of information about the planned protest activities were consistent with FBI policies.

#### 1. Facts

In an Electronic Communication (EC) dated December 28, 1999, ("opening EC") the FBI's Anchorage Field Division opened a preliminary inquiry to determine whether two named subjects and unknown others were involved in a conspiracy to commit "terrorist related criminal activity" in connection with the Northstar offshore oil development project in the Arctic operated by British Petroleum/Amoco ("BP"). The FBI opened the preliminary inquiry under the investigative classification for Acts of Terrorism by domestic terrorists.

The opening EC and another FBI document cited information received by the FBI that the subjects and unknown others were preparing to disrupt or halt the construction of BP's Northstar Project, an offshore energy development project in Alaska. During the course of the preliminary inquiry, the FBI added additional subjects who were members of an "environmental pressure group" (later identified as Greenpeace) that was planning to interrupt or delay construction of Northstar, although Greenpeace itself was never made a subject of the investigation. According to the FBI's information, the group's plan was to interfere with BP's construction of two 6-inch sub-sea pipelines from Seal Island to the Mainland where it would connect to the Alaska Pipeline, by, among other things, cutting trenches across BP's "ice road" used to transport

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[142] We identified one matter in which the FBI investigated the protest activities of both Greenpeace and The Catholic Worker, as well as other groups. We address that investigation separately in Chapter Seven.

equipment over sea ice to the site, chaining themselves to pipes embedded in the ice in the path of BP's activities, or chaining themselves to BP's construction equipment.

According to the FBI file, on February 24, 2000, representatives from BP security, Alaska State Troopers and the Alaska North Slope Borough met with members of Greenpeace to advise them that certain areas, such as the right of way for the pipeline and the ice roads that have been constructed for the purposes of the sub-sea pipeline construction, were designated as "environmentally sensitive areas" requiring special permission for entrance. The Greenpeace members were informed that any trespassers would be arrested for entering restricted areas. They were also informed that a special Alaska State permit to camp in excess of 14 days in one location on "State Land" was required.

On March 10, 2000, three individuals were arrested by state and local law enforcement authorities for trespassing onto BP property. A fourth individual was arrested a few weeks later for trespassing. Several more members of Greenpeace were arrested in the ensuing weeks. At least two of the protesters were in possession of thick chains and were attempting to secure themselves to the cab of a backhoe when they were arrested. On April 11, 2000, five Greenpeace members were arrested while trespassing onto BP property, and some of those individuals were in possession of chains and bolt cutters. One of the arrested individuals was driving a snowmobile, which dragged a warming hut containing two protesters chained together. The activities for which the Greenpeace members were arrested were consistent with the information that the FBI relied on in opening the investigation.

On April 18, 2000, the FBI opened a full investigation of 10 individuals associated with Greenpeace in connection with the Northstar project. The opening EC for the full investigation stated that based on the arrest of 15 members of Greenpeace and other information, Greenpeace activists remained committed to engaging in direct action activities to halt the production of petroleum energy in Alaska's Arctic region by hindering, delaying, or halting BP's planned transportation of oil drilling equipment for the Northstar Project during the upcoming summer months.

On August 7, 2000, seven members of Greenpeace boarded a 420-foot barge carrying drilling equipment for BP's Northstar Project. In boarding the barges, the protesters crossed the 400 yard "safety zone" around the tug and barge. As a result of the boarding, the barge was forced to turn around and return to the nearest port. Greenpeace members erected a polar survival shelter on the barge and sent an e-mail to BP employees describing the direct action campaign against Northstar. In addition, Greenpeace members hung up banners and flags on the barge.

On August 8, 2000, at the request of attorneys for BP, the federal district court in Alaska issued a temporary restraining order against Greenpeace. Just prior to the issuance of the restraining order, several motorized rafts, operated by Greenpeace members, attempted to halt a tug near Prayeth Bay. After the order was issued, Greenpeace members and the Greenpeace vessel, M/V Arctic Sunrise, left the area.

Beginning in late 2000, the FBI expanded the scope of the Northstar investigation to obtain information about protest activities planned by Greenpeace and some of its members relating to other issues. For example, the FBI developed information that Greenpeace and some of its members (as well as other organizations) were planning to disrupt a different BP project in Alaska known as the Liberty Oil Field. The FBI also developed information that Greenpeace and some of its members were planning to protest Strategic Missile Defense Initiative activities at locations in Alaska and outside of the United States. The FBI file noted that numerous Greenpeace members who might be involved in the disruption activity planned for the Liberty project had been arrested in connection with the Northstar protests.

Throughout 2000 and 2001 the FBI developed detailed information regarding the plans being developed by Greenpeace to disrupt and delay construction of the Northstar and Liberty projects and other potential protest activities. The primary focus of the information recorded in FBI documents was anticipating and preparing for potential criminal activity in the form of trespass and other actions such as protesters chaining themselves to equipment or to the ice. Some documents briefly described the message that the group was seeking to convey to the public through its acts and the group's deliberations and strategies (apart from the acts) for getting the message out.

In early 2001 the FBI case agent filed a report in the Northstar investigation file describing information the FBI had developed regarding the upcoming travel and protest plans of three individuals: A. Bartlett, C. Daniels, and E. Franklin.[143] Bartlett was a Greenpeace member and a named subject of the Northstar investigation who had been arrested during the Northstar protests in 2000. Daniels was a Greenpeace member who was not a named subject. According to FBI documents, Daniels participated in the Northstar protests, but there was no indication in the FBI files that Daniels had been arrested. FBI documents identified Franklin as someone who had been arrested the prior year during the Northstar protests and who was moving to Alaska. Franklin was identified as a member of Greenpeace and other environmental organizations. The report did not contain any information about illegal or planned future illegal activities by these individuals.

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[143] Bartlett, Daniels, and Franklin are pseudonyms.

On May 14, 2001, the FBI opened a preliminary inquiry relating to Franklin and the Ruckus Society, a group described as being closely tied to Greenpeace through cooperation and common employees. The opening EC described information that the FBI developed that Franklin had mentioned an interest in blowing up the Alaska pipeline. The EC described Ruckus as specializing in high profile direct actions, which the FBI called a "euphemism for criminal activity." The EC stated that Ruckus and other environmental extremist groups, through Franklin, would become increasingly active in targeting projects in Alaska, potentially including the Alaska Pipeline, the Strategic Missile Defense Initiative, and others.

Through the rest of 2001, the FBI collected and recorded information regarding Franklin's efforts to establish a Ruckus "direct action" training camp in Alaska. The FBI also collected and recorded information about Daniels's political positions and protest-related activities, including an alleged plan to conduct reconnaissance of missile defense sites in Alaska in preparation for protest activities. The FBI also collected and recorded information about Greenpeace's plans for protesting the Strategic Missile Defense Initiative, including plans for protest activities at a location outside the United States. This information was retained in both the Northstar full investigation file and the Franklin preliminary inquiry file.

On September 6, 2001, the FBI Anchorage Field Division case agent reported that there was no indication that Ruckus would approve a direct action training camp in Alaska. The agent stated that the investigation had not determined that Franklin had the intention or the means to blow up the Alaska Pipeline. On December 13, 2001, the case agent reported that Franklin had left the state, and the preliminary inquiry of Franklin was closed.

In January 2002 the FBI Anchorage Field Division case agent prepared an EC noting that Greenpeace had signed a plea agreement stating that American Greenpeace members would not trespass on U.S. military property linked to the National Missile Defense, and that Greenpeace was stepping back from National Missile Defense issues in the United States. The full investigation that had originally been opened in connection with the Northstar matter was closed.

### 2. OIG Analysis

#### a. Predication for the Investigations

We concluded that under the applicable guidelines, the FBI had a sufficient factual predication to open a preliminary inquiry and full investigation on members of Greenpeace for a general crimes investigation in connection with the Northstar investigation. While the opening ECs did not identify a specific federal law that the subjects may have been planning to

violate, the facts and circumstances known to the FBI at the time of the opening ECs supported a preliminary inquiry and later a full investigation relating to a potential violation of 18 U.S.C. § 1366 (Destruction of an Energy Facility). This statute provided that "[w]hoever knowingly and willfully . . . damages or attempts or conspires to damage the property of an energy facility in any amount and causes or attempts or conspires to cause a significant interruption or impairment of a function of an energy facility, shall be punishable by a fine under this title or imprisonment for not more than ten years, or both." 18 U.S.C. § 1366(a) (effective to October 25, 2001). The statute defines "energy facility" as "a facility that is involved in the production, storage, transmission, or distribution of electricity, fuel, or another form or source of energy, or research, development, or demonstration facilities relating thereto, regardless of whether such facility is still under construction or is otherwise not functioning." 18 U.S.C. § 1366(c).

At the time that the preliminary inquiry was opened, the FBI concluded that there was a "possibility of criminal activity" as required under the Attorney General's Guidelines. Once under construction, the Northstar Project would clearly be an energy facility within the meaning of the statute. The FBI also had credible information (later confirmed by the conduct of Greenpeace members) that Greenpeace members were planning activities which, if successful, would interrupt or impair the function of the facility. Similar actions to impede the activities of a target organization had been used by Greenpeace members on numerous other occasions. Interrupting or impairing the facility was Greenpeace's central purpose. This information was sufficient to support a conclusion that Greenpeace activities would possibly satisfy the "damage to facility property" element of 18 U.S.C. § 1366.

By the time the full investigation was opened in April 2000, the FBI had more information about the potential actions of the Greenpeace members that provided sufficient predication for a full investigation under the "reasonable indication" standard of the Attorney General's Guidelines. By that time, at least 15 members of Greenpeace had been arrested while trying to impede or impair construction of the project through means such as chaining themselves to equipment. Under the circumstances, the FBI concluded that there was a reasonable indication that 18 U.S.C. § 1366 would be violated.

As noted above, the focus of the full investigation shifted to efforts to disrupt a different BP project (the Liberty Oil Field) and to protests relating to Missile Defense, and we concluded there was adequate predication for a full investigation into these additional matters. As to the BP Liberty Oil Field project, although the FBI did not open a separate investigation, based on the activities and arrests of Greenpeace members protesting the Northstar project and other information there was a reasonable indication that these individuals or others associated with Greenpeace would continue to disrupt or impede

construction in a similar fashion and would violate 18 U.S.C. § 1366, as discussed above.

We also concluded that, under the Attorney General's Guidelines, there was sufficient predication for the FBI to investigate possible crimes by the subjects in the Northstar investigation in connection with Greenpeace's planned protests regarding the Strategic Missile Defense Initiative. In the course of the Northstar investigation the FBI learned that some of the same individuals who participated in the illegal Northstar protest activities were also involved in the plans regarding Missile Defense protests. The FBI concluded that there was a reasonable indication that the planned protest activities might include illegal acts, including, for example, trespass on a military facility, 18 U.S.C. § 1382.[144]

We also determined that the FBI had sufficient predication to open a preliminary inquiry of Franklin. Franklin's reported statement of interest in blowing up the Alaska pipeline would justify a preliminary inquiry relating to the possibility of a violation of 18 U.S.C. §§ 844(i) and (m) (bombing of property used in interstate commerce).

### b. Classification as an Act of Terrorism Investigation

We also considered whether this matter was properly classified as an Act of Terrorism investigation. At the time the investigation was opened, this classification was applicable to "any investigation of a criminal act which involves as an individual or individuals affiliated with a domestic terrorist group." MIOG Part 1, § 266-1(1). We are not aware of any specific definition of "domestic terrorist group" that was used by the FBI at that time, although the 1989 Attorney General's Guidelines defined a "domestic security terrorism investigations" as "focused on investigations of enterprises . . . whose goals are to achieve political or social change through activities that involve force or violence."

Many of the tactics used by the Greenpeace members in this case, such as trespassing and even chaining themselves to ice roads, could be considered forms of civil disobedience and would not normally be considered acts of terrorism. However, the FBI developed some credible information that the Greenpeace individuals under investigation were seeking to promote its goals in part through acts that might include acts of force or violence. In particular, the FBI had information that one subject had expressed interest in blowing up

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[144] Although the Alaska Field Division did not open a separate investigation related to the National Missile Defense protests in Alaska, as we describe in Chapter Seven, in April 2001 the Los Angles Field Division opened an investigation on Greenpeace, The Catholic Worker, and others for protest activities of the NMD at the Vanderburgh Air Force Base in California.

the Alaska pipeline. We therefore concluded that there was a basis for the FBI to classify this investigation as an Act of Terrorism matter.

### c. Collection and Retention of Information about First Amendment Activities

Some of the FBI reports in the files related to the Greenpeace Alaska investigations contained information about the actual or planned travel and First Amendment activities of Greenpeace or individuals associated with Greenpeace. In particular, the FBI collected information about the travel and protest plans of Bartlett, Daniels, and Franklin. In some of these documents, no specific connection between this information and any possible illegal action was made explicit. These documents could create the impression that the FBI was investigating Greenpeace or the individuals solely on the basis of their First Amendment activities. We therefore considered whether the FBI collected and retained this information in compliance with applicable guidelines.

As detailed in Chapter Two, the Privacy Act and the FBI's MIOG provide that information concerning the exercise of First Amendment rights should be made a matter of record only if it is "pertinent to and within the scope of authorized law enforcement activity." 5 U.S.C. § 552a(e)(7); MIOG Introduction, § 1-4(4). After reviewing the FBI file as a whole, we did not conclude that it was unreasonable for the FBI to consider the information about the First Amendment activities of Greenpeace and its members to be pertinent to and within the scope of the authorized preliminary and full investigations described above. The purpose of collecting this information appears to have been to track the location and future intentions of subjects of the investigations or other persons who had participated in protest activity relating to the Northstar project that included illegal acts. Greenpeace members had already engaged in actual and attempted illegal acts, including efforts to disrupt an energy facility by, for example, trespassing, boarding an oil company barge, and chaining themselves to equipment, and they had demonstrated an intention to continue to conduct future protest activities that could include illegal acts similar to those attempted earlier. In addition, at least one subject had reportedly expressed an interest in blowing up the Alaska pipeline. Given these activities, the specific plans and intentions of individuals involved in these plans as to future travel and future targets for protest were pertinent to the investigation.

## B. FBI Dallas Field Division Investigations of Individuals Associated with Greenpeace – 2004 – 2007

In 2004 the FBI's Dallas Field Division opened a full investigation against four individuals associated with Greenpeace relating to their protest activities with respect to Exxon-Mobil (Exxon) and Kimberley-Clark Corporation. During this investigation the FBI utilized a wide variety of investigative techniques,

including surveillance and the use of a pole camera. We examined the adequacy of the predication for this investigation and whether the investigation was predicated solely on First Amendment activities.

### 1. Facts

The FBI's Dallas Field Division opened an investigation under the Acts of Terrorism classification against two individuals (G. Harris and I. Johnson) associated with Greenpeace on May 17, 2004.[145] The opening EC did not identify the potential federal criminal violations, but later documents [redacted] stated that the investigation related to possible violations of criminal statutes: conspiracy, civil disorders, interruption of an energy facility, and traveling to riot, 18 U.S.C. §§ 231, 371, 1366 and 2101.[146]

According to the file, the facts known to the FBI case agent at the time the full investigation was opened included that Harris and Johnson were arrested [redacted][147]

The FBI file noted that when Harris and Johnson were arrested, they gave as their address a [redacted]. The file also noted that Harris had contacts with the subjects of other FBI Act of Terrorism investigations.

The case agent also knew as a result of a different FBI investigation that Harris had numerous contacts with a person who was suspected of

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[145] G. Harris and I. Johnson are pseudonyms.

[146] [redacted].

[147] [redacted].

involvement in an alleged conspiracy to [redacted]. Although Harris was not a named subject of this other investigation, he was suspected of involvement in the alleged conspiracy.

The case agent told the OIG that he recommended that the full investigation be opened prior to Exxon's upcoming May 24, 2004, annual shareholder meeting because he was concerned about the subjects committing the same kinds of criminal acts that they committed [redacted]. He stated that "[o]ur mission in the counterterrorism field is to try and prevent these kinds of things from happening." He was unable to cite a particular federal criminal statute that was at issue, stating:

> I wasn't picking out statutes to try and go. I was running it as a counterterrorism investigation primarily. I saw pretty good facts and hoped to prevent future acts. There was a possibility for several charges. I do not know them off the top of my head but I was looking at finding out if there was going to be any future attacks.

The agent told us that he was concerned that the activists who participated in the [redacted] might resort to more violent actions such as arson because [redacted]. The case agent also stated that the "federal nexus" was the fact that most of the persons [redacted] traveled from out of state or from foreign countries "to be part of this conspiracy to commit a crime."

