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# ✓ Changing the Standard

## Despite Civil Liberties Fears, F.B.I. Faces No Legal Obstacles on Domestic Spying

By ADAM LIPTAK

In 1972, with public concern about government surveillance of the civil rights and antiwar movements near its peak, a closely divided Supreme Court refused to forbid the Army to monitor public political activities.

### News Analysis

The majority quoted a lower court's assessment of the basic facts: "The information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand."

With the substitution of the Internet for the newsstand, that is essentially what Attorney General John Ashcroft now proposes to allow the Federal Bureau of Investigation to do. [Page A20.]

If the Supreme Court was unwilling to bar a similar practice in 1972, there is little reason to think a challenge would succeed today.

Indeed, the restrictions under which the F.B.I. has operated for three decades were self-imposed. Congressional pressure, lawsuits, scandals and a public outcry played

a role in the bureau's vow to limit domestic surveillance to situations in which criminal conduct was suspected. But the restrictions were not enforceable in court and were grounded in what might be called constitutional values, rather than actual law.

Civil libertarians largely acknowledge that the Justice Department is free to revise its own guidelines, but they say that the knowledge that political activity is being monitored by the government will chill the kinds of unrestrained discussions that are central to American democracy, with no appreciable benefits.

"There is no Fourth Amendment constitutional problem with the government surfing the Web or going into a public space or attending a public event," said David D. Cole, a law professor at Georgetown University, referring to the constitutional limits on governmental intrusions. "But there are significant First Amendment concerns. There is a real cost to the openness of a free political society if every discussion group needs to be concerned that the F.B.I. is listening in on its public discussions or attending its public meetings."

That concern is particularly acute in mosques and other religious settings, said Jason Erb of the Council on American-Islamic Relations. "It starts to erode some of the trust and good will that exists in these institutions if you're afraid they have been infiltrated by an undercover agent," Mr. Erb said.

Eric M. Freedman, a law professor at Hofstra University, said the costs to society of the new investigative tools outweigh their benefits. "There is a high likelihood that the weapon will be used in unintended ways and create more collateral damage in the First Amendment area than it will result in law en-

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NEWS ANALYSIS

# Standard Is Changing On Spying By F.B.I.

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forcement gains," Professor Freedman said.

But Mary Jo White, who supervised several major terrorism prosecutions as United States attorney in Manhattan, sees things differently.

Even as a reaction to abuses in the 60's and 70's, Ms. White said, the old Justice Department guidelines were misguided.

"I wouldn't have favored them in the old days because they are a barrier to important, legitimate investigative measures," she said. "We're now at war. The public safety concern has to come first. Would that we wouldn't have to pay this price for our own safety and national security. But we do."

The new guidelines allow wide-ranging monitoring of political and religious activities unconnected with the investigation of any crime and do away with the requirement that some kinds of investigations be approved in Washington.

Both revisions troubled Zachary W. Carter, a former United States attorney in Brooklyn. "To be a Black Panther was not against the law," Mr. Carter said. "To be a Black Panther and conspire to kill policemen or blow up buildings was against the law."

The distinction, he said, was sometimes lost in investigations of that

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**An agency's rules  
arose from concern  
about free speech.**

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group. Without the old guidelines, "law enforcement authorities could conduct investigations that had a chilling effect on entirely appropriate lawful expressions of political beliefs, the free exercise of religion and the freedom of assembly."

The solution, Mr. Carter said, is careful supervision at the highest levels in Washington. "Just because the folks in Minneapolis turned out to be even 100 percent right this time doesn't mean they always will be," he said, referring to the F.B.I. agents who unsuccessfully sought warrants to examine the computer files of Zacarias Moussaoui, the only person charged in the Sept. 11 terrorist attacks.

"Whenever the government in my experience ventures into these gray areas, whether or not they're going to do it responsibly or not depends on whether mechanisms are put in place to monitor the exercise of their discretion," Mr. Carter added.

James X. Dempsey, the deputy director of the Center for Democracy and Technology, said that monitoring of political activity would not have uncovered the perpetrators of the Sept. 11 attacks.

"Not a single one of the 19 guys, or 20 if you count Moussaoui, did anything overtly political," Mr. Dempsey said. "Not one of them said, 'I support Palestinian rights' or 'I hate America' in a public way."

But the new guidelines will, he said, have an inevitable impact on public debate. "Allowing people to freely and openly advocate, say, Palestinian rights in the hope of persuading others creates the crucial safety valve that keeps people from turning to violence to force change."

Greg Nojeim, associate director of the American Civil Liberties Union, identified one potential legal vehicle for attacking the new guidelines: The Privacy Act. The law, enacted in the Watergate era, prohibits the government from keeping records "describing how any individual exercises rights granted by the First Amendment." There are exceptions: where the monitoring is subject to specific statutory authorization, where the monitored individual consents and where the information is "pertinent to and within the scope of an authorized law enforcement activity."

The F.B.I. will presumably argue that the last exemption fits, though Mr. Nojeim was skeptical about whether the bureau was free to grant itself such authority.

Not every civil liberties lawyer opposes the revised regulations. One, Steven Lubet, a law professor at Northwestern University, said context matters. "They're not conducting surveillance of a peace movement," Professor Lubet said. "J. Edgar Hoover has been dead for 30 years, and there is no reason the abuses of the 1960's should prevent the F.B.I. from taking prudent measures today."