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Martin L. Perschetz

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DOMESTIC INTELLIGENCE INFORMANTS, THE FIRST AMENDMENT AND THE NEED FOR PRIOR JUDICIAL REVIEW

INTRODUCTION

Recently, the use of informants and undercover agents by the government for domestic intelligence gathering has received much public attention. Simultaneous investigations by the Senate and House Select Committees on Intelligence have rekindled the controversy which inevitably accompanies a conflict between the legitimate interests of government in enforcing its laws and the constitutional rights which are endemic to American democracy.

The purpose of this Comment is to demonstrate the need for prior judicial review of the decision by law enforcement agencies to use informants. The reluctance of the Supreme Court to recognize the fourth and fifth amendment interests at stake has prevented the development of effective legal safeguards against the dangers of illegitimate official use of informants for intelligence gathering. This, in turn, has fostered abuses which seriously inhibit the exercise of first amendment freedoms. Although the scope of the protection available under the

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1. For purposes of this Comment, the terms "informant," "undercover agent," and "secret agent" refer to individuals who surreptitiously gather information or conduct other covert intelligence activities upon the orders of a law enforcement agency. The terms will be used interchangeably throughout the Comment, but, unless otherwise specified, they do not apply to individuals who gather information on their own initiative or for private concerns or whose assistance is neither solicited by, nor within the control of, a law enforcement agency.

The type of informant discussed in this Comment is usually recruited and compensated by a law enforcement agency and acts as its employee. The constitutional implications of the use of this type of official agent, as well as the implications for a democratic society in general, are far greater than those presented by the private use of undercover operatives. The design of the constitution "to keep government off the backs of the people," Laird v. Tatum, 408 U.S. 1, 28 (1972) (Douglas, J., dissenting), and consequent restrictions on state action require more zealous scrutiny of governmental than of strictly private use of secret agents. Private intelligence gathering is often conducted merely for the purpose of protecting an employer against pilferage or other activities detrimental to his business.


2. Hereinafter referred to as the Senate Committee.

3. Hereinafter referred to as the House Committee.
first amendment has not been clearly articulated by the Supreme Court, the first amendment offers the only viable basis for challenging widespread official spying. More important, the first amendment provides a basis for a judicially or legislatively created requirement of prior judicial review of the use of informants by law enforcement agencies. As this article demonstrates, only such a measure will adequately safeguard first amendment interests while permitting law enforcement agencies to employ informants when necessary.

I. THE STATUS OF INFORMANTS UNDER PRESENT LAW: THE LACK OF ADEQUATE SAFEGUARDS

The use of informants is overwhelmingly the most common method of domestic intelligence gathering employed by law enforcement agencies. Generally, officials justify this technique as a highly effective and necessary means by which they can gather information in order to prevent crimes and public disorders. Law enforcement agencies view the broad authority to utilize informants as indispensable if they are to keep pace with potential unlawful activity, particularly because of the subtle complexity of much modern “antisocial” behavior.

4. Informants are the primary source of information in approximately 85 percent of intelligence investigations conducted by the FBI, as compared with 5 percent in which the primary source is electronic surveillance. As of June 30, 1975, the FBI had 1,500 domestic informants in its employ, not including those informants used strictly in connection with the investigation of particular crimes. The budget allocation for fiscal year 1976 for the FBI’s intelligence informant program was $7,401,000. Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, S. Rep. No. 755, 94th Cong., 2d Sess. 228 (1976) [hereinafter cited as Senate Committee Report].

5. Intelligence gathering has been described as “proactive,” rather than “reactive,” police work. Statement of the Los Angeles Board of Police Commissioners, The Public Disorder Intelligence Function of the Los Angeles Police Department at 1 (April 10, 1975).

By analyzing past actions and keeping abreast of present activities, reasonable projections can be made which may permit the police to anticipate the commission of a crime and take steps to prevent it.

Id. at 2. See also Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970):

The police function is pervasive. It is not limited to the detection of past criminal events. Of at least equal importance is the responsibility to prevent crime . . . . [T]he preventive role requires an awareness of group tensions and preparations to head off disasters as well as to deal with them if they appear. To that end the police must know what forces exist, what groups or organizations could be ensnared in public disorders.