A week after the full investigation was initiated, the FBI added a third subject, K. Lewis.[148] Lewis had also been [redacted],[149] and had contacts with the subject of another domestic terrorism investigation in a different FBI field division. FBI documents filed in this investigation after the Exxon meeting made no mention of any protests, crimes, or arrests in connection with the meeting, although they continued to reference [redacted]. On December 6, 2004, the FBI Dallas Field Division learned about a [redacted]

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[148] K. Lewis is a pseudonym.

[149] The FBI case file does not contain any information that criminal activity occurred in relation to the [redacted]. It also does not appear that any arrests or charges were filed as a result of the activities stemming from the [redacted].

[redacted]. The FBI determined that 1 of the [redacted] had likely been in contact with Harris and with the subjects of other domestic terrorism cases. This individual was added as the fourth subject of the FBI Dallas Field Division investigation.

Beginning in May 2004 (and ending in April 2006), on at least seven separate occasions the case agent conducted surveillance of the residence at the address given by Harris and Johnson when arrested, taking note of all vehicles parked near it. Later the tag numbers on these vehicles were submitted to the state's department of motor vehicles in order to obtain vehicle registration information, which was kept in the FBI file.

[redacted].[150]

The FBI conducted database and Internet research on the subjects and some of their associates. Information from this research was placed in the FBI case file, including summaries of the subjects' involvement with activist organizations, information from a database, photographs obtained through a state driver license image retrieval system, and other personal information.

On January 4, 2005, the case agent received information from corporate security at Kimberly-Clark Corporation that the company had been targeted by Greenpeace for its use of pulp from non-recycled wood in many of its paper products.[151] A neighbor of Kimberly-Clark's CEO reported seeing a green van, occupied by two males taking pictures of the CEO's residence, but was unable to obtain the license plate number. Kimberly-Clark's officials were aware of [redacted] and wanted to open a dialog with Greenpeace to prevent similar actions from occurring against Kimberly-Clark.

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[150] According to FBI files, [redacted].

[151] Kimberly-Clark's corporate security informed the FBI that Greenpeace members had been sending voluminous e-mails (e-mail attacks) aimed at overloading the corporate server.

The information about Kimberly-Clark, along with other past information in the case file, led to the case agent's request, on March 3, 2005, to his supervisor to install a pole camera [redacted].[152] The case agent was concerned that the subjects planned to disrupt shareholder's meetings scheduled for Kimberly-Clark and Exxon in April and May, 2005. The case agent said he therefore requested the installation of a pole camera [redacted], which he believed served as a meeting and preparation location for individuals involved in illegal activity. The agent stated that this technique would be useful in identifying additional subjects and vehicles at the residence. The request was granted and the pole camera was installed on April 21, 2005. The FBI installed two pole cameras [redacted] for the purpose of determining the pattern of activity [redacted] in preparation for the upcoming Exxon and Kimberly-Clark annual meetings. The case agent stated that nothing significant was learned as a result of the pole cameras.[153]

On March 25, 2005, the case agent requested and obtained the assistance of the Special Operations Group (SOG) to conduct surveillance of Harris's residence. The case agent told us that the FBI had learned about a threat to bomb the World's Best Technology conference being held in Arlington, Texas. The case agent stated that because this conference was close in time to the Exxon and Kimberly-Clark annual meetings, he was concerned that the same subjects were involved in the threat. When further investigation revealed that the individual making the bomb threats was not related to any of the subjects of this investigation, a separate investigation was opened and surveillance of the target residence was discontinued.

On July 11, 2007, 3 years after the initiation of the full investigation, the FBI closed the matter. FBI documents contain no evidence or allegation that any of the subjects of the investigation disrupted the operations of Exxon or Kimberly-Clark during this 3-year period. The closing EC noted that the target residence (the residence of Harris) [redacted]. The closing EC stated that the information collected on the subjects was being provided to the FBI field office [redacted] for any action deemed appropriate.

All of the subjects were placed on the Violent Gang and Terrorist Offender File (VGTOF) database at the time they were named as subjects. The

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[152] Also referred to as a closed-circuit television camera, a pole camera is typically installed on a utility pole outside the target residence or place of business allowing investigative agencies to observe and record activities in areas where individuals have no expectation of privacy.

[153] The pole cameras were removed some time prior to the investigation being closed in 2007, but we were not able to determine the precise date.

FBI Dallas Field Division thereafter received information about law enforcement encounters involving the subjects and in some cases the subjects' associates. For example, in [redacted] one of the subjects and several friends were questioned in another city by a local policeman who found them [redacted] in a residential neighborhood. Although no citation was issued, the officer recorded the vehicle license plate number and forwarded the identities of the occupants to the FBI. Because one of the occupants was a subject of the Dallas investigation who was in the VGTOF database, information about this encounter was forwarded to the Dallas Field Division and placed in the case file. According to the file, the police officer reported the incident because a conference was recently held in that city which had drawn protests from various "animal rights/eco-terrorism" groups.

The case file also contained a VGTOF alert relating to Harris's travel outside the country [redacted]. Although Harris's travel was not delayed, as a result of this alert the FBI connected Harris's trip with an anonymous complaint from [redacted], entered in the FBI's Automated Case Support (ACS) system, indicating that [redacted]. The complaint further alleged that the "attacks may include destruction, immobilizing, setting fires and destroying bulldozers."

As discussed in Chapter Two, at the time of the Dallas investigation FBI policy required that subjects of a domestic terrorism full investigation be nominated to the consolidated terrorist watchlist (thereby placing the subject's identity into the VGTOF database) and that the subject be removed from the watchlist upon the case closure. The agent told us that he requested that the subjects of the Dallas investigation be removed after the case was closed. However, it appears that this did not occur. We found that the FBI file contained a VGTOF alert about one subject's arrest at an [redacted] unrelated to the Dallas investigation that took place [redacted] after the Dallas matter was closed. The case agent told us that when he received this alert he again requested that the subjects be removed from VGTOF.[154] The agent's second request was probably successful, because we found no subsequent VGTOF alerts in the case file.

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[154] The watchlist removal delays we found here were consistent with the findings of an OIG audit of the FBI's consolidated terrorist watchlist nomination practices. The May 2009 audit found that 72 percent (61 of 85) of the subjects of closed international and domestic terrorism cases were removed from the watchlist in an untimely manner. See U.S. Department of Justice Office of the Inspector General, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Audit Report 09-25, (May 2009) at 38. On average, removals were delayed 60 days from case closure. Id. The audit found that the FBI had no timeliness requirement for subject removals from the watchlist. Id. at 44. During the audit, the FBI put in place a new requirement that field offices submit watchlist removals within 10 days of a case closure request. Id.

### 2. OIG Analysis

Based on our review of the case file as a whole and our interview of the FBI Special Agent and the Assistant United States Attorney assigned to this matter, we did not conclude that the FBI's Dallas Field Division targeted Greenpeace or its members solely on the basis of their First Amendment activities. The FBI documents and witnesses stated that the FBI was seeking to investigate the subjects who the FBI believed might engage in protest activities against Exxon that could include criminal acts such as trespass that could ultimately result in damage to property or injuries to individuals. The FBI cited the participation of the subjects in a [redacted]. In addition, the FBI had information that at least one of the subjects had contacts with a person who was suspected of being involved in a conspiracy to [redacted].

Although we did not conclude that the FBI was investigating the subjects solely as a result of their First Amendment activities, we concluded that the predication for this investigation as relating to a federal crime was extremely weak.

Moreover, we found that the FBI Dallas Field Division did not comply with Section II.C3. of the Attorney General's Guidelines, which required that the "FBI supervisor authorizing an investigation shall assure that the facts or circumstances meeting the standard of reasonable indication" be recorded in writing. The importance of complying with the writing requirement in cases implicating the exercise of First Amendment rights is underscored by the FBI policy requiring "strict compliance" with Attorney General's Guidelines and FBI policies in initiating investigations of "individuals or members of assembled groups who advocate political or social goals through violent means, as well as investigations into the causes of civil or social disorder." MIOG, Introduction, § 1-4(1), (2).

The FBI did not comply with these requirements. First, the opening EC provided no information to support the suspicion that the subjects were planning any future protest against Exxon in Dallas (or elsewhere), other than the fact that the subjects had [redacted] in the past and were in regular contact with others who were the subjects of domestic terrorism investigations.

Second, even assuming that the available information created a reasonable indication that the subjects were planning future protests [redacted], the opening EC did not explain how such a protest might involve a violation of federal law. All the crimes that occurred during [redacted]

[redacted] were investigated and prosecuted by local authorities under state law. There is no federal criminal statute prohibiting trespass on private property. The case agent was unable to specify to us any particular federal crime that he had in mind at the time he opened the investigation in 2004. He said that his focus was more broadly aimed at preventing criminal acts such as those that occurred [redacted] from being committed at future events. Yet, the [redacted] were charged only with state crimes, not federal crimes. The case agent also stated that he was concerned the protesters might escalate their future protests by engaging in more violent and destructive acts because [redacted], but we found no basis in the opening EC to support this concern.[155]

Court documents filed by the prosecutor after the case was opened described the investigation as relating to potential violations of 18 U.S.C. §§ 371 (conspiracy), 231 (civil disorders), 1366 (interruption of energy facility) and 2101 (riot).

We believe that at the time the investigation was opened the most likely predication for a potential violation related to the riot statute, 18 U.S.C. § 2101.[156] The riot statute prohibits traveling in interstate commerce or using a facility of interstate commerce to incite, organize, promote, encourage, participate in, or carry on a riot. The statute generally defines a riot as an act or threat of an act of violence, by a person who is part of an assemblage of three or more persons, constituting a clear and present danger of, or resulting in, damage or injury to the property or person of an individual. 18 U.S.C. § 2102.

Based on [redacted], the FBI may have had indication that the subjects would promote or encourage the travel of out-of-state protesters in interstate commerce or otherwise use interstate facilities (cell phones) for similar future activities. However, we found scant evidence suggesting that the subjects were planning protest activities that would satisfy the "act or threat of an act of violence" element of the riot statute. The only specific information suggesting that the subjects might engage in acts or threats of acts of "violence" was the [redacted]

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[155] The case agent identified the "federal nexus" as the fact that most of the [redacted] had traveled from out of state in a conspiracy to commit criminal acts, indicating that the subjects might solicit persons from out of state to commit criminal acts. However, under 18 U.S.C. § 371, the subject of the conspiracy must be an "offense against the United States." The agent did not specify any federal crimes that were the subject of the potential conspiracy.

[156] As noted in footnote 93 of Chapter Three, two FBI OGC attorneys told us they interpreted the Attorney General's Guidelines on "Reporting on Civil Disorders and Demonstrations" to require Attorney General approval to open an investigation under the riot statute. The FBI file contains no record that such approval was sought in this case.

[redacted]. The case agent told us that based on a conversation with local police he believed that "[redacted]" He said he did not know the extent of that injury.

We note that the FBI also had information showing contacts between Harris and another person who was suspected of being involved in a conspiracy to make specific threats of violence against the employees of a different company [redacted]. The FBI may have been concerned that such unlawful threats of violence might therefore be used in potential future protests of Exxon and Kimberly-Clark in Dallas. However, the available record does not establish a link between Harris and the threatened acts of violence in the [redacted] company case, the agent did not offer during our interview such a link as a reason for targeting Harris, and there is no evidence that the FBI considered this link at the time it opened the investigation. In sum, we concluded that the predication for this investigation as relating to a federal crime was weak and likely did not satisfy the Attorney General's Guidelines.

We also considered whether this investigation was properly classified under the FBI's "Acts of Terrorism" classification. As previously noted, FBI policy permitted the use of this classification for investigations of individuals who seek to further political or social goals through activities that involve the use of force or violence and violate federal law. Yet, we found scant evidence supporting the "force or violence" element of this test for the same reasons that we found that the FBI's predication for the "acts or threats of violence" element under the federal riot statute was weak.

This classification caused the subjects to be placed in the VGTOF database and on a federal watchlist. As a result, the FBI collected information about the subjects' travel and protest activities throughout the United States. For example, when local police stopped one of the subjects for [redacted] they submitted the subject's name to the FBI's Terrorist Screening Center. Because the subject was in the VGTOF database, information regarding a passenger in the car was also collected and retained in the case file for the Dallas investigation as part of the Terrorist Screening Center's "Associates Project" for identifying possible associates of "known or suspected terrorists."

We also considered the long duration of this investigation in light of FBI policy requiring that the duration of any investigation with potential impacts on First Amendment activity "must not be permitted to extend beyond the point at which its underlying justification no longer exists." MIOG Introduction, § 1-4(2). The investigation was opened in 2004 and was not closed until 2007, when [redacted]. The last investigative activity reflected in this case file was a "spot check" of the target residence in April

2006. The Dallas Field Division investigation did not result in the collection of any evidence of potential criminal acts by the subjects, and several shareholders meetings of the target companies took place during the pendency of the investigation without incident.

In fact, the investigation was originally opened to prevent possible crimes at the 2004 Exxon annual shareholder meeting. When we asked the case agent why he kept the investigation open after the 2004 shareholder meeting passed without incident, he stated that the fact that no criminal actions were taken at one shareholder meeting did not compel the conclusion that no criminal actions were being planned for the next.

Yet, under the circumstances we believe that, under the Attorney General's Guidelines and FBI policies, the FBI should have closed the Dallas investigation and removed the subjects from the VGTOF database sooner than July 2007. The investigation was held open more than a year after the Dallas Field Division's last investigative activity. During that time the FBI continued to collect information about the subjects' travel and other activities pursuant to the VGTOF database. We believe the FBI kept the Dallas investigation open "beyond the point at which its underlying justification no longer existed," which failed to comply with the MIOG.

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## CHAPTER SIX
## INVESTIGATIVE ACTIVITIES DIRECTED AT THE CATHOLIC WORKER MOVEMENT

### I. Background

According to its website, the Catholic Worker movement began in 1933 as a newspaper published in New York City and edited by Dorothy Day, the movement's founder. Today, the Catholic Worker movement is a collection of an estimated 180 autonomous community groups located mostly in the United States.[157] The Catholic Worker has no central organizational structure. It operates hospitality houses, located mostly in urban area. Catholic Worker volunteers and members, some of whom live in the hospitality houses, commonly provide "soup kitchen" meals to the needy.

The Catholic Worker's website states that it is a religious community whose members may adopt "lives of voluntary poverty" and share a Christian/ pacifist philosophy derived from the Sermon on the Mount and certain teachings of the Catholic Church. It has no official affiliation with the Catholic Church. An article on its website described Catholic Worker activities as follows:

> Beyond hospitality, Catholic Worker communities are known for activity in support of labor unions, human rights, cooperatives, and the development of a nonviolent culture. Those active in the Catholic Worker are often pacifist people seeking to live an unarmed, nonviolent life. During periods of military conscription, Catholic Workers have been conscientious objectors to military service. Many of those active in the Catholic Worker movement have been jailed for acts of protest against racism, unfair labor practices, social injustice and war.

We selected the Catholic Worker for this review because it was one of the groups that had been featured in the news articles that, beginning in December 2005, reported that the FBI had improperly monitored the activities of advocacy groups. As noted in Chapter One, many of these news articles were based upon information contained in document disclosures resulting from Freedom of Information Act (FOIA) requests to the FBI.

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[157] In this section, we will refer to the Catholic Worker movement generically as "the Catholic Worker," or "Catholic Worker group(s)" and, where a local community forms the context, by the local group's name (such as "the Des Moines Catholic Worker").

## II. Specific FBI Activities Relating to the Catholic Worker

The FBI's investigative activity with respect to Catholic Worker groups' and their members' protest activities during the period of our review fell into three general categories: cases in which a local Catholic Worker group or its members were made the subject of an FBI investigation, cases in which the FBI investigated the activity of a local group or its members in connection with a "special event," and cases in which the FBI retained records of the activities of a local Catholic Worker group or its members based on reports submitted by other agencies.

### A. Investigations in Which Catholic Worker Groups or Their Members Were Made the Subject of an FBI Investigation

We found three cases in which the FBI opened preliminary inquiries or full investigations in which local Catholic Worker groups or their members were named subjects or a member was an unnamed subject in connection with protest activity. We discuss below the two cases in which Catholic Worker members were named subjects or a member was an unnamed subject. Because the third case was an investigation of the Catholic Worker group, Greenpeace, and others, we discuss that case in Chapter Seven.

#### 1. Milwaukee, WI Military Recruiting Station – Milwaukee Field Division

##### a. Facts

In an Electronic Communication (EC) dated June 18, 2003, the FBI Milwaukee Field Division opened a full investigation on unknown subject(s) for an act of vandalism that occurred at a military recruiting station near the campus of the University of Wisconsin, Milwaukee. According to the opening EC, in the early morning hours of June 17, 2003, unknown subject(s) damaged three large glass panel windows and shattered the glass front door of the building. In addition, the subjects threw four or five Christmas ornaments filled with red paint into the recruiting station, causing further damage. The EC did not state whether any military personnel or other persons were in the building at the time of the incident. Army personnel reported that it appeared nothing had been taken from the office. The EC also stated that an anonymous e-mail sent to a local newspaper and TV news station claimed responsibility and asserted the action was taken on "behalf of the people of Iraq who suffered under Saddam Hussein and now suffer under the United States." The FBI opened the investigation under the investigation classification that is designated for acts of terrorism by domestic terrorists occurring on government reservations.

According to an EC dated October 24, 2003, during the investigation a witness to the vandalism identified an individual, a member of the Casa Maria

Catholic Worker, as a person who may have been involved in the vandalism. The EC did not describe in any detail what the witness saw but simply referenced "a witness to the captioned matter." According to the EC, the witness identified the Catholic Worker member as a possible suspect after viewing a videotape of a protest which occurred at the Federal building in Milwaukee.[158]

The Casa Maria Catholic Worker was a local group with a hospitality house located in Milwaukee. Twice the FBI interviewed the member of the Casa Maria Catholic Worker who the witness had identified, both times at his Milwaukee residence, which was also the Casa Maria Catholic Worker hospitality house.[159] The individual denied any involvement in or knowledge of the vandalism. Following additional investigative activity, the FBI closed the case for lack of evidence that identified any subjects.

**b. OIG Analysis**

We concluded that under the applicable Attorney General's Guidelines the FBI had a sufficient factual basis to open an investigation on unknown subjects and to interview the Catholic Worker member suspected of the vandalism. The 2002 Attorney General's Guidelines in effect at the time of the investigation stated that a general crimes investigation may be opened "when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed." The Special Agent who wrote the opening EC had a "reasonable indication" that a federal crime was committed from the report of vandalism at a military recruiting station and an anonymous claim of responsibility. See 18 U.S.C. § 1361 (willful injury or depredation to United States property.) Moreover, interviewing the Catholic Worker member at the Catholic Worker hospitality house was a lawful investigative technique under the 2002 Attorney General's Guidelines, based on the witness' belief that the Catholic Worker member might have been involved.

We also examined whether this investigation was properly classified as a domestic terrorism matter. The FBI policy in effect during most of this investigation stated that such classification "shall include any investigation of a criminal act which involves an individual(s) who seeks to further political and/or social goals wholly or in part through activities that involve the use of force or violence and violate federal law."[160] The act of vandalism, which involved the

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[158] The EC did not describe the nature of the videotaped protest, state whether the Catholic Worker or its members were present at the protest, or identify the reasons the FBI had possession of the videotape.

[159] The FBI memorandum that memorialized the details of the individual's first interview described the Casa Maria Hospitality House and provided its website address.

[160] MIOG, Part 1, § 266-1(1) (July 2003). As noted in Chapter Two, this MIOG provision went into effect on July 9, 2003. Because this provision was in effect for all but 3 (Cont'd.)

shattering of the glass front door of the military recruiting station, constituted a use of force or violence. Additionally, an anonymous individual claimed responsibility for the act and stated that the action was on behalf of oppressed Iraqis, showing a desire to further a particular political view. These facts therefore fit within the FBI's policy describing the classification of a matter as domestic terrorism.

### 2. Ithaca, NY Military Recruiting Station - Albany Field Division

#### a. Facts

In an EC dated June 1, 2004, the FBI Albany Field Division opened a full investigation, under the domestic terrorism classification, on four individuals for entering a military recruiting station in Ithaca, New York, and pouring human blood on the walls, pictures, and an American flag.[161] The vandalism occurred on March 17, 2003, 3 days before the beginning of the Iraq War. Some of the individuals read a declaration encouraging military members to "refuse the order to go to war," and to "leave the military before it is too late." According to the opening EC, the four individuals were members of the Ithaca Catholic Worker.

The four individuals – who came to be known as the "St. Patrick's Four" – were initially tried for trespass and felony criminal mischief in state court (Tompkins County, New York). According to the FBI's opening EC, in April 2004, after a jury was unable to reach verdicts, the county court judge declared a mistrial. The Tompkins County District Attorney then requested that the U.S. Attorney (Northern District of New York) file charges against the St. Patrick's Four in federal court, which the U.S. Attorney did. The four individuals were subsequently prosecuted in U.S. District Court on federal charges of conspiracy to impede an officer of the United States by force, intimidation and threat, 18 U.S.C. § 372; injury or damage to government property, 18 U.S.C. § 1361; and two counts of trespass on a military station, 18 U.S.C. § 1382.

The FBI's opening EC stated that the Ithaca Catholic Worker was an organization the FBI believed to be a support group or chapter for the Prince of Peace Plowshares. The EC provided detailed information on the Prince of Peace Plowshares, including a list of criminal acts that group had previously

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weeks of the investigation we used it as the controlling authority in this analysis, although we recognize it was not the version in effect at the time the FBI initially classified this case.

[161] When the EC was written, the investigation was classified by the FBI as an act of terrorism by domestic terrorists involving violent crimes as the predicate offense. On October 6, 2005, the investigation was reclassified as an act of terrorism by domestic terrorists involving "other" predicate offenses.

committed targeting secure government facilities, including destruction of government property, destruction or disabling of military weapons systems, and trespass onto military facilities. The EC stated that these actions were believed to have been conducted to support the Prince of Peace Plowshares's anti-war/anti-nuclear views. The EC also stated that the Prince of Peace Plowshares's website described criminal actions previously taken against the military by two of the four individuals, including damaging military aircraft and a submarine by the use of hammers and pouring human blood and damaging another submarine by ramming a vehicle into it.

The opening EC also stated that Prince of Peace Plowshares actions may be planned at community centers using names such as "Jonah House" or the "Catholic Worker." The EC stated that the Jonah House website published the declaration that was read by one of the four individuals during the action taken against the Ithaca military recruiting station. The Jonah House website also contained signatures of individuals who subscribed to the ideology stated in the declaration. One of the signers was an individual who was not one of the St. Patrick's Four but who was then being investigated by the FBI Albany Field Division for attempting to firebomb a military recruiting station in Vestal, New York.

The opening EC also stated that the Jonah House website had recently announced a protest, to be held on June 5, 2004, of the launching of a nuclear submarine, the USS Jimmy Carter, in Groton, Connecticut. The EC stated that the protest was being organized by the Hartford Catholic Worker. The FBI case agent sent a lead to the New Haven Field Division requesting that it disseminate the information on the planned protest against the USS Jimmy Carter to local law enforcement and shipyard security personnel. The case agent sent another lead to the New Haven Field Division requesting local law enforcement to conduct checks on the St. Patrick's Four and forward to him any police reports.

The FBI case file indicates that the St. Patrick's Four were indicted on federal charges in February 2005. In preparation for the trial, the FBI case agent requested in an EC dated September 20, 2005, that the FBI Los Angeles Field Division contact the Los Angeles Police Department to obtain the police report for the Los Angeles area arrest of one of the four individuals. The file did not contain any other evidence of investigative activities directed at the St. Patrick's Four.

The defendants were tried and convicted on the federal offense of damage to government property and two counts of trespass on a military station in September 2005, and sentenced in January 2006. The four were acquitted of the most serious charge of conspiracy to impede an officer of the United States by force, intimidation, and threat.

### b. OIG Analysis

We concluded that under the Attorney General's Guidelines the FBI had sufficient predication to open a full investigation on the four alleged members of the Ithaca Catholic Worker for a general crimes investigation, including for the crime of trespassing onto government lands or military installations. The 2002 Attorney General's Guidelines, which were in effect at the time of the investigation, stated that a general crimes investigation may be opened "when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed." The predication for the investigation was the allegation of a crime itself and not the First Amendment activities of the protesters.

We also concluded that the Albany Field Division's action in sending a lead to the New Haven Field Division to alert it to a planned Hartford Catholic Worker protest at a shipyard did not violate any guidelines or FBI policies. We based this conclusion on several factors, including: (1) the Ithaca Catholic Worker members were alleged to have committed a federal offense at an Albany military recruiting station; (2) an affiliated group had a long history of criminal acts directed at military weapons systems; and (3) the website that published the declaration read at the Albany military recruiting station also publicized the Hartford protest.[162]

We also considered whether this investigation was properly classified as a domestic terrorism matter. The FBI policy in effect at the time stated that acts of domestic terrorism matters "shall include any investigation of a criminal act which involves an individual(s) who seeks to further political and/or social goals wholly or in part through activities that involve the use of force or violence and violate federal law."[163] The FBI made a determination that the acts of spilling human blood on the walls, an American flag, and pictures were forceful acts – going beyond simple trespass – resulting in damage to government property. [164] We concluded that it was not improper for the FBI to classify this matter under the Act of Terrorism classification.

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[162] The file index for this investigation does not list a document indicating what, if any, actions were ultimately taken by the New Haven Field Division, Groton, Connecticut local law enforcement, or shipyard security personnel as a result of this lead. The opening EC is the only document provided to us during our review that referenced the anticipated Hartford Catholic Worker protest of the USS Jimmy Carter on June 5, 2004.

[163] MIOG, Part 1, § 266-1(1).

[164] Willful injury or depredation to United States property is an offense listed in the definition of the federal crime of terrorism for which the 2002 guidelines authorized the FBI to open a terrorism enterprise investigation.

### B. "Special Events" at which Catholic Worker Organizations Participated in Protests

We found eight incidents in which FBI records reference the Catholic Worker in an FBI "special events" file, most of which simply noted the expected participation of a Catholic Worker group and other groups in demonstrations connected with an FBI-designated special event or on federal property. Below we discuss two of these incidents that we determined raised issues meriting examination.

#### 1. USS Ronald Reagan Commissioning – Norfolk Field Division

##### a. Facts

On March 5, 2003, the Norfolk Field Division issued an EC that opened a "special events" matter in connection with the commissioning of the USS Ronald Reagan in Norfolk, Virginia, scheduled for May 8-11, 2003. The EC stated that the event would generate significant media attention, that all living former presidents had been invited to attend, and that President Bush and other senior government officials were expected to attend. The EC also stated that past Navy commissioning events "have drawn protest from the [Prince of Peace] Ploughshares and Little Flower Catholic Worker Party (anti-war demonstrators)." The EC did not report that these past protests resulted in any disturbances or the commission of terrorist or criminal acts. It stated that since the event "has the potential for similar type protest/demonstrations" the Norfolk Field Division classified it as special events readiness level (SERL) IV. As described in Chapter Two, SERL IV is the lowest special events readiness level; generally events classified as SERL IV are supported by state and local resources and only minimally by the FBI.

The EC requested assistance from all FBI Field Divisions "in identifying individuals associated" with the groups it referenced who would be "traveling into the Norfolk Field Division territory or any potential threats." The EC requested that the offices provide only "positive intelligence" of a threat or identified problem.

The records provided by the FBI did not contain any responses to this request. It also appears that the EC's request for intelligence on the Little Flower Catholic Worker did not result in any interviews or other investigative techniques directed at its members. The Special Agent who wrote the EC told us he does not believe any such actions were taken. The case agent told us that when he wrote the EC, he had information that the leader of the Little Flower Catholic Worker had a prior criminal history involving damage to government property in connection with protest activities, although this information was not included in the EC. The agent also said he had

information that the Little Flower Catholic Worker and the Prince of Peace Ploughshares consisted of the same membership using different group names.

We found no indication in the records provided by the FBI that there were any criminal acts or other disturbances at the event. FBI records provided to us did not contain any description of the First Amendment activities of the Catholic Worker group during this event.

#### b. OIG Analysis

The FBI's MIOG, Part 1, § 300-1(2) defines a "special event" as an event "which, by virtue of its profile and/or status, represents an attractive target for terrorist attack." The FBI considered the commissioning of the USS Ronald Reagan to be such an event. Having designated the commissioning as a special event, the Norfolk Field Division was authorized to collect information relevant to assessing the threat of a terrorist incident at the event, including the solicitation of background and threat information from other FBI offices about individuals associated with groups known to have previously protested at similar events.[165]

### 2. Strategic Command Conference, Offutt Air Force Base

#### a. Facts

The FBI Omaha Field Division distributed an EC dated July 7, 2003, that sought threat information from other FBI offices in connection with a conference at the Offutt Air Force Base regarding U.S. nuclear policy sponsored by the United States Strategic Command (the "Stockpile Stewardship Conference"). The EC stated that the purpose of the conference was to evaluate various aspects of U.S. nuclear policy and that it would be attended by 126 participants from various government agencies. According to the EC, the Offutt Air Force Base is the home of the United States Military Strategic Command (STRATCOM), the command center that oversees all U.S. strategic nuclear weapons. In an EC dated July 21, 2003, the FBI designated the Stockpile Stewardship Conference a SERL IV event.

The EC stated that the Air Force had requested the FBI to provide threat information regarding "any individuals or groups who may target this event to determine the level and method of force protection needed at the air base." The EC stated that an anti-war advocacy group had posted on its website its intention to hold a "counter-conference," including rallies and protests to be held over the course of 3 days in Omaha culminating with a demonstration at the base. The group described itself as "a coalition of concerned citizens,

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[165] See generally MIOG, Part 1, § 300-1.

dedicated to nonviolent pursuit of a peaceful world, organized in response to the emerging nuclear threat." The EC stated that 16 organizations had endorsed the "counter-conference," including Catholic Worker organizations from Des Moines, Iowa, and Duluth, Minnesota. The FBI Special Agent who wrote the EC told us he had no specific information that any of the 16 groups were involved in unlawful activities and that he did not receive any information in response to the EC from other FBI offices indicating that any illegal activity should be expected at the conference.

In a subsequent EC dated August 11, 2003, the Special Agent reported attending (along with another FBI Special Agent) a public rally held by the organizing group in Omaha on August 2. This EC identified the name of the organizing group and stated that the rally was in support of the counter-conference.[166] The EC stated that "[r]ally attendance was estimated to be 100 people which included various vendors and organizers" and stated that no "illegal activity was observed."[167] The EC stated that the FBI shared the information on the number of rally attendees with local and military law enforcement officials from offices involved in security preparations for the special event.

**b. OIG Analysis**

The FBI Omaha Field Division's action in seeking information about potential threats to the Stockpile Stewardship Conference was authorized under the MIOG's special events planning authorities. The MIOG, Part 1, § 300-1(2) defines a "special event" as an event "which, by virtue of its profile and/or status, represents an attractive target for terrorist attack." The FBI considered the STRATCOM's conference regarding nuclear policy to be such an event.

As noted in Chapter Two, threat assessments are authorized pursuant to the FBI's lead agency responsibilities for countering terrorism threats within the United States, including at designated special events.[168] The EC at issue solicited potential threat-related information from other FBI offices regarding any groups or individuals who may have targeted the event.

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[166] Because the organizing group is not one our selected groups, we do not identify it in our discussion.

[167] We found only one reference in the file to illegal activity occurring at the Stockpile Stewardship Conference. An August 11, 2003, EC stated that one protester was detained for trespassing at an Offutt gate during a protest. This EC identified the protester by name but it did not state which if any groups were involved.

[168] See generally MIOG, Part 1, § 300-1.

We did not find any specific rationale described in the July 2003 ECs or in the FBI file for the conclusion that this event was in fact an attractive target for attack. The ECs did not characterize the 16 participating groups beyond the brief description quoted above, and the ECs did not suggest that the groups were suspected terrorist organizations or posed any threat. However, in light of the high profile subject of the conference, the large number of senior government officials who were participating, and the sensitivity of the location, we did not conclude that the FBI abused its discretion in designating the conference as a special event.

We also considered whether the FBI was authorized to attend and monitor the public rally held in Omaha on August 2 at which Catholic Worker activists may have been present.[169] At the time, Part VI.A.2 of the Attorney General's Guidelines provided that "[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally." As noted above, by designating the Stockpile Stewardship Conference as a "special event," the FBI had determined that it posed a potential target for terrorist activity. Accordingly, the FBI was authorized to attend the rally under Part VI.A.2.[170] Part VI did not require any objective evidence of a threat in order to attend this public event.

We also considered whether the FBI complied with applicable policies regarding the retention of information about First Amendment activity. We concluded that the FBI should not have retained the information contained in the August 11 EC that described the public rally's organizing group, its purpose, and number of attendees. Part VI.A.2 of the 2002 Attorney General's Guidelines stated: "No information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activity." As noted in Chapter Two, the FBI also issued Field Guidance dated October 7, 2002, explaining that if a visit to a public event does not develop information relating to potential criminal or terrorist activity, the only information that should be recorded is the "date, time and place visited, and that the visit had negative results." The August 11 EC stated that no "illegal activity was observed" at the August 2 rally in Omaha and contained no observations relating to potential future

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[169] We believe that Catholic Worker activists were likely present at the August 2 Omaha event, given the participation of two Catholic Worker organizations in endorsing the counter-conference. However, the FBI report relating to this rally did not identify particular participants other than the umbrella group that organized the events.