56 N.J. at 222, 265 A.2d at 684 (citations omitted).

6. See United States v. United States District Court, 407 U.S. 297, 311-12 (1972);
Nevertheless, good faith claims by a law enforcement agency that infiltration by informants is a necessary tool for achieving legitimate government objectives cannot alone justify infiltration which is constitutionally impermissible or otherwise illegal. Thus far, however, the Supreme Court has declined to hold that the use of informants is per se unconstitutional or that the decision to utilize informants should be subject to prior judicial review. As a result, law enforcement agencies currently have virtually unlimited discretion in making this decision.

A. The Rejection of Fourth and Fifth Amendment Protections

1. The fourth amendment. In holding that the covert use of informants is not per se unconstitutional, the Supreme Court, in Hoffa v. United States, stated that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Based on this version of the assumption of risk doctrine, the Court concluded that "no right protected by the Fourth Amendment was violated" by the use of an informant who had been taken into the petitioner's confidence. The Court therefore rejected the fourth amendment as a ground for suppressing evidence of conversations heard by the informant, although he had been present without prior judicial approval.

In Katz v. United States, the Court discarded the physical trespass theory of the fourth amendment and construed that amendment

_Hearings on S. Res. 21 Before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate, 94th Cong., 1st Sess., vol. 6, at 132 (1976) [hereinafter cited as Senate Hearings] (testimony of James Adams, Assistant to the Director, FBI, Dec. 2, 1975).

7. [W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained . . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.


8. 385 U.S. 293 (1966). Hoffa and his co-defendants were convicted of attempting to bribe members of a jury, primarily on the basis of the testimony of a paid informant who was able to gain Hoffa's confidence and overhear his conversations. Particularly damaging were conversations overheard between Hoffa and his attorney.

9. Id. at 302. See also Lopez v. United States, 373 U.S. 427 (1963).

10. 385 U.S. at 303.


as affording protection for conversations, in addition to tangible items, where the participants are justified in relying on the privacy of their communications. Thus, the exclusionary rule was applied to evidence derived from an electronic listening device that enabled agents, who had not obtained a warrant, to monitor defendant's conversations in a telephone booth. Initially, there was some doubt as to whether the interpretation of the fourth amendment enunciated in *Hoffa* with respect to informants could continue to prevail in light of the *Katz* doctrine. Any such doubt was apparently laid to rest in *United States v. White*, a post-*Katz* reaffirmance of *Hoffa*. The Court again held that where the agent is a participant in the conversation or is known to be present during the conversation—as was the case in *Hoffa* but not in *Katz*—the defendant assumes the risk that his statements will be revealed to the government. As a result, the use of informants by law enforcement agencies continues to be considered outside the purview of the fourth amendment and, therefore, not subject to any warrant requirement or other sort of prior judicial review.

2. The fifth amendment privilege against self-incrimination. In *Hoffa*, the fifth amendment privilege against self-incrimination was held not to be violated—in the absence of coercive tactics or custodial interrogation—when an informant elicits incriminating verbal evidence from a suspect.

B. “Existing” Protections

1. The sixth amendment right to counsel. According to the *Hoffa* Court, *Coplon v. United States* and *Caldwell v. United States* were two cases in which “[t]he proposition that a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment has found expression . . . .” In *Coplon*, a violation of the attorney-client privilege of the sixth amend-

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14. But see *Bakes v. United States*, 350 F. Supp. 547 (N.D. Ill. 1972), holding that at least within the Seventh Circuit, *White* was to be construed as controlling only pre-*Katz* interceptions of conversations.
15. 401 U.S. at 749.
16. For criticism of this doctrine, see Note, *Judicial Control of Secret Agents*, 76 Yale L.J. 994 (1967).
19. 191 F.2d 749 (D.C. Cir. 1951).
20. 205 F.2d 879 (D.C. Cir. 1953).
21. 385 U.S. at 306.
ment was found where telephone conversations between the accused and her attorney were intercepted by the government both prior to and during her trial. The right of persons accused of a crime to consult with counsel both before and during trial was held to be a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner. The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel. . . . The Fifth and Sixth Amendments unqualifiedly guard the right to assistance of counsel, without making the vindication of the right depend upon whether its denial resulted in demonstrable prejudice.

That is, the right to counsel guaranteed by the sixth amendment is violated by a mere invasion of the attorney-client relationship, regardless of the consequences of that invasion on the outcome of the trial.

In Caldwell, a government agent served as an assistant to the defense, thereby gaining free access to the planning of defense strategy and other matters related to the impending trial. The court of appeals found the placing of the informant into the defense camp violative of the attorney-client privilege, reinforcing the concept that the mere presence of a government agent is prohibited by the sixth amendment.

In Hoffa, however, the Court rejected the notion of an absolute attorney-client privilege both before and during trial, limiting the Coplon and Caldwell cases to their facts. The mere utilization by the government of an informant to overhear conversations between a suspect and his attorney would no longer be sufficient grounds to claim a sixth amendment violation. Henceforth, a defendant would have to show that the conversations were directly related to a charge for which the suspect had been arrested and was facing trial at the time the comments were overheard. This would be true even if the defendant could show that the police intentionally delayed making an arrest, a stage at which a suspect cannot be interrogated unless provided with an opportunity to confer privately with counsel.

22. 191 F.2d at 759.
23. Id. (emphasis added).
24. 205 F.2d at 759.
24.1 Later, in Weatherford v. Bursey, 45 U.S.L.W. 4154 (U.S. Feb. 22, 1977), the Court noted that it had, in Hoffa, "merely assumed, without deciding," that Coplon and Caldwell were decided correctly. Id. at 4156.
25. 385 U.S. at 307-08. Only rarely does an intelligence investigation result in a criminal prosecution. Senate Committee Report at 231.
On the basis of this view of the attorney-client privilege, courts began to chip away at Coplon and Caldwell. One federal court held, in language that appears to be contrary to that of Coplon, that "[m]ere presence of an informant during strategy sessions of defense attorneys is not per se violative of the right to freely communicate with counsel guaranteed by the Sixth Amendment." In addition, in Kirby v. Illinois, the Supreme Court held that the accused's sixth amendment "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."

Recently, the Supreme Court dealt the final blow to the Coplon-Caldwell notion of per se violation of the sixth amendment. In Weatherford v. Bursey, defendant and an undercover agent were arrested for vandalizing a selective service office. Thereafter, in order to preserve the effectiveness of his cover, the agent continued to masquerade as a co-defendant. The guise was successful; defendant and his attorney unsuspectingly invited the informant to participate in conversations at which defense strategy was planned. Subsequently, the agent testified at trial but did not directly reveal information obtained at the strategy sessions. The Court, reversing the decision below, found no unconstitutional invasion of the attorney-client privilege:

> [W]hen conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. This is a far cry from the per se rule an-

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26. See text accompanying note 23 supra.

27. United States v. Crow Dog, 399 F. Supp. 228, 237 (N.D. Iowa 1975). Coplon and Caldwell were distinguished here as involving "gross intrusion[s]," id., following the characterization of those cases adopted by the Hoffa Court. See 385 U.S. at 306. See also United States v. Rosner, 485 F.2d 1213, 1224-25 (2d Cir. 1973) (no sixth amendment violation where co-indictees who were present during conversations between defendant and defendant's attorney were asked by the government to cooperate against defendant but had not agreed to do so); United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970) (where FBI informant served as private investigator for defendant's attorney, participated in the development of defendant's trial strategy, attended conferences between defendant and his attorneys, and sat with counsel at trial, case remanded for in camera inspection of FBI files to determine the nature of the information communicated to the FBI or the prosecution and its relevance to defendant).


29. Id. at 688. See also Massiah v. United States, 377 U.S. 201 (1964).


29.2 The Court intimated that it might have viewed defendant's claims more sympathetically had he not invited the informant to participate. Id. at 4157.

29.3 Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975).
nounced by the Court of Appeals below, for under that rule trial prejudice to the defendant is deemed irrelevant.29.4

Defendant's case, the Court indicated, would have been stronger had the agent testified as to the actual conversations, had the government's evidence been derived from these conversations, had the agent's presence during the conversations resulted in some other way to defendant's "substantial prejudice," or had there been evidence that details of the conversations about trial preparation were forwarded to the prosecution.29.5

Thus, in the vast majority of domestic intelligence-gathering investigations, the use of informants to obtain information about matters within the attorney-client relationship is not subject to sixth amendment restrictions. Since surveillance of this type almost always occurs well in advance of the commencement of formal proceedings and often is unrelated to any specific criminal activity, law enforcement agencies have wide discretion in utilizing informants to learn about matters within the attorney-client relationship. Only when formal proceedings have been commenced, when there is more than mere presence of the informant within the confines of the defense camp, and when the information reported to the government by the informant relates to the specific charge for which an accused is to be tried are courts obligated by sixth amendment doctrine to find a violation of the right to counsel.