[170] In addition, the Omaha Field Division's action in obtaining website information about the group organizing the counter-conference was authorized under Part VI.B.2 of the 2002 Attorney General's Guidelines. That provision stated: "[f]or the purpose of detecting or preventing terrorism or other criminal activities, the FBI is authorized to conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally."

criminal or terrorist activity. Therefore there was no basis to retain the information about the public rally that went beyond noting "the date, time and place visited and that the visit had negative results."

We also considered whether the FBI Omaha Field Division complied with applicable policies in retaining the First Amendment information from the umbrella group's website, describing the purpose of the counter-conference, and identifying the groups that had endorsed it. The MIOG, Introduction, § 1-4(4), provided: "Information concerning the exercise of the First Amendment rights should be made a matter of record only if it is pertinent to and within the scope of the authorized law enforcement activity." We concluded that at the time information about the participation of Catholic Worker and other groups was originally recorded and disseminated, it was pertinent to the FBI's authorized activity in assessing the potential threat of terrorist activity in connection with the conference, as discussed above.[171]

### C. The FBI Recorded Information Provided by other Organizations Regarding the First Amendment Activities of Catholic Worker Organizations or their Members

We found two incidents in which the FBI recorded and retained information provided by another organization regarding peaceful incidents of civil disobedience involving the Catholic Worker or its members.

#### 1. Offutt Air Force Base Protest

##### a. Facts

In 2004, a Special Agent in the FBI's Omaha Field Division distributed an EC based on information provided by the Air Force that described an anti-war protest by Catholic Workers at the Offut Air Force Base. The EC recorded the names, social security numbers, and contact information for eight protesters who were briefly detained (but not arrested or charged) after peacefully trespassing on base property. We found no indication that the FBI was involved in surveilling the protesters at the time of the incident; the FBI merely recorded facts about the incident provided by the military after the fact.

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[171] Under the 2008 Attorney General's Guidelines, the FBI would be authorized to attend rallies protesting the conference if it were held today, as part of an assessment. Any information obtained from such an assessment could be retained because the 2008 Attorney General's Guidelines do not have a provision analogous to the 2002 Guidelines, Part I.A.2, which stated that no information obtained from attending a public event shall be retained unless it relates to potential criminal or terrorist activity. However, as noted in Chapter Two, the DIOG states that if an assessment results in no sufficient basis to justify further investigation of an individual or group, the records must be clearly annotated to state that the individual or group identified during the assessment does not warrant further FBI investigation. See DIOG § 5.13.

The EC attached a news article that quoted the protest organizer describing the incident, stating that the Catholic Worker group planned to return to the base, and inviting others to join them. Although the Special Agent said he did not believe that either the individual protesters or the Catholic Worker Group were the subject of any FBI investigation, the EC was sent to the attention of domestic terrorism supervisors in field offices corresponding to the addresses of the eight detained protesters for whatever action the field offices deemed appropriate. The EC was placed in two files in the Omaha Field Division: a file relating to administrative matters and a "control file" relating to terrorist enterprise investigations of suspected domestic terrorist groups. Control files are administrative tools "established for the purpose of administering specific phases of an investigative matter or program."[172] The EC was also placed in a control sub file that the Omaha Field Division opened in 1997 to store intelligence information obtained from federal, state and local law enforcement agency contacts who report on domestic security/terrorism problems in the Field Division.[173]

When we asked the Omaha FBI Special Agent how a nonviolent protest resulting in the detention but not the arrest of some individuals could be viewed as potential domestic terrorism matter, he stated that when the FBI reports information or intelligence the act need not be serious and it need not be a criminal act or domestic terrorism attack. He said the FBI's intent is to create a database of intelligence in case "there is a planning or a process that's going on with a certain group or individual that we can track that. We can notice indicators if there is going to be an attack." The Special Agent also stated that he believed that evidence of nonviolent civil disobedience, while not necessarily an indicator of terrorist activity, certainly indicates that a person is "willing to break the law and to disobey an authoritative command not to cross into military property" which he considered to be important information.

An attorney in the FBI's Office of General Counsel who provides legal support to the FBI's Domestic Terrorism Program told us that an EC should be filed in the most logically corresponding file or files and the decision on where to place the EC is within an agent's discretion. The attorney told us that placing an EC in a terrorism enterprise investigation file does not make it more easily retrievable than it would if it were placed in a non-terrorism file. The attorney also said that the individuals named in the Omaha Field Division EC were not at risk of facing any greater consequences because they were

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[172] See MAOP, Part 2, § 2-4.1.5. FBI policy states that leads on occasion may be assigned out of control files. Id.

[173] The FBI policy addressing control files states that "[i]n circumstances where neither an investigation nor an inquiry is warranted, the FBI may ascertain the general scope and nature of criminal activity in a particular location or sector of the economy." MAOP, Part 2, § 2-4.1.5(2).

identified in a domestic terrorism control file and that the EC was placed in a file holding information that had been determined not to require investigative action.

**b. OIG Analysis**

The recording of information about the Offut Air Base incident in an EC was authorized under FBI policies because the information related not solely to First Amendment activity but also to a violation of a federal criminal statute prohibiting trespass on a military facility. The information about the protest was "pertinent to and within the scope of authorized law enforcement activity," specifically the "checking out of initial leads" relating to a federal crime of trespass on a military facility, 18 U.S.C. § 1382. See Privacy Act, 5 U.S.C. § 552a(e)(7), 2002 Attorney General's Guidelines at Introduction, Part A; MIOG, Introduction, § 1-4(4).

Although we found that retention of this information was not prohibited by the Privacy Act, Attorney General's Guidelines or FBI policy, we questioned the FBI's retention and dissemination of information of this type. The acts in question were nonviolent civil disobedience, and the FBI has at times disavowed interest in such activity. For example, in April 2006, following the FBI's release of documents pursuant to a FOIA request, the FBI's Executive Secretariat Office responded to a letter from a citizen expressing concern that the FBI was "investigating the Catholic Worker" by stating: "[T]he FBI is not targeting lawful civil disobedience. Our organization does, however, seek to prevent unlawful violent activities. In order to do so, we advise our partners in law enforcement of the tactics used by those who wish to impinge on the civil rights of others by violently disrupting otherwise peaceful marches and assemblies." Yet, the information collected in this case had no relationship to any "violent activities," much less to terrorism.

In addition, we concluded that the FBI violated its own policies by retaining and disseminating a news article about the protest. The MIOG, Introduction, § 1-4(4) states that "[w]hen public-source printed material concerning the exercise of First Amendment rights is obtained and a decision made to retain such material, a notation must be placed on the material describing the reason(s) it was collected and retained. The notation must clearly indicate the specific investigative interest(s) which led to the decision to retain the item." The required notation was not included on the article in FBI files or in the EC.

We also believe that it would have been more appropriate to retain the EC in a file corresponding to crimes occurring on government reservations than under the Acts of Terrorism classification. The EC did not state, nor did the Special Agent tell us, that the individuals detained on the base were involved in any terrorist or violent acts or associated with any suspected terrorists. In

addition, as the FBI Office of General Counsel Attorney noted, the retention of an EC in a terrorism enterprise investigation file does not make it more easily retrievable to the FBI if it later becomes relevant to a terrorism investigation.

### 2. Norfolk Naval Station Protest

#### a. Facts

The FBI's Norfolk Field Division distributed two ECs based on information provided by the Navy that described the activities of two Catholic Worker anti-war protesters who obstructed traffic during a protest at the U.S. Naval Station in Norfolk in February 2003. The base police served the protesters letters ordering them not to return and released them.[174] The FBI did not attend the protest. The information in the EC was provided to the FBI by Naval Station officials.

The first EC was written by a Naval Criminal Investigative Service (NCIS) agent who was detailed to the FBI's Joint Terrorism Task Force. The second EC repeated the contents of the first, and it is not clear why it was written. The ECs were placed in the Norfolk Field Division's "zero file" relating to domestic terrorist enterprise investigations. A zero file is a type of file used by the FBI to retain information relating to a classification that does not at the time it is collected "require investigation."[175]

The NCIS agent sent the first EC to the Richmond and the Boston FBI Field Divisions for their information. According to the ECs, one of the protesters had previously been arrested twice for unspecified "protest activities" and had been the subject of an investigation by the FBI's Richmond Field Division in connection with planned protests of the World Bank in April 2000. The ECs stated that at the time of the 2003 Norfolk protest, the second protester was a guest at a Catholic Worker group house in Norfolk that was also the residence of a different individual who had previously been convicted numerous times for destruction of U.S. property, including for a 1997 incident in which he and others associated with the Prince of Peace Plowshares damaged a U.S. Navy vessel with a hammer and by throwing human blood on it. An EC prepared by the Boston Field Division in 1997 stated that the damage to the ship was estimated at $10,000.

The NCIS agent who wrote the first EC regarding the Norfolk incident told us that the second protester's link to the individual involved in the 1997 Prince of Peace Plowshares incident was the primary basis for writing the EC.

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[174] The ECs do not reflect the basis for letters of disbarment. However, trespassing on naval property is a violation of 18 U.S.C. § 1382.

[175] See MAOP, Part 2, § 2-4.1.2.

This link was what made the information potentially relevant to domestic terrorism, according to the agent. He stated that he was memorializing the possibility of a connection between the Catholic Worker group and Prince of Peace Plowshares, the individual involved in the 1997 Prince of Peace Plowshares incident, and the potential for a threat to the naval base.

We found no other FBI documents referencing the Catholic Worker indicating that the FBI conducted any further investigative activity with respect to the incident in Norfolk or the two detained Catholic Worker protesters.

**b. OIG Analysis**

The 2002 Attorney General's Guidelines authorized the "prompt and extremely limited checking out of initial leads" that "should be undertaken whenever information is received of such a nature that some follow-up as to the possibility of criminal activity is warranted." See 2002 Attorney General's Guidelines, Introduction, § A. We believe the agent's activities were authorized by this provision. The agent received information from another law enforcement entity and followed up on it by checking the criminal histories of the detained protesters, drawing a connection to a person with a criminal history, and forwarding this information internally to other field offices that might have use for the information. The brief references to the Catholic Worker's First Amendment activities provided context for the incident and were "pertinent to and within the scope of authorized law enforcement activity," within the meaning of the Privacy Act and Section 1-4(4) of Part 1 of the MIOG.

We also concluded that it was not a violation of FBI policy to retain the ECs in the Norfolk Field Division's zero file relating to the domestic terrorism program's classification for terrorism enterprise investigations. While the act of nonviolent civil disobedience described in the ECs did not alone appear related to a terrorism enterprise investigation, the FBI identified a link between one of the protesters, the Catholic Worker, and an individual who 6 years earlier had been convicted, along with other Prince of Peace Plowshares members, of damage to a U.S. Navy ship. The individual and his fellow Prince of Peace Plowshares members were convicted of damage to government property, an enumerated offense under the definition of the "federal crime of terrorism." Given this link, the FBI could place the ECs describing the Norfolk protest and the Catholic Worker's role in that protest in the Norfolk Field Division's zero file relating to terrorism enterprise investigations. However, as noted above, the EC placement in a terrorism file did not make it more easily retrievable to the FBI than it would if it were placed in a non-terrorism file.

As stated earlier, a zero file is a type of file holding information that does not require investigative action. We found no FBI documents referencing the Catholic Worker which show that, as a result of the EC, the FBI initiated any

investigative activities against the Catholic Worker or the referenced individuals.

## CHAPTER SEVEN
## INVESTIGATION OF PROTESTS BY GREENPEACE AND THE CATHOLIC WORKER AT VANDENBURG AIR FORCE BASE

The FBI opened a preliminary inquiry and full investigation into the activities of Greenpeace, the Catholic Worker, and other groups and individuals with respect to the Vandenberg Air Force Base (VAFB or Vandenberg) in Central California. Because of the complexity of this case we are addressing this investigation in this separate chapter. In reviewing the FBI's actions, we examined the adequacy of predication for opening the investigation and the appropriateness of the FBI's characterizations of the Catholic Worker in internal records.

### I. Facts

The Vandenberg Air Force Base is a Department of Defense facility that is used for space and missile testing as well as satellite launching. Because the VAFB has been the site of test launches of the National Missile Defense Initiative, a nuclear missile defense program, it has regularly drawn protests from various groups.

In an EC dated April 25, 2001, a Special Agent working in the FBI Los Angeles Field Division's Santa Maria Resident Agency opened a preliminary inquiry on Greenpeace and three other groups, two individuals, and unknown subjects.[176] The FBI opened the preliminary inquiry under the investigative classification designated for acts of terrorism by domestic terrorists occurring on government reservations. As detailed below, the Catholic Worker was added as a subject in a subsequent EC.

The opening EC alleged the following facts. Greenpeace, along with other groups and individuals, planned to disrupt test launches of a National Missile Defense missile, including a test launch in May 2001. One of the individuals solicited volunteers to "participate in an 'encampment' on Vandenberg Air Force Base days before the launch and, on the day of the launch, visibly enter the safety zone in order to preclude the test launch."[177] The other individual had been arrested for trespass at the Vandenberg in October 2000 and had stated his intention to continue to attempt to illegally impede future launch

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[176] The three additional groups and two individuals are not any of the groups or the individual that we selected for this review.

[177] This individual had previously served a federal prison term for damage to government property, and an FBI document stated that he was responsible for $3 million in damage to a government global positioning satellite.

attempts by trespassing and other 'non-violent' activities.[178] The FBI also received information indicating that Greenpeace purchased two powered paraglider aircraft "with the purpose of impeding the [National Missile Defense Initiative] test launches." Greenpeace, in alliance with one of the other groups that was also named in the opening EC as a subject, called for the Vandenberg trespassers to carry walkie-talkie radios and other equipment. This other group's website solicited protesters to engage in "nonviolent civil disobedience" in order to interfere with the May 2001 launch.[179] The opening EC stated that the solicited actions (to intrude on the base) at a minimum constituted violations of federal law prohibiting illegal entry on military property, malicious mischief, "and possibly" destruction of national defense materials.

The opening EC also contained the following statement, portions of which were restated in other file documents:

> The majority of people involved in protesting the [National Missile Defense Initiative] are exercising legitimate and proper First Amendment rights. The FBI has no interest in collecting information derived from free speech. This is an investigation of violations of Federal Law only. Extraordinary care will be taken that no source or other government agent interferes with the free speech of protestors. No information will be gathered from any school records.

The FBI file contained other reports of information obtained from a source detailing Greenpeace's plans to impede the National Missile Defense through the use of powered parachutes. [redacted]. The source expressed concern that the plans were dangerous and, if attempted, could result in accidental loss of life. The source provided additional information over several months detailing Greenpeace's plans. The source also stated that hundreds of groups would attempt to

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[178] An e-mail from the Air Force Office of Special Investigations (OSI) attached to the opening EC stated that at the October 2000 protest, 200 people demonstrated at the VAFB's main gate and blocked traffic. The e-mail stated that 23 persons were cited for trespass and released. The Special Agent who wrote the opening EC told us he believed the Catholic Worker may have been involved in the October 2000 protest at the VAFB because movie actor Martin Sheen was arrested for trespass at that protest. The Special Agent said he remembered there was discussion at the October 2000 protest of Sheen starring in a movie about the Catholic Worker and its founder.

[179] The e-mail from the Air Force OSI attached to the opening EC stated that at the previous launch date in July 2000, various groups announced their intention to disrupt the launch and seven individuals hiked through the rough terrain of the base in an attempt to disrupt the launch. The seven individuals were located and removed prior to the launch window. They were charged with trespassing.

interfere with the launch. The source stated that other groups were also expected to "infiltrate" the VAFB to impede the launch although the source did not identify any of the other groups.

On May 19 and 20, 2001, approximately 225 people participated in protest activities at the VAFB. A total of 33 protesters were arrested for trespassing, including some who were members of the Los Angeles area Catholic Worker. Of these, 23 were arrested for crossing onto the VAFB during a rally held outside the base's main gate on May 19. The other 10 protesters were arrested the following day for trespassing onto the "backcountry" of the VAFB in an area known as south base. The FBI Special Agent who opened the case described these "backcountry" trespassers as Catholic Worker members. The Special Agent stated they trespassed surreptitiously onto south base and had to call base officials to alert them to their presence in order to be arrested. The Special Agent said these trespass activities were typical of the VAFB protests and were carried out in different locations in an attempt to interfere with base operations, in addition to protests conducted at the VAFB's front gate. Although the opening EC stated that a launch was scheduled for May 2001, it appears that no missiles were launched during this month.[180]

The Special Agent interviewed the Catholic Worker members who were arrested in May 2001. They provided him with information on the group and its intentions to block a missile launch. In addition, the agent told us that one of the Catholic Worker members who was arrested voluntarily called him on several subsequent occasions. The file did not indicate that the FBI directed any other investigative activities at the Catholic Worker or its members as a result of the investigation, and the Special Agent did not identify any such activities.

Within a few days after the May 2001 protests at the VAFB, the FBI named the Catholic Worker and another group as additional subjects in the VAFB investigation.[181] In an EC dated May 22, 2001, the FBI summarized the case to date and reported on the protest activities that had occurred at the VAFB on May 19, 2001. The May 22 EC stated that the subject groups proposed a variety of activities to disrupt or impede future National Missile

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[180] The FBI file, which includes arrest affidavits and news articles describing the events of May 19 and 20, does not state that a missile launch occurred during May 2001. File documents state that the test launches held after the opening EC were in July and December 2001.

[181] According to two May 2001 ECs, the other group, which is not one of the groups selected for this review, had four to eight members present at the protest. This other group "advocated confrontation, possibly physical confrontation, in order to defeat the capitalist domination of America." According to the Special Agent, he observed four protesters, believed to be members of this other group, who "were advocating confrontation with the Air Force police."

Defense missile launches. The EC stated that "the subject groups have proposed trespassing onto the VAFB and entering the 'safety zone,' thereby causing the launch to be aborted." The methods, according to the EC, "could be as simple as hiking on to the base or by using the Greenpeace ships to launch rubber boats into the safety zone . . . . One method that poses a serious threat that would be hard to counter (without injuring someone) would be to launch powered parachutes and hover over the missile silo." The May 22 EC stated that based on "overhears and conversations with protesters, the Catholic Workers advocated peace with a Christian and semi-communistic ideology." The EC also characterized the ideology of two other groups present at the protest.

Another EC, dated May 23, 2001, provided additional information about the protest at the VAFB. It quoted one Catholic Worker protester who was arrested as having stated that the Catholic Worker group "advocates love and peace thru prayer." According to the EC, this protester and another Catholic Worker protester "advocated impeding [National Missile Defense] launches thru non-violent civil disobedience." The Special Agent who wrote the EC told us that prior to interviewing the Catholic Worker protesters he did not associate the Catholic Worker with the goal of impeding future missile launches. After noting that the Catholic Worker protesters advocated nonviolent means to impede the National Missile Defense, the agent wrote that based on his "interpretation of comments made by various [Catholic Worker] protesters, [the Catholic Worker Group] also advocates a communist distribution of resources."

The FBI Special Agent stated that when he spoke to the Catholic Worker members as a group during their May 2001 arrests, he shared with them his interpretation of how they described the philosophy of the group. He told the OIG that he told the members that his interpretation was that they believed in peace, Christian love and in a "communist distribution of resources."[182] The Special Agent stated that the members, who did not all agree on wording, liked how he characterized the group. According to the Special Agent, one member stated his desire to have the characterization appear in the Special Agent's report because their purpose in going to the VAFB was to trespass and get their message heard.[183]

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[182] According to the Special Agent, the Catholic Worker members described themselves as believing in "distributionism and communitarianism." The Special Agent paraphrased for us what some of the Catholic members told him they believed: "everybody works according to their abilities, and gets according to their needs, but we are anti-Communist when it goes outside the scope of the distribution of resources and wealth because Communists are Atheists, and we are strongly Christian."

[183] As noted in Chapter One, after the disclosure of documents pursuant to the FOIA request, the FBI came under criticism for these characterizations of the Catholic Worker. According to a December 20, 2005, *New York Times* article, an ACLU official stated: "You look (Cont'd.)

The Special Agent told us that he characterized the Catholic Worker political philosophy in these ECs because he felt it was important to explain the Catholic Worker's two motives in trespassing onto the VAFB: (1) to publicize their belief in a communist distribution of resources, and (2) to impede National Missile Defense missile launches. The Special Agent told us that when he asked the group members why they came to the VAFB to violate the law they told him they trespassed to get the word out that they want a communist distribution of resources.[184] He said the Catholic Worker's peace philosophy and Christian ideology explained the group's additional motive of wanting to impede missile launches.[185]

On June 1, 2001, the FBI issued an EC that converted the case from a preliminary inquiry to a full investigation, maintaining the domestic terrorism on government reservations classification. The June 1 EC stated that the FBI had received information from a reliable source that "a group associated with Greenpeace intends to use powered parachutes to trespass" onto VAFB, in order to impede the launch of the National Missile Defense, and that "[t]he parachutes will be violating restricted airspace." The EC stated that the Special Agent in the past year had interviewed trespassers who have "made general comments that they support actions to impede test launches." According to the EC, one arrestee stated that "the use of powered parachutes to block a launch, is at least in theory," a method that he supported. The EC concluded by stating that "the use of a powered parachute to impede a military operation is a possible violation of Title 18 U.S.C. Section 2155" (destruction of national-defense materials, national-defense premises, or national-defense utilities) and accordingly the case would be converted to a full investigation.

The June 1 EC did not identify any additional facts about the Catholic Worker Group to support the conversion from a preliminary inquiry to a full investigation. The only additional facts the EC added that were linked to a subject group or individual was information appearing to confirm Greenpeace's intent to use powered parachutes to impede a National Missile Defense test launch.

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at these documents and you think, wow, we have really returned to the days of J. Edgar Hoover, when you see in FBI files that they're talking about a group like the Catholic Workers league as having a communist ideology."

[184] The FBI file contained documents memorializing the interviews of two of the Catholic Worker members, and these documents do not state that these two Catholic Worker members told the agent they entered the base because they wanted to publicize their belief in a communist distribution of resources.

[185] The FBI file did not contain characterizations of Greenpeace's political or social goals or philosophy.

The Special Agent told us he did not recall having any particular evidence that the Catholic Worker was coordinating with Greenpeace on the powered parachute plan. However, he stated that he believed there was an affiliation among the group members protesting at the VAFB, not just because they appeared to know each other when arrested for trespassing but also because they entered the VAFB at different points in a manner that appeared coordinated. The Special Agent also stated the best recollection he had of specific information linking the Catholic Worker with the other groups was that Catholic Worker members contacted a member of another group when the Catholic Worker members were trespassing on south base.

The Special Agent stated he opened only one investigation containing the various groups and individuals because they all shared the same objective of impeding future missile launches on the same date. He said the Catholic Worker members who he interviewed during the May 2001 protest told him that they were there to block any missile launches. He also said that one Catholic Worker member's blog stated that it was his intent to impede a missile launch. The Special Agent told us that he believed this Catholic Worker member with a website was speaking to him as "essentially" the leader of the Catholic Worker group.

Two subsequent ECs in the case file provided details about a "credible threat" to a July 14, 2001, National Missile Defense launch test from the use of powered parachutes by Greenpeace. One EC stated that Greenpeace was "planning on using backcountry hikers, inflatable boats and light aircraft to attempt to impede" the National Missile Defense launches. These ECs provided no further information about the Catholic Worker or its members.

In July 2001, 17 persons associated with Greenpeace were arrested for a variety of trespass activities that succeeded in penetrating an established missile launch safety zone. The defendants were initially charged with felony conspiracy, violating an order of a U.S. Coast Guard Captain by entering a safety zone, as well as misdemeanor trespass. The trespassing acts involved use of boats to position protesters to swim onshore and enter onto highly restricted areas of the VAFB. According to the grand jury indictment, the defendants used four Zodiak vessels to enter the Coast Guard safety zone after being advised of the zone's location by Harbor Patrol. Some defendants entered the water in the safety zone and swam to shore. Helicopter rescues were ultimately necessary for some of the swimmers who needed immediate medical attention. According to the Special Agent, some swimmers became hypothermic and were taken to the hospital. However, the powered parachute plan was not attempted at the VAFB. There is no record of Catholic Worker members participating in this protest.

On July 17, 2001, the FBI Los Angeles Field Division opened a separate full investigation on Greenpeace and the 17 persons arrested during this

incident. This investigation was also classified as a domestic terrorism on government reservations matter. The investigation was focused on the July 2001 arrests and subsequent prosecution of the 17 persons associated with Greenpeace. In a January 2002 EC, the Special Agent stated that according to a source, as a result of recent guilty pleas from Greenpeace members for VAFB activities, most organized groups "would refrain from any civil disobedience that exceeds the threshold of misdemeanor trespassing."[186] The persons arrested in July 2001 were convicted in January and April 2002. The file contains no indication of any further activity of significance by any of the groups at the VAFB.

In a July 2002 EC, the FBI closed the original investigation, stating that at that time there was no indication that any of the subjects intended to further violate the law. The FBI also closed its full investigation of Greenpeace and the 17 persons arrested and convicted for the trespass activities at the VAFB in July 2001.

The FBI Special Agent told us that the classification of the investigation of Greenpeace and Catholic Worker as an act of domestic terrorism was justified because while the actions themselves were nonviolent, they could be dangerous to human life, an element of the statutory definition of domestic terrorism. He said that although he did not believe that simple trespass should generally be equated with domestic terrorism, in this case the entry onto designated safety zones, the planned use of aircraft that may not be safely flown in the area of the safety zone, or swimming in extremely cold waters, are acts that while not involving the use of force or violence would expose individuals to serious danger and were thus potential acts of domestic terrorism. He said that while he did not have specific evidence that Catholic Worker members were involved in the dangerous acts, he did not know at the time the extent of their involvement with Greenpeace's plans and believed the groups could be affiliated. The Special Agent also said that they used the domestic terrorism classification for the Catholic Worker "only for processing" the VAFB trespass arrests and he would not have taken issue if "someone would have said it belongs under crimes under government reservations."

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[186] In addition to the individual criminal prosecutions of the 17 persons associated with Greenpeace for the July 2001 trespass activities, the federal government sued Greenpeace civilly in federal district court. The case was settled by the parties and in January 2002 the court entered a stipulated judgment and injunction requiring Greenpeace to pay the United States $150,000 in monetary damages and to refrain for 5 years from trespassing onto the VAFB or any other federal military installations involved in the National Missile Defense program. The settlement agreement was also conditioned on the court's acceptance of a plea agreement on the criminal prosecutions of the 17 individuals. See *United States* v. *Greenpeace Inc.*, No. CV-02-00156 (C.D. Cal. Jan. 16, 2002).

Documents in the FBI file indicate that the FBI [redacted] sometime after their arrests.[187] According to the FBI file, on August 1, 2001, most of these individuals were convicted of several counts of misdemeanor conspiracy and trespass onto military property. The FBI file indicates that these individuals were [redacted] on May 18, 2002.

An April 2002 news column appearing in a Catholic oriented national publication alleged that a police officer had "recently" stopped one of these individuals for speeding in Arizona. According to the column, the officer handcuffed the individual for about an hour and justified the procedure by stating that the individual was "affiliated with a terrorist organization." We found no other information suggesting the individuals were detained or otherwise subjected to greater investigative scrutiny [redacted].

## II. OIG Analysis

### A. Predication for the Investigation

We concluded that under the Attorney General's Guidelines the FBI had factual predication to open the initial preliminary inquiry on Greenpeace to determine whether it was planning to disrupt the National Missile Defense missile launches at the VAFB. The 1989 Attorney General's Guidelines in effect at the time provided that the FBI may open a preliminary inquiry in response to an allegation or information "indicating the possibility of criminal activity." When the FBI opened the initial preliminary inquiry, it had information that Greenpeace had purchased two powered paraglider aircraft to use in attempts to impede the National Missile Defense test launches. This information indicated the possibility that Greenpeace planned to commit a federal offense, such as interference with the national defense of the United States, 18 U.S.C. § 2155.

The FBI added the Catholic Worker as a subject of the preliminary inquiry after Catholic Worker members were arrested for trespassing onto the backcountry of the VAFB in May 2001. When the Catholic Worker protesters were arrested at the VAFB, the FBI had information indicating a "possibility" that the group had violated and may again violate a federal law such as

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[187] Documents also indicate that the two individuals who were initially named subjects of the preliminary inquiry in the opening EC, but who were not arrested for trespassing in May 2001, were [redacted]. We found no documents in the case files indicating that any of the Greenpeace members were [redacted].

trespassing onto a military installation, 18 U.S.C. § 1382, in an attempt to impede an National Missile Defense test launch. Therefore, at that time the FBI had evidence that a federal crime had been committed and the Catholic Worker members' statements provided further evidence that the group would likely commit a trespassing crime on the VAFB in the future in an attempt to impede National Missile Defense test launches.[188]

The FBI subsequently converted the preliminary inquiry to a full investigation. The 1989 Attorney General's Guidelines stated that a general crimes investigation may be open "when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed." We believe the reasonable indication standard was satisfied at the time the FBI opened the initial preliminary inquiry based on all the facts and circumstances then known to the FBI. When the FBI later converted the matter to a full inquiry it had additional information, particularly about the Greenpeace powered parachute plans.[189]

### B. Characterizations of the Catholic Worker

As noted above, in the May 22 and 23 ECs written after the arrests of Catholic Worker members for trespassing on the VAFB, the FBI agent characterized the group's ideology as advocating "peace with a Christian and semi-communistic ideology," "love and peace thru prayer," "impeding [National Missile Defense] launches thru non violent civil disobedience," and "a communist distribution of resources."

The MIOG, Introduction, § 1-4(4), stated that "[t]he collection of information concerning groups and individuals must be justified as reasonable and necessary for investigative purposes." We concluded the characterization of the Catholic Worker's alleged advocacy of a communist distribution of resources lacked a reasonable and necessary relationship to any alleged actions on the group's part to impede National Missile Defense launches. The agent who wrote the ECs told us that one of the reasons the Catholic Worker members stated that they trespassed on the VAFB was to draw attention to their ideology. The ECs characterized the group as communistic but did not explain that one of the group's motives for trespassing was to obtain publicity for its political philosophy. Even assuming the "communist" characterizations

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[188] There do not appear to have been any investigative activities directed at the Catholic Worker as a result of the group being named as a subject. The investigative techniques were focused on the powered parachute plan and directed at other individuals or groups, including Greenpeace.

[189] While our review did not focus on the other groups or individuals that were additional subjects of the preliminary inquiry and full investigation, we found no evidence to indicate that the FBI lacked a predicate as to these groups and individuals or targeted them solely on the basis of their exercise of protected First Amendment activities.

had some marginal relevance in explaining the group's motive for trespassing, memorializing the characterizations in an FBI file as the agent did showed questionable judgment, particularly given the way it was stated.[190]

### C. Classification as an Act of Terrorism Matter

We considered the FBI's decision to classify its investigation of Greenpeace, the Catholic Worker, and their members as relating to Acts of Terrorism. FBI policy in effect at the time stated that the classification for domestic terrorism investigations "shall include any investigation of a criminal act which involves an individual or individuals affiliated with a domestic terrorist group." MIOG, Part 1, § 266-1(1). We are not aware of any specific definition of "domestic terrorist group" that was used by the FBI at that time, although the 1989 Attorney General's Guidelines defined a "domestic security terrorism investigations" as "focused on investigations of enterprises . . . whose goals are to achieve political or social change through activities that involve force or violence."

The documents we were provided do not show that the FBI had designated Greenpeace or the Catholic Worker as a "domestic terrorist group," or a terrorist enterprise. Although other classifications were available, in light of the nature of the alleged protest plans, we did not conclude that this classification was a violation of FBI policy. However, this matter, like several others described in this report, illustrates the consequences of the broad definitions of terrorism used by the FBI to classify investigations involving potential crimes by domestic protesters.

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[190] When the ECs were written, the MIOG, Introduction, § 1-4(5) addressed characterizations of groups or individuals and required that characterizations in FBI records reflect whether the characterization was made by a third party. The MIOG, Introduction, § 1-4(5), also provided that the FBI record may also state if the characterization comports with the results of an independent FBI investigation. The FBI substantially complied with this provision since the ECs stated that the characterizations were attributed to the special agent's "overhears and conversations" with the Catholic Worker protesters as well as "interpretation of comments" made by the Catholic Worker protesters.

## CHAPTER EIGHT
## INVESTIGATIVE ACTIVITIES DIRECTED AT GLEN MILNER

We examined the FBI's investigative activity relating to Glen Milner, an anti-war activist. Media accounts based on documents released under FOIA indicated that the FBI had monitored the First Amendment activities of several anti-war groups and individuals, including the Ground Zero Center for Nonviolent Action (Ground Zero) and one of its members, Milner. Milner was described in a *Seattle Post-Intelligencer* article as a "Quaker peace activist" who was "under watch" for protest activities carried out at the 2003 Seafair festival in Seattle, Washington. The article detailed various reports released from FBI files. As detailed below, although the FBI utilized its special events authorities in connection with the Seafair, most of the information in FBI files was collected by other agencies.