29.4 45 U.S.L.W. at 4156.

29.5 Id. at 4156. Justice Marshall delivered a strongly worded dissent in which Justice Brennan joined. Finding the rule established by the majority as "little better than no rule at all," id., at 4159, Justice Marshall reasoned:

Establishing that a desire to intercept confidential communications was a factor in a State's decision to keep an agent under cover will seldom be possible, since the State always can argue plausibly that its sole purpose was to continue to enjoy the legitimate services of the undercover agent. Proving that an informer reported to the prosecution on defense strategy will be equally difficult, not only because such proof requires an informer or prosecutor to admit his own wrongdoing (and open the door to damage suits and attacks on convictions), but also because an informer's failure to make a report after overhearing a lawyer-client session oftentimes can be an effective means of communicating to the prosecutor that nothing was uncovered. Given these problems of proof, the only way to assure that defendants will feel free to communicate candidly with their lawyers is to prohibit the government from intercepting such confidential communications, at least absent a compelling justification for doing so.

Like the Court of Appeals, and unlike the majority today, I believe a per se rule of this sort is fully supported.

Id. at 4159-60.
2. **Entrapment.** Entrapment is an affirmative defense to be used at trial.\(^{30}\) It is available to the criminal defendant whose offense would not have been committed but for the fact that a police agent "implant[ed] in the mind of an innocent person the disposition to commit the alleged offense and induce[d] its commission" so that the defendant could be prosecuted.\(^{31}\)

The entrapment concept offers little protection to the subject of an intelligence-gathering operation: it is not available unless the defendant has been arrested and will be tried. Absent arrest and trial, which are extremely rare in domestic intelligence cases, entrapment has never taken place: courts have not recognized a constitutional right to be free of entrapment that does not result in arrest and prosecution. Moreover, even where the defendant has been brought to trial, the subjective test used by the federal courts is difficult to meet.\(^{32}\)

3. **The due process clauses of the fifth and fourteenth amendments.** The due process clauses of the fifth and fourteenth amendments are violated by police practices which "offend the community's sense of fair play and decency"\(^{33}\) or are "so outrageous . . . [that they violate] that 'fundamental fairness, shocking to the universal sense of justice,'"\(^{34}\) or are contrary to the "decencies of civilized conduct."\(^{35}\) Unfortunately, these standards are nebulous.\(^{36}\) While the Supreme Court has maintained continually that due process remains as a barrier to certain police activities, it has been reluctant to invoke the standard.\(^{37}\)

\(^{30}\) See, e.g., N.Y. Penal Law § 40.05 (McKinney 1968).


\(^{36}\) See Rochin v. California, 342 U.S. 165 (1952): “Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a ‘sense of justice.’” Id. at 173.

\(^{37}\) See, e.g., United States v. Russell, 411 U.S. 423 (1973) (no due process violation where conviction obtained for unlawful manufacturing and sale of an illegal drug even though a police agent supplied defendants with an indispensable ingredient for the drug's manufacture that was very difficult to obtain); Neils v. Biggers, 409 U.S. 188, 199 (1972) (unnecessary suggestiveness of pretrial identification held not violative of due process if "under the 'totality of the circumstances' the identification was reliable"). Compare Foster v. California, 394 U.S. 440 (1969) (due process violation where robbery victim failed to identify defendant in one suggestive lineup, made only a tentative identification at a one-on-one showup, and finally identified defendant in
Indeed, no court has found the activities of an informant to be unconstitutional on due process grounds. Although it is possible that an informant's activities might someday be held violative of the principles of due process, there is no indication that such a holding is imminent.

4. Supervisory powers. While a federal court may overturn state convictions only through application of the fourteenth amendment, it may go beyond minimal constitutional requirements in its supervisory administration of the federal criminal justice system. In United States v. Banks, a federal court utilized its supervisory powers to dismiss a case on the ground that the defendant could not receive a fair trial because of government misconduct. In enunciating the test which would trigger the use of supervisory powers, the court stated that:

The attorneys' and enforcement officers' conduct need not be so unfair or imprudent as to offend "due process" before exercise of this supervisory power is appropriate . . . . Instead the supervisory power can be utilized whenever the administration of justice is tainted . . . .