### I. Facts

The Seafair, the largest festival in the Pacific Northwest, is an annual 5-week festival featuring various events in July and August. One of the annual events included in Seafair is a "Fleet Arrival," in which a Navy flotilla sails into Seattle's Elliott Bay. In 2003, the Fleet Arrival was scheduled for July 30.

According to the Ground Zero website, "Ground Zero Center for Nonviolent Action offers the opportunity to explore the meaning and practice of nonviolence from a perspective of deep spiritual reflection, providing a means for witnessing to and resisting all nuclear weapons, especially Trident. We seek to go to the root of violence and injustice in our world and experience the transforming power of love through nonviolent direct action."[191] In 2003, Milner was elected to Ground Zero's Stewardship Council, which defines the policies for the organization and oversees all of its programs, assets, and finances.

According to the Seattle Field Division, on July 7, 2003, the Special Events Management Unit at FBI Headquarters designated the Seattle Seafair as a SERL IV special event. On that same date, the special events case agent in the FBI's Seattle Field Division sent a query to all FBI field offices asking them whether they had any information on potential threats against the Seattle Seafair.

The Seattle Division began working with other federal, state, and local law enforcement agencies to develop information regarding Seafair. Relying primarily on publicly available information from antiwar websites, the

[191] http://www.gzcenter.org/aboutgz.htm

participating law enforcement agencies identified four groups, including Ground Zero, that were planning "some sort of demonstration" for the arrival of the Navy ships in Elliot Bay on July 30. According to the FBI file, an agent from the Coast Guard Investigative Service contacted Milner under the pretext of being a Ground Zero sympathizer and began obtaining more information about the demonstration plans from Milner. The extent of the contacts between the agent and Milner is not clear from the FBI file.

According to the FBI file, the antiwar groups had informed the Navy and the Coast Guard that they intended to launch a "peace navy" to meet the fleet when it entered Elliot Bay. The FBI file indicates that a source provided further information about the anti-war protest activities planned for Seafair, including evidence that the protest organizers included individuals who had been involved in two prior Seattle protests that resulted in arrests: the Law Enforcement Intelligence Unit protest that occurred in June 2003, and the 1999 World Trade Organization protest. The FBI also received "uncorroborated information" indicating that the protesters might be planning a sit-in or some other form of physical demonstration during the public tours on one of the navy ships, and that the groups might attempt to secure themselves to the inside of the vessels (by handcuffs or other means), secure themselves to the outside of the vessels while in transit, or prevent the vessels from departing their moorings at the end of Seafair.

On July 30, the day of the Fleet Arrival, a federal law enforcement agent (not from the FBI) conducted a surveillance of the launching of two small boats flying anti-war flags. According to the FBI file, a total of five protesters' boats met the fleet in Elliot Bay and conducted a peaceful protest without breaching the 500 yard security zone around the military vessels. No incidents were reported. Milner later stated in a 2006 article on the Ground Zero website that the "activists' civil liberties were not violated" during the 2003 protests.[192] The FBI file does not indicate that any of the acts of civil disobedience attributed to the "uncorroborated information" actually took place.

Seafair concluded on August 3, 2003. On August 5, 2003, in a closing EC, the case agent noted that the Seafair events proceeded as planned without disruption or need for FBI assistance. All told, the FBI case file for the 2003 Seafair special event contained 6 entries and consisted of 10 total pages

Milner's 2006 article also described events at the 2004 Seafair in which protesters were allegedly detained by the Coast Guard and Milner was prosecuted for breaching the 500-yard security zone. According to public source documents, Milner was detained for protest activities undertaken in

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[192] "Spying in Seattle," http://www.gzcenter.org/articles/spying_in_seattle.htm (June 2006).

August 2004 and received a warning for failing to keep a proper distance from a naval vessel.[193] However, we found no documents indicating that the FBI was involved in responding to the 2004 protests.

## II. OIG Analysis

We concluded that the Seattle Field Division's action in seeking information about potential threats to 2003 Seattle Seafair summer festival was authorized under the FBI's special events planning authorities. The MIOG Part 1, § 300-1(2), defines a "special event" as an event "which, by virtue of its profile and/or status, represents an attractive target for terrorist attack." Given the government's heightened security concerns in the wake of the Iraq war and the presence of a U.S. naval fleet in Elliot Bay we believe that the FBI had grounds to designate the 2003 Seattle Seafair to be such an event. The FBI classified this event as a SERL IV event, which under the MIOG is "generally supported by state and local resources," typically warranting "only minimal support by the FBI field division." MIOG Part 1, § 300-1(4).

The FBI's opening EC solicited potential threat-related information from other FBI offices regarding any groups or individuals who may target the event. The opening EC specifically stated that no intelligence had been gathered and did not suggest any individuals or groups were suspected of terrorist activity or posed any threat. Over the next few weeks, the FBI received information from other law enforcement officials indicating that various protest groups might be planning to impede the progress of U.S. Navy and U.S. Coast Guard vessels upon their arrival into Elliot Bay or that various protesters might attempt to secure themselves to the inside or outside of the Navy vessels. The case file contains no evidence that the FBI conducted surveillance of any of the advocacy groups or their members, although another agency did conduct surveillance of a boat launching. Consistent with a SERL IV special event, only minimal support by the FBI field division was provided, and this special event was generally supported by state and local resources.

Our document request to the FBI sought all documents containing Glen Milner's name during our review period, and the only case file the FBI produced containing any reference to Milner was the special events file for the 2003 Seattle Seafair.

There is also no indication in the FBI file documenting that the FBI attended or monitored the Seafair event. The closing EC noted that no criminal

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[193] U.S. Department of Homeland Security, United States Coast Guard Hearing Office; Activity No. 2220407.

activity took place at Seafair, and the special events case was closed 2 days after Seafair ended.

In sum, we found no evidence that the FBI improperly investigated Milner because of his exercise of First Amendment rights or otherwise acted in violation of FBI policies.

Finally, as noted above, Milner was described in a *Seattle Post-Intelligencer* article as a "Quaker peace activist." This reference was the subject of a question by Senator Leahy, in response to which Director Mueller stated, "[t]o my knowledge, we have not surveilled the Quakers."[194] We attempted to determine whether the FBI had surveilled or otherwise investigated the Quakers (also known as the Religious Society of Friends) during the period of our review. Our review of FBI documents did not reveal any evidence that the FBI investigated the Quakers as a group or any individuals identified in FBI documents as Quakers for protest activities.[195]

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[194] FBI Oversight: Hearing Before the S. Jud. Comm. 109th Cong. 15 (2006).

[195] After the May 2006 hearing, Senator Leahy submitted a written question asking whether the FBI was involved in surveillance of protests at Seattle's Seafair Festival. We did not find any evidence to contradict the FBI response, which stated that it did not participate in the surveillance.

## CHAPTER NINE
## CONCLUSIONS AND RECOMMENDATIONS

The Office of the Inspector General (OIG) initiated this review in response to congressional inquiries that raised concerns over whether the FBI had improperly targeted domestic advocacy groups for investigation based upon their exercise of First Amendment rights. The congressional inquiries were prompted by media reports describing FBI documents released by the FBI pursuant to Freedom of Information Act (FOIA) requests. In a congressional hearing, Senator Leahy had questioned FBI Director Mueller about allegations the FBI had "targeted Americans based on their exercise of First Amendment rights," and Director Mueller stated that he would welcome an investigation by the OIG.[196]

This OIG review examined FBI investigative activity relating to five advocacy groups and one individual who were mentioned in the news articles and congressional inquiries related to the release of FBI documents. Our review addressed FBI activities over a 6-year period, from January 2001 to December 2006, related to: (1) the Thomas Merton Center of Pittsburgh, Pennsylvania; (2) People for the Ethical Treatment of Animals (PETA); (3) Greenpeace USA; (4) the Catholic Worker; (5) Glen Milner, (an individual); and (6) the Religious Society of Friends (the "Quakers").[197] In general, we addressed the following issues raised by the FBI documents relating to these groups:

- Whether the FBI targeted the groups or their members because of their First Amendment expressions;
- Whether investigations of the groups or individuals affiliated with them were adequately predicated under applicable Attorney General's Guidelines and FBI policies;
- Whether the FBI improperly collected or retained information about the First Amendment activities of the groups or their members;
- Whether FBI documents contain characterizations of the groups or their members based on their First Amendment views; and
- Whether the FBI improperly classified investigative matters relating to these groups or individuals as terrorism matters.

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[196] FBI Oversight: Hearing Before the S. Jud. Comm. 109th Cong. 14 (2006).

[197] Our review period encompasses most of the years covered by the FOIA requests and ends in 2006, when the OIG received the Congressional inquiries.

This chapter first summarizes the findings contained in this report regarding the FBI's investigations on the five domestic advocacy groups and the individuals associated with those groups. It then provides our conclusions and recommendations regarding the FBI's investigations of these groups and individuals.

## I. Findings Regarding Individual Groups

### A. Thomas Merton Center

The Thomas Merton Center describes itself as "Pittsburgh's peace and social justice center" and advertises its commitment to "nonviolence, social justice, peace and human dignity." We found numerous references to the Merton Center in documents from the FBI's Pittsburgh Division describing its investigative activities. In general, we found that the FBI's investigations related to the Merton Center and its statements describing the basis for that investigation raised the most troubling issues in this review. The FBI's Pittsburgh Field Division conducted surveillance of a Merton Center anti-war rally in 2002 and the FBI later provided inaccurate and misleading information about this incident to Congress and to the public when describing the basis for this FBI investigation.

#### 1. Surveillance of the November 2002 Merton Center Anti-War Event

Our review determined that in late November 2002, a probationary FBI agent in the Pittsburgh Field Division attended a public anti-war leafleting event sponsored by the Merton Center. The agent told us that his supervisor sent him to the rally on a slow work day (the day after Thanksgiving) when he asked the supervisor for work, and that the supervisor instructed him to go to the rally to look for Pittsburgh Field Division international terrorism subjects. We found no evidence that the assignment was made pursuant to a particular investigation or in response to any information suggesting that any particular terrorism subject might be present at the rally. The agent was unable to identify any terrorism subjects at the event, but he photographed a woman in order to have something to show his supervisor. He told us he had spoken to a woman leafletter at the rally who appeared to be of Middle Eastern descent, and that she was probably the person he photographed. He said he discarded the photographs after other agents in the Pittsburgh Field Division Joint Terrorism Task Force (JTTF) were unable to identify the woman pictured in them.

The agent told us that after he returned to his office he conducted some internet research on the Merton Center, and then wrote an EC about the event. The synopsis line of the EC stated: "to report results of investigation of Pittsburgh antiwar activity." The EC described the Merton Center as a "left-

wing organization advocating, among many political causes, pacifism." It also described cooperation between the Merton Center and the Islamic Center of Pittsburgh, which the agent found during his internet research. Yet, the EC did not describe the agent's assignment to look for terrorism subjects or report that he was unable to identify any such subjects. The agent told us that he wrote the EC in the way he did because he was a probationary agent at the time and needed to please his supervisor and show her that he would do what she told him as thoroughly as he could.

In 2006 this EC was publicly released in response to a FOIA request and became the focus of significant controversy. In response, the FBI issued a press response in March 2006 stating that the agent had attended the event "for the sole purpose of determining the validity of information he received from another source establishing a link between an on-going investigation and the [Merton Center]." Moreover, during a Congressional hearing in May 2006, based on information that was provided to him, Director Mueller responded to a question from Senator Leahy that the surveillance was an outgrowth of an investigation, and that the agent was "attempting to identify an individual who happened to be, we believed, in attendance at the rally." In further response to a question for the record submitted by Senator Leahy after the hearing, the FBI declined to provide additional information on the basis that "the investigation of the individual whose presence at the rally was anticipated is still ongoing."

Notwithstanding the synopsis line of the EC, we concluded that the FBI was not targeting the Merton Center or its members for investigation because of the Merton Center's anti-war advocacy. Rather, we concluded that the agent was sent to the event pursuant to an ill-conceived "make work" assignment given to a probationary agent on a slow work day (the day after Thanksgiving). However, we concluded that the agent's attendance at this public event did not violate the Attorney General's Guidelines.

The Attorney General's Guidelines did not require factual predication for the FBI to attend public events like the rally. They required only that the purpose of the attendance be "to prevent or detect terrorist activity." We concluded that this assignment fulfilled this undemanding requirement, since the assignment was designed at least in part to check whether any terrorism subject attended the public event. Although the possibility that any useful information would result from this make-work assignment was remote, the "purpose test" of the Attorney General's Guidelines was not violated. Therefore we believe that attendance at the event was not prohibited by the Attorney General's Guidelines in effect at the time.

However, we concluded that the agent had no authority for conducting any follow-up internet research on the Merton Center or for recording and retaining information about the Merton Center's First Amendment activities in

the EC, given that the information did not relate to potential criminal or terrorist activity.

Moreover, we concluded that the FBI's statements to Congress and the public about the reason the agent attended the event were inaccurate and misleading. As noted above, the FBI stated in a press response and Director Mueller stated in Congressional testimony that the FBI's surveillance at the event was based on specific information from an ongoing investigation and conducted to identify a particular individual. These statements were not true. We found no evidence that the FBI had any information at the time of the event that any terrorism subject would be present at the event. Instead, we found that FBI personnel created two inconsistent and erroneous explanations of the surveillance of the anti-war rally, stating inaccurately that the surveillance was a response to information that certain persons of interest in international terrorism matters would be present.

The first version appeared in a document created by the Office of the Chief Division Counsel in the FBI Pittsburgh Field Division in early 2006, in the course of preparing a response to a FOIA request. This version eventually became the basis for the press response issued by the FBI and in turn for Director Mueller's Congressional testimony. In this version, the surveillance was supposedly directed at Farooq Hussaini, an individual living in Pittsburgh who had become "of interest" to the FBI based on evidence developed in a terrorism investigation in a different field office. However, we determined that this version of events was not true. First, the agent who attended the rally denied this version of events. Second, we found no evidence that Hussaini had been identified by anyone in the FBI's Pittsburgh Field Division as a person of interest at the time of the rally. Neither the agent, his supervisor, nor anyone else in the Pittsburgh Field Division was even aware of the evidence developed in the other field office investigation at the time of the rally. Moreover, the agent who attended the rally told us that the chance that the evidence developed in the other field office actually related to Farooq Hussaini in Pittsburgh was "almost non-existent."

We recognize that the possibility exists that the inaccurate statements in this first version of events were inadvertent. However, we believe it is more likely that this version reflected an effort to state a stronger justification for the surveillance. Several Pittsburgh Field Division employees may have had a hand in creating this inaccurate document, but we were not able to determine with certainty who was specifically responsible for creating this inaccurate version of events.

We also determined that later the FBI created another different, inconsistent, and also inaccurate explanation for the FBI's surveillance of the Merton Center rally in response to follow-up inquiries from Senator Leahy. This second inaccurate version is contained in a document prepared by the

FBI's Counterterrorism Division in consultation with personnel from the Pittsburgh Field Division. According to this second version, the FBI attended the rally to look for a completely different person (referred to as "Person B" in this report) who was at the time the subject of a preliminary inquiry in the Pittsburgh Field Division. We found no evidence to substantiate this version either. The agent who attended the rally told us although he was looking for terrorism subjects in general he was not looking for Person B in particular and that he was not even carrying a picture of Person B at the time of the surveillance. The agent who attended the rally also made no mention of this subject in the EC and did not file the EC under the case number pertaining to the subject. In addition, the FBI case agent who was responsible for the preliminary inquiry told us that he was not aware that any surveillance of his subject was being conducted at the rally. Moreover, we found no evidence to suggest that the FBI had any reason to believe that this subject would be in attendance at the rally.

Again, although it is conceivable that the errors in the second version were also inadvertent, we believe they were more likely the result of an effort by FBI personnel in Pittsburgh Field Division or the Counterterrorism Division to justify the surveillance and to substantiate the Director's testimony. However, we were again unable to determine with certainty who was responsible for this misleading version of events.

We concluded that the Director was not aware that the information that was the basis for his testimony and the FBI's response to Senator Leahy's follow-up letter was inaccurate. We found no evidence that Director Mueller received information that should have given him reason to doubt the accuracy of the briefing materials he relied on in preparing to testify. Rather, we concluded that FBI personnel took insufficient care to ensure that Director Mueller was given accurate information and that Congress was accurately informed about the basis for the FBI's actions in the Merton investigation. We recommend that the FBI review this case to determine if action is warranted for any of the individuals involved in the creation of the inaccurate justifications for the FBI's surveillance of the Merton anti-war rally.

### 2. The 2003 Letterhead Memorandum

The FBI's FOIA release of Merton Center documents also included a Letterhead Memorandum (LHM) dated February 26, 2003, and titled, "International Terrorism Matters." The LHM indicated that a JTTF "investigation had revealed" certain information about the Merton Center, including that it "has been determined to be an organization which is opposed to the United States' war with Iraq." It described the Merton Center's plans for an upcoming anti-war rally (different from the one discussed above). As written, the LHM created the inaccurate impression that the Merton Center was the subject of an international terrorism investigation. We were unable to

determine the origins and author of the LHM, which was found on the hard drive of an FBI Pittsburgh Field Division stenographer's computer. The LHM was an inaccurate document that was not approved or disseminated outside the FBI Pittsburgh Field Division. Yet, contrary to the impression given by the document, we did not find any evidence that the FBI's Pittsburgh Field Division had in fact opened an investigation of the Merton Center.

### 3. Surveillance Relating to the 2003 Miami Free Trade Area of the Americas (FTAA) Meeting

In 2003, the FBI's Miami Field Division opened a special events case in preparation for the upcoming Free Trade Area of the Americas (FTAA) meeting in Miami. The FBI was concerned that the event could attract violent protests similar to the 1999 World Trade Organization protests in Seattle. The Miami Field Division also opened a full investigation on unknown subjects planning to disrupt the event.

The FBI Miami Field Division requested that the FBI Pittsburgh Field Division collect intelligence related to efforts by the Merton Center and another advocacy group, the Pittsburgh Organizing Group (POG) to recruit protesters for the FTAA meeting. The POG is a self-described anarchist group that the Merton Center has publicly identified as an "affiliate." We found no evidence that the Pittsburgh Field Division collected the requested intelligence. However, three JTTF agents from Miami traveled to Pittsburgh to monitor a conference sponsored by the Merton Center and POG and to conduct related surveillance.

We concluded that the FBI's special events case and the full investigation relating to the FTAA did not violate the Attorney General's Guidelines and FBI policies. Although FBI documents did not make explicit what federal criminal statute the FBI relied on in opening the full investigation, the FBI had information supporting a "reasonable indication" that the unnamed subjects, possibly including protesters being recruited at the Pittsburgh conference, would violate the civil disorders statute, 18 U.S.C. § 231. For similar reasons we found that the Attorney General's Guidelines and FBI policies allowed the FBI to monitor the Pittsburgh conference and to conduct related investigative activities.

### 4. Investigation of POG Members and Surveillance of First Amendment Activities

In another matter, in 2004 and 2005 the FBI Pittsburgh Field Division conducted investigative activities relating to individuals associated with the POG. Several of these individuals were also allegedly associated with the Merton Center or attended meetings at the Merton Center. The FBI opened two preliminary inquiries on three POG members in connection with upcoming

anti-war protests in Pittsburgh. Although the FBI Pittsburgh Field Division's opening ECs did not specify a federal crime, the FBI case agent and supervisors responsible for this case told us that POG or its members utilize "direct actions" as part of their protests, and that arson, attacks on military recruiting centers or other government facilities, and bombings were among the possible "direct actions" that might violate a federal statute. However, neither the opening ECs nor any of the agents we interviewed identified any direct link between the POG and such acts.

We concluded that the factual predication for the preliminary inquiries opened on the POG members for a federal crime was thin. However, because the Attorney General's Guidelines provided the FBI wide latitude to open a preliminary inquiry in response to any information "indicating the possibility of criminal activity," we did not find a violation of the applicable predication standard in the Attorney General's Guidelines as to two of the three subjects. Yet, information indicating the possibility of a federal crime by the third individual was so lacking that we concluded the FBI did not have sufficient predication under the Guidelines to open a preliminary inquiry of him as a subject.

We determined that for most of the period of the preliminary inquiries, the FBI conducted only limited investigative activity relating to the three subjects. However, near the time that the FBI's preliminary inquiries were closed, the case agent for one of the inquiries recruited [redacted] as a confidential informant to collect information regarding members of the POG who participated in meetings [redacted]. However, the agent told us that the recruiting of this source was more "motivated by wishing to participate in the informant program than it [was] POG generally speaking." At the agent's direction, the source attended several [redacted], and provided information about the other participants to the agent. The FBI files contain a series of source reports resulting from this activity that recorded information about the identity and First Amendment expressions of POG members meeting [redacted]. The case agent continued directing his source to monitor POG members at public events even after the preliminary inquiry under which this assignment was originally conducted was closed.

We concluded that the agent's purpose in recruiting this source and assigning this source to conduct surveillance on [redacted] POG was to establish his participation in the source program, not to prevent or detect terrorism. Because of this improper purpose, we concluded that the FBI's collection of information about POG members' First Amendment activities was not "pertinent to and within the scope of an authorized law enforcement activity" and therefore raised serious questions under the Privacy Act, the Attorney General's Guidelines, and FBI policy.

Even if the FBI's conduct did not violate the Privacy Act, we are concerned by the lack of justification for the FBI's activities in this matter and the resulting implications for the First Amendment rights of individuals. The FBI established a confidential source to attend [redacted] and to collect information that was almost exclusively focused on the First Amendment activities of persons who were not the subject of any investigation. Moreover, the source collected no information regarding the subject of the preliminary inquiry under which he was operated, and the source continued to collect and report information on First Amendment activities after the FBI's inquiry was closed.

### B. People for the Ethical Treatment of Animals

The People for the Ethical Treatment of Animals (PETA) was founded in 1980 and today is the largest animal rights organization in the world. PETA has been based in Norfolk, Virginia since 1996 and has affiliates in the United Kingdom, Germany, the Netherlands, India, and Asia. According to its website, PETA operates on the principle that "animals are not ours to eat, wear, experiment on, or use for entertainment." It primarily focuses its efforts on four areas that it believes create the largest and most intense amount of suffering among animals: factory farms, laboratories, the clothing trade, and the entertainment industry.

We reviewed the PETA-related cases conducted by the FBI's Norfolk Field Division because PETA's headquarters is located in that city and the Norfolk Field Division conducted several investigations of PETA or individuals associated with PETA. Our review did not find that the FBI targeted PETA or its members for investigation based solely on their exercise of First Amendment rights. Rather, the evidence indicates that the FBI opened investigations of several individuals and of PETA as an organization to determine whether PETA or any of its leadership was funding or directing the criminal activities of the Animal Liberation Front (ALF) and other animal rights extremists.

We concluded that the FBI did not violate the Attorney General's Guidelines when it opened most of these investigations. However, we questioned whether the FBI had a sufficient factual basis to open several of the cases as full investigations rather than preliminary inquiries. We concluded with respect to one individual that the facts contained in the opening EC did not support opening any investigation at all.

The most significant PETA-related cases the FBI opened were against Alex Collins and against the organization itself.[198] The case against Collins, which remained open for nearly 6 years, was based on information that Collins

[198] Alex Collins is a pseudonym.

[redacted], and traveled to foreign countries [redacted] that instructed animal rights activists about maximizing economic damage to businesses with techniques that included raids and arson. However, FBI Headquarters recommended to the field office responsible for the matter that it convert the case from a full investigation to a preliminary inquiry for several reasons, including that the information about Collins was 2 years old. In addition, the reliability of the source for the information was not indicated and the allegations were conclusory and lacking in detail. We agreed with FBI Headquarters that the information did not warrant conducting that case as a full investigation.

The Field Division's decision to operate the case as a full investigation contributed to the case remaining open for 6 years. We concluded that the lengthy duration of the investigation was unreasonable and was inconsistent with FBI policy requiring that an investigation with potential impacts on First Amendment activity "not be permitted to extend beyond the point at which its underlying justification no longer exists." Had the investigation been conducted as a preliminary inquiry, and therefore been subject to the requirement that such cases be renewed at defined intervals, we believe it is likely the case would have been closed considerably earlier than it was.

The FBI's investigation of Collins also illustrates the impact a lengthy investigation can have on individuals who are subjects of FBI preliminary and full investigations. Because this case was classified as a domestic terrorism matter, Collins was placed on federal watchlists. As a result, the FBI collected information about Collins's travel activities for years. At least one time Collins returned to the country, Collins was subjected to a secondary inspection that included copying personal documents. Although the FBI had Collins removed from a watchlist that tracked international travel, Collins apparently remained in at least two other government databases that caused the FBI to continue receiving international travel alerts relating to Collins. The FBI, pursuant to its policy, did not remove Collins from a separate FBI watchlist until the investigation was closed. For the reasons explained above, we believe this would have occurred substantially earlier had the case been conducted as a preliminary inquiry.

The FBI also opened a preliminary inquiry on PETA to determine whether grounds existed to initiate a broader, terrorism enterprise investigation of the organization. The investigation remained open for a total of 15 months, during which time the case received 3 90-day extensions. We concluded that the FBI did not violate the Attorney General's Guidelines opening this case or in extending the inquiry on the first two occasions. However, we questioned the factual basis for the third extension.

We identified one PETA-related case that we believe did not have a sufficient factual basis even for a preliminary inquiry. The communication that opened the case did not contain any indication that the individual made statements advocating force or violence, and the only information indicating involvement in unlawful acts was one, or possibly two, arrests several years prior to the case being opened for protest activities not uncommon for animal rights activists. We believe these previous arrests were not sufficient to justify the opening of a preliminary inquiry. We also determined that the FBI field division responsible for this case also failed to comply with FBI policy requiring that a domestic terrorism subject be removed from federal watchlists when the case was closed. As a result, the subject was not removed until 3 years after the investigation was closed.

### C. Greenpeace

According to its annual report, Greenpeace is a global environmental organization that "uses peaceful protest and creative communication to expose global environmental problems and promote solutions for the future."

Our review did not find that the FBI targeted Greenpeace or its members for investigation based solely on their exercise of First Amendment rights. Rather, the FBI opened investigations of individuals associated with Greenpeace based on concerns about potential illegal conduct, such as trespass, vandalism, and other crimes.

In one case we reviewed involving Greenpeace protest activities in Alaska, the FBI's investigation was based on evidence of potential conduct that could violate federal laws such as 18 U.S.C. § 1366 (Destruction of an Energy Facility). We concluded that the FBI had sufficient factual predication to open a preliminary inquiry and later a full investigation on members of Greenpeace in that case. For similar reasons, we found that the FBI was authorized to collect and retain information about the future travel and protest plans of the subjects.

In another case, we reviewed the FBI's predication for a full investigation of Greenpeace members relating to their planned protest activities with respect to two corporations in Texas (Exxon and Kimberly-Clark). In prior years, the Greenpeace members had been arrested [redacted]. The FBI opened an investigation based on the belief that the subjects might be planning similar or perhaps more destructive protest activities in the future. The FBI used a wide variety of investigative techniques in this investigation, including surveillance.

We did not conclude that the FBI was investigating the subjects solely as a result of their First Amendment activities. However, the FBI articulated little

or no basis for suspecting a violation of any federal criminal statute. The subjects had previously been prosecuted for [redacted], and the FBI's opening EC did not articulate any basis to suspect that they were planning any federal crimes. Moreover, the FBI did not comply with the Attorney General's Guidelines, which required that the "FBI supervisor authorizing an investigation shall assure that the facts or circumstances meeting the standard of reasonable indication" be recorded in writing.

We also found that the FBI kept this investigation open for over 3 years, long past the corporate shareholder meetings that the subjects were supposedly planning to disrupt, and over a year beyond the last investigative activity in the case. We concluded that the investigation was kept open "beyond the point at which its underlying justification no longer existed," which was inconsistent with the FBI's Manual of Investigative and Operational Guidelines (MIOG).

The FBI's investigations of these subjects were also classified as Acts of Terrorism investigations. We considered whether these matters satisfied the broad definitions of terrorism in the MIOG and therefore could be classified under the FBI's Acts of Terrorism investigative classification. In the Alaska case, we found that the FBI had developed credible information regarding the potential use of force or violence by at least one of the subjects, thereby providing a basis for the FBI to classify the case as an Act of Terrorism matter under the MIOG. In the Texas case, however, we found scant basis for the FBI to suspect the subjects were planning acts that would involving "force or violence," as the MIOG required to classify the matter as relating to Acts of Terrorism.

The classification of this investigation as a terrorism case had significant consequences to the subjects, who were placed on a federal watchlist like other subjects of Acts of Terrorism investigations. As a result, the FBI collected information about their travel and protest activities throughout the United States.

### D. The Catholic Worker

Our review concluded that the FBI did not target the Catholic Worker or its members for investigation based on their exercise of First Amendment rights. Although several incidents related to Catholic Worker protests of the Iraq War, investigative activities and documents relating to the Catholic Worker or its members were generated by an array of FBI field divisions responding to discrete circumstances.

Our review of the documents related to the investigations of members of the Catholic Worker revealed that most did not describe the exercise of First

Amendment rights by Catholic Worker members, or the contents of their expressions. In those documents that did reference First Amendment activities, information the FBI collected and retained related to concerns about potential criminal actions such as damaging military property. We also concluded that the retention of this information did not violate Attorney General's Guidelines or FBI policy.

However, in one case we concluded that the FBI improperly retained information about a public event that Catholic Worker members may have attended. This information did not relate to "potential criminal or terrorist activity" and therefore should not have been retained under the Attorney General's Guidelines then in effect.

In the two investigations we reviewed in which Catholic Worker members were named or unnamed subjects, we concluded that the investigations did not violate the Attorney General's Guidelines and that the investigative techniques used during these investigations were limited.

We also reviewed two incidents in which FBI records referenced the Catholic Worker in a "special events" file. We determined that in one case the FBI retained information that described a public anti-war rally's organizing group, its purpose, and number of attendees. Under the Attorney General's Guidelines in effect at the time, as well as in FBI field guidance, this information should not have been retained because it contained no observations relating to potential future criminal or terrorist activity.

We also considered two instances in which the FBI retained in a domestic terrorism file ECs referencing anti-war related civil disobedience by Catholic Worker members. The FBI ECs retained information about nonviolent civil disobedience (peaceful trespass on a military facility). Retaining this information – which pertained to a federal crime – was not prohibited by the Privacy Act, Attorney General's Guidelines, or FBI policy.

However, we question the FBI's collection and retention of this information. The acts in question were nonviolent civil disobedience, and the FBI has at various times disavowed interest in such activity. For example, in April 2006, following the FBI's release of documents pursuant to a FOIA request, the FBI's Executive Secretariat Office responded to a letter from a citizen expressing concern that the FBI was "investigating the Catholic Worker" by stating: "[T]he FBI is not targeting lawful civil disobedience. Our organization does, however, seek to prevent unlawful violent activities. In order to do so, we advise our partners in law enforcement of the tactics used by those who wish to impinge on the civil rights of others by violently disrupting otherwise peaceful marches and assemblies." Yet, the information the FBI collected in one case had no relationship to any "violent activities," much less to terrorism. Nothing contained in FBI files or stated by the Special Agent who

recorded the information explained the potential relevance of this information to the FBI's anti-terrorism mission.

We also concluded that the FBI's classification of one of these matters under the Act of Terrorism classification was inappropriate, because the acts in question (trespass on a military facility) did not include the use of violence or force. Other file classifications were also available to the FBI and their use would not have interfered with the FBI's ability to retrieve the information in the event that it became relevant to a future terrorism investigation.

### E. Vandenberg Air Force Base

The FBI opened a preliminary inquiry and full investigation into the activities of Greenpeace, the Catholic Worker, and other groups and individuals with respect to planned protests at the Vandenberg Air Force Base (VAFB) in Central California in 2001. Our review found no evidence that the FBI targeted Greenpeace or the Catholic Worker based on their exercise of First Amendment rights in this protest activity. We found that the Vandenberg investigations did not violate Attorney General's Guidelines. The FBI had obtained information that Greenpeace was planning or considering actions to disrupt a National Missile Defense test launch by activities that would exceed trespass. The planned activities would constitute a federal offense, such as interference with the national defense (18 U.S.C. § 2155). When the FBI added the Catholic Worker as a subject to its investigation, the FBI had information that the group had violated and might again violate a federal law such as trespassing onto a military installation, 18 U.S.C. § 1382.

However, the FBI included its files characterizations of the Catholic Worker as advocating, among other things, "peace with a Christian and semi-communistic ideology," and "a communist distribution of resources." FBI guidance states that "[t]he collection of information concerning groups and individuals must be justified as reasonable and necessary for investigative purposes." See the FBI MIOG, Introduction, § 1-4(4). We concluded that these characterizations of the Catholic Worker lacked a reasonable and necessary relationship to any alleged actions on the group's part to impede the National Missile Defense launches.

### F. Glen Milner

We also examined the FBI's investigative activity relating to Glen Milner, who was described in a *Seattle Post-Intelligencer* article as a "Quaker peace activist" who was "under watch" for protest activities carried out at the 2003 Seafair festival in Seattle, Washington. Although the FBI utilized its special events authorities in connection with the Seafair, most of the information in FBI files reflected investigative activity by other agencies. We concluded that the FBI did not improperly investigate Milner because of his exercise of First

Amendment rights or otherwise act in violation of FBI policies. We also found no evidence that the FBI investigated the Quakers as a group, or any individuals identified in FBI documents as Quakers, for their protest activities.