Although this test appears to be easier to satisfy than that of the due process clause, it undoubtedly would be necessary to prove a high degree of misconduct by an informant before a court could be prompted to invoke its supervisory powers, particularly where the informant's behavior is the only ground upon which a request for use of these powers rests. Moreover, to rely on the protection of the court's supervisory powers another lineup, at which defendant was the only person to reappear from the first lineup); Rochin v. California, 342 U.S. 165 (1952) (due process violation where an emetic solution was forced through a tube into defendant's stomach against his will in order to induce vomiting so that officers could recover narcotic capsules defendant had swallowed).


40. Id. at 392 (emphasis added). Chief Justice Warren, dissenting in Hoffa, maintained that the Court should have used its supervisory powers because of the "affront to the quality and fairness of federal law enforcement" presented there by the type of informant used and the nature of his activities, which had "a serious potential for undermining the integrity of the truth-finding process in the federal courts." 385 U.S. at 320.

41. The Banks court was faced with repeated instances of misconduct by the government in its handling of the case, which arose out of the Indian occupation of Wounded Knee, South Dakota. Despite warnings that the court would not tolerate such misconduct, the government persisted in conspiring to suborn perjury, suppressing an FBI statement exposing the perjury of a government witness, illegal and unconstitutional use of military personnel and equipment at Wounded Knee and an effort to cover it up, violations of ethical, professional and moral standards, and various other examples of misconduct. 383 F. Supp. at 391. See also United States v. Crow Dog, 399 F. Supp. 228 (N.D. Iowa 1975); N.Y. Times, March 13, 1975, at 31, col. 1.
powers is to rely on such unpredictable factors as the discretion and subjective judgment of the court.42

These four available "protections" against the use of informants for intelligence-gathering purposes—the sixth amendment, the defense of entrapment, the due process clause, and the supervisory powers of the federal courts—do not deal effectively with the most serious aspect of the problem: the generally unchecked discretion enjoyed by law enforcement agencies in determining when, how, and against whom an informant will be utilized. This absence of constitutional or statutory controls over law enforcement agencies permits continuing invasions of privacy and the inhibition of constitutionally protected activity. The following cases illustrate the extent to which the use of informants for intelligence gathering has been abused and the need for effective controls.

II. THE CONTEMPORARY USE OF INFORMANTS FOR DOMESTIC INTELLIGENCE: LIMITLESS BOUNDARIES AND WIDESPREAD ABUSE

In 1973 and 1974, Mary Jo Cook was a paid informant for the FBI. Cook was ordered to infiltrate a local chapter of the Vietnam Veterans Against the War (VVAW), an organization the FBI suspected of having a potential for violence. In testimony before the Senate Intelligence Committee, Cook described her duties as follows:

I was to go to meetings, write up reports or phone in reports on what happened, who was there, in some way to try to totally identify the background of every person there, what their relationships were, who they were living with, who they were sleeping with, to try to get some sense of the local structure and the local relationships among the people in the organization.

So I'd go to a meeting, identify the people who were present and identify them as individuals, and then identify the substance of the meeting.43

Cook's instructions to delve into the personal lives of the members of the group she infiltrated were not unusual. Another witness before the Senate Intelligence Committee, Gary T. Rowe, had infiltrated the

43. Senate Hearings at 111.
Klu Klux Klan for the FBI in the Birmingham, Alabama, area from 1960 to 1965. He testified that he was to report not only political information, but also "the most intimate details" of Klan members' social and personal lives.\(^4\) Rowe was instructed to attempt to break up the homes of as many Klan members as possible by sleeping with their wives.\(^4\) An informant named Robert Merritt, who testified before the House Intelligence Committee, had been instructed by the FBI during the early 1970's to "solicit and provide information to the FBI regarding homosexual proclivities of politically prominent people and individuals of the New Left."\(^4\)

The government's need for information of this kind is not readily apparent. The use of undercover police agents to provide official agencies with the details of the sex lives of whole groups of people is neither consistent with the most basic view of the right to privacy,\(^4\) nor easily justified as necessary to prevent violence\(^4\) or to preserve the national security.\(^4\) Yet, even in the absence