## II. Conclusions and Recommendations

In this review we addressed several issues raised by the FBI's investigation of selected First Amendment advocacy groups. We reached the following general conclusions.

### A. Targeting for First Amendment Views

As noted above, our review examined whether the FBI targeted the groups or their members because of their First Amendment expressions rather than for valid law enforcement purposes. The evidence did not indicate that that the FBI targeted any of the groups for investigation on the basis of their First Amendment activities. In most cases, the groups were not themselves subjects of any investigation. Instead, individuals associated with the groups were named subjects. As detailed in our report, the FBI's investigations of these individuals were generally predicated on concerns about potential criminal acts by the individuals, not their First Amendment views.

However, FBI documents we reviewed gave the impression that the FBI's Pittsburgh Field Division was focused on the Merton Center as a result of its anti-war views. In fact, the FBI did not open any investigation of the Merton Center at all. Instead, we found that some of the FBI's investigative activities relating to the Merton Center were the result of poor judgment by agents and supervisors in unconnected instances, including a supervisor's decision to send a probationary agent to monitor an anti-war rally on a slow work day and an agent's decision to operate a source in the POG investigation in order to establish his participation in the FBI's source program.

### B. Predication

A related issue that we addressed was whether the investigations relating to the groups and their members were adequately predicated under the Attorney General's Guidelines and FBI policies. The applicable standard in the Guidelines for predication was low, especially for preliminary inquiries, which required only the "possibility" of a federal crime. In part as a result of this standard, we found in most cases that the FBI did not violate the Guidelines in opening these investigations.

However, we concluded that in several cases, the FBI's predication was factually weak and in several cases there was little indication of any possible federal crime as opposed to local crime. We also found that in some cases that matters opened as full investigations should have been opened as preliminary

inquiries. This distinction had consequences, because the Attorney General's Guidelines limit the investigative techniques that can be used during preliminary inquiries and require more frequent review to determine if the investigation should be closed.

We also found that FBI case agents sometimes did a poor job of documenting the predication for opening investigations, despite the fact that FBI policy required "strict compliance" with the Attorney General's Guidelines, including the documentation requirement, in cases implicating First Amendment rights. As a result, in the absence of clear contemporaneous documentation, FBI agents and supervisors sometimes provided the OIG with speculative, after-the-fact rationalizations for their prior decisions to open investigations that we did not find persuasive.

In many of the cases we reviewed, the FBI conducted relatively little investigative activity of any kind. In those cases in which the FBI conducted activity, we found with rare exception that the FBI used techniques that were authorized for the level of investigation that had been predicated, such as a preliminary inquiry, a full investigation, or pursuant to a special event.

However, in some cases, we found that the FBI extended the duration of investigations involving advocacy groups or their members without sufficient basis. This had practical impacts on subjects, whose names were maintained on watchlists as a result and whose travels and interactions with law enforcement were tracked. For example, the FBI continued to collect information about the international travel of two subjects of a PETA-related investigation after the point that the underlying justification for the case ceased to exist.

### C. Collection and Retention of Information

We also reviewed whether the FBI improperly collected or retained information about the First Amendment activities of the groups or their members. We found that in most cases, documents in FBI files referencing the advocacy groups did not focus on the content of their First Amendment expressions.

However, we found instances in which the FBI used questionable investigative techniques and improperly collected and retained First Amendment information in FBI files. These instances, which are summarized above, related to the Merton Center or the Pittsburgh Organizing Group. In one case, a probationary agent was sent to look for terrorism subjects at an anti-war rally in an ill-conceived project on a slow work day that resulted in the placement of inappropriate information in FBI files, in violation of the Attorney General's Guidelines. In another, an FBI agent recruited a source to report on the First Amendment activities of and advocacy group in a poorly supervised

effort to establish the agent's participation in the source program. This activity also resulted in the improper retention of First Amendment information in FBI files.

Moreover, although we did not find that these incidents were part of a coordinated investigation by the FBI based solely on the First Amendment activities of these groups, they had an impact on the First Amendment rights of those groups and their members.

### D. Characterizations of Groups

With one exception, the FBI documents we reviewed relating to the selected advocacy groups generally did not contain inappropriate characterizations of the groups. In one case, an agent described a group as "communistic" in a context in which that characterization was irrelevant to a law enforcement purpose.

### E. Classification as Terrorism Matters

The FBI classified the matters we examined as domestic terrorism cases. This practice did not violate the broad definitions of domestic terrorism in federal law, the Attorney General's Guidelines, and FBI policies. However, this practice relied upon potential crimes that may not commonly be considered as "terrorism" (such as trespassing or vandalism) and that could alternatively have been classified differently, such as under the classification for crimes on government reservations. The domestic terrorism classification had impact beyond any stigma resulting from the public release of the documents under FOIA. For example, persons who are subjects of domestic terrorism investigations are normally placed on watchlists, and their travels and interactions with law enforcement may be tracked.

### F. OIG Recommendations

Based on this review, and some of the problems we found in the FBI investigations we examined, we make the following six recommendations.

#### 1. Address False and Misleading Statements to Congress and the Public

As detailed in this report, we found that in 2006 the FBI made false and misleading statements to the public and to Congress about the Pittsburgh Field Division's surveillance of a Merton Center anti-war rally. Two inconsistent and erroneous versions of the incident were created in which the FBI claimed that the surveillance was a response to information that certain persons of interest in international terrorism matters would be present. This was not true. We recommend that the FBI examine our findings and determine whether

administrative or other action is warranted for any individuals in connection with this matter.

### 2. Establish Procedures to Track Source of Facts Provided to the Public and Congress

As described above, we had difficulty tracing the sources of information that the FBI provided to Congress and the public regarding the Pittsburgh Field Division's surveillance of the 2002 anti-war rally sponsored by the Merton Center. We recommend that the FBI seek to ensure that it is able to identify and document the source of facts provided to Congress in testimony and questions for the record, as well as in press releases.

### 3. Require Identification of Federal Crime as Part of Documenting Predication

The Attorney General's Guidelines require that FBI agents document the basis of predication for preliminary and full investigations. FBI policy requires "strict compliance" with this documentation requirement. As detailed in this review, we found that in some cases the predication appeared to be based on possible violations of state law, rather than federal offenses. We recommend that the FBI specify the potential violation of a specific federal criminal statute as part of documenting the basis for opening a preliminary or full investigation in cases involving investigation of advocacy groups or their members for activities connected to the exercise of their First Amendment rights.

### 4. Consider Revising Attorney General's Guidelines and DIOG to Reinstate Prohibition on Retention of Irrelevant First Amendment Material from Public Events

The 2008 Attorney General's Guidelines and the FBI's Domestic Investigative and Operational Guidelines (DIOG) in various places address First Amendment issues in connection with federal criminal investigations. The 2008 Attorney General's Guidelines loosened the limitations on the FBI's retention of information collected in connection with attendance at public events. Under Part VI of the Attorney General's Guidelines, the FBI formerly was prohibited from retaining any such information unless it relates to potential criminal or terrorist activity. This limitation has been removed from the most recent Guidelines. Therefore, some of the violations of policy we found in this review would not be violations if they occurred today. We recommend that the Department examine the Guidelines and the DIOG to determine whether to reinstate the prohibition on retaining information from public events that is not related to potential criminal or terrorist activity.

### 5. Clarify When First Amendment Cases Should Be Classified as "Acts of Terrorism" Matters

We identified several cases in which the FBI investigated acts of nonviolent civil disobedience that could constitute federal crimes (such as trespassing on military facilities). These investigations were classified as Acts of Terrorism matters. We recommend that the FBI and the Department consider and provide further guidance on when such cases involving First Amendment issues should be classified as Acts of Terrorism matters and when they should not.

### 6. FBI Inspection Division Should Review Pittsburgh Division Cases

In light of the problems in investigations by the FBI's Pittsburgh Field Division described in this report, we recommend that the FBI Inspection Division conduct an inspection of recent domestic terrorism cases in the Pittsburgh Field Division to assess the Division's compliance with applicable statutes, Attorney General's Guidelines, and FBI policies involving First Amendment issues.

## G. Conclusions

In sum, the evidence in our review did not indicate that that the FBI targeted any of the groups for investigation on the basis of their First Amendment activities. However, we also concluded that the factual basis for opening some of the investigations of individuals affiliated with the groups was factually weak. Moreover, in several cases there was little indication of any possible federal crimes as opposed to state crimes. In some cases, we also found that the FBI extended the duration of investigations involving advocacy groups or their members without adequate basis, and in a few instances the FBI improperly retained information about the groups in its files. In some cases, the FBI classified some investigations relating to nonviolent civil disobedience under its "Acts of Terrorism" classification.

We recognize that the FBI investigations we examined in this report occurred several years ago, when different FBI policies and versions of the Attorney General's Guidelines were in effect. Nevertheless, we believe this report is relevant to current and prospective FBI investigations that may implicate First Amendment considerations. Although the current Attorney General's Guidelines and FBI policies contain some restrictions on the conduct of such cases, they continue to allow the FBI wide latitude to pursue these investigations. We therefore believe that the findings of this report, the concerns about the FBI's activities in cases we reviewed, and the recommendations we make in this report are important for current FBI practices. We therefore believe that that the FBI should carefully consider our

findings and recommendations in this report to help avoid similar problems to those in the investigations discussed in this report.

# APPENDIX A

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

September 14, 2010

Honorable Glenn A. Fine
Office of the Inspector General
U.S Department of Justice
Suite 4706
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Fine:

The Federal Bureau of Investigation (FBI) appreciates the opportunity to review and respond to your draft report entitled, "A Review of the FBI's Investigations of Certain Domestic Advocacy Groups" (hereinafter "Report").

We are pleased the Report concludes the FBI did not target any groups for investigation on the basis of their First Amendment activities. As noted in your Report, "[t]he FBI's investigations of these individuals were generally predicated on concerns about potential criminal acts by these individuals, not their First Amendment views."

Additionally, as described in the Report, inaccurate information was provided to the FBI Director and Congress regarding the basis for an agent's presence at an anti-war rally that was sponsored by the Thomas Merton Center in November 2002. The FBI regrets that incorrect information was provided regarding this matter.

In conclusion, based upon a review of the Report, the FBI concurs with the six recommendations directed to the FBI. Please feel free to contact me at 202-324-3315 should you have any questions or need further information.

Sincerely yours,

Timothy P. Murphy
Deputy Director

# APPENDIX B

(Rev. 08-28-2000)

~~SECRET~~

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 11/29/2002

To: Pittsburgh

From: Pittsburgh
Squad 4
Contact: SA [redacted]

b6
b7C

Approved By: [redacted]

Drafted By: [redacted] tro TRO

Case ID #: ~~(S)~~ 199-0 (Pending)

Title: ~~(S)~~ IT Matters

Synopsis: ~~(S)~~ To report results of investigation of Pittsburgh anti-war activity.

~~(S)~~ Derived From : G-3
Declassify On: X1

Details: ~~(S)~~ The Thomas Merton Center (TMC), 5125 Penn Avenue, Pittsburgh, Pennsylvania, telephone: (412) 361-3022, webpage: www.thomasmertoncenter.org, is a left-wing organization advocating, among many political causes, pacificism.

~~(S)~~ TMC holds daily leaflet distribution activities in downtown Pittsburgh and is currently focused on its opposition to the potential war with Iraq. According to these leaflets, Iraq does not possess weapons of mass destruction and that, if the United States invades Iraq, Sadam Hussien [sic] will unleash bio-chemical weapons upon American soldiers.

~~(S)~~ TMC advertises its activities on its webpage. On November 24, 2002, TMC coordinated the 8th Annual An-Nass (Humanity) Day at the Islamic Center of Pittsburgh, 4100 Bigelow Blvd., Pittsburgh, Pennsylvania 15213. The contact person for this event was Farooq Hussaini of the Islamic Center, work telephone: (412) 622-8838, home telephone: [redacted] email: [redacted] URL: www.icp-pgh.org. The purpose of An-Nass Day was "to bring all people of Pittsburgh together in understanding and respecting each other and also to inform them about Islam and Muslims."

~~SECRET~~

b6
b7C

I:\4\[redacted]\333TRO01.EC

DECLASSIFIED BY 60309AUCtam/dcg/mbh
ON 01-12-2006

199-0-734

To: Pittsburgh From: Pittsburgh
Re: [redacted] 199-0, 11/29/2002

[redacted] Tim Vinning, the Merton Center's executive director, stated to Pittsburgh Tribune Review columnist Mike Seate that there are more than a few Muslims and people of Middle Eastern descent among the regulars attending meetings at the Merton Center's East Liberty headquarters.

[redacted] On November 29, 2002, SA [redacted] photographed TMC leaflet distributors at the Pavilion in Market Square, Pittsburgh, Pennsylvania. These photographs are being reviewed by Pittsburgh IT specialists. b6 b7C

[redacted] One female leaflet distributor, who appeared to be of Middle Eastern descent, inquired if SA [redacted] was an FBI Agent. No other TMC participants appeared to be of Middle Eastern descent. b6 b7C

♦♦

# APPENDIX C

**PRESS RESPONSE**
**March 14, 2006**

**NATIONAL PRESS OFFICE**
**(202) 324-3691**

Some FBI documents recently released to the ACLU under the Freedom of Information Act refer to an FBI Agent taking photographs at a public anti-war event in Pittsburgh in November 2002.

While the Agent was acting with all appropriate investigative authorities, it is important to emphasize some points not evident in the publicly released documents. First, the photos taken at the November 29, 2002, event were taken as a direct result of information provided to the FBI, related to an ongoing investigation. Specifically, the photos were compared with photographs of a person under FBI investigation. Once that comparison was made, and determined to be of no value to the ongoing investigation, the photos taken at the event were destroyed.

Second, the February 26, 2003, document contained in the FOIA release, a Letterhead Memorandum, was actually a draft which was never finalized -- nor made a part of an FBI file. The draft was retrieved from a work file and processed under FOIA, as part of the ACLU request. A related internal communication that was also released was written in a manner that suggests it is a report on the activities of an anti-war group. Such a characterization would be factually misleading. The Agent was not in attendance at the event for the purpose of monitoring this group's political activities. As noted above, he was present for the sole purpose of determining the validity of information he received from another source possibly establishing a link between an on-going investigation and the group engaging in anti-war protests. Finding no such link, he terminated his surveillance.

Finally, while the photographs taken in 2002 were authorized under the Attorney General investigative guidelines, and FBI policy, several subsequent FBI-wide policy directives have been issued. Directives in 2003 and 2004 reiterated and, where appropriate, clarified policy pertaining to investigations that in some way involve public demonstrations or protest activities. These directives were part of an effort to ensure that field Agents fully understood all applicable guidelines, policy and law. Field Agents must regularly strike a proper, legally-defensible balance between aggressively pursuing investigative leads to address and mitigate national security threats, and not chill the exercise of constitutionally protected rights of free speech and assembly.

####

# APPENDIX D

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Pittsburgh, PA 15203-2148
February 26, 2003

INTERNATIONAL TERRORISM
MATTERS

Pittsburgh Division Joint Terrorism Task Force (JTTF) investigation has revealed the following information of which your agency may already be aware:

The Thomas Merton Center (TMC), located at 5125 Penn Avenue, Pittsburgh, Pennsylvania (PA), telephone 412-361-3022, webpage: www.thomasmertoncenter.org, has been determined to be an organization which is opposed to the United States' war with Iraq. A review of the above website revealed that when the United States begins war with Iraq:

> "All who desire peace and an end to war gather at the Federal Building downtown, corner of Liberty and Grant at 12 noon for an interfaith prayer vigil, 5 P.M. for a rally, and possible civil disobedience for those prepared to do this."

Also listed on the website is the date February 15, 2003. This day is a day of international protestors against the war promoted by United for Peace and Justice (www.unitedforpeace.org). The organization hosted the international rally and march against the war in New York City at the United Nations Building. Hundreds of people from the Pittsburgh region were making the trip to New York City for the protest. In addition, thousands more were anticipated in local marches, rallies, and vigils in Youngstown, Ohio (OH), Morgantown, West Virginia (WV), and Butler, Meadville, and Pittsburgh, PA.

Regional events included:

12:00 P.M. North Side Vigil for Peace in Iraq.
Allegheny UU Church, North Avenue and
Resaca Place (North Side)

INTERNATIONAL TERRORISM
MATTERS

12:00 P.M. East End Community Stand for Peace, corner of Penn and Highland (East Liberty)

12:00 P.M. Regent Square Community Vigil for Peace in Iraq. Waverly Church corner of Forbes and Braddock (Regent Square)

The above information is for your use and any action deemed appropriate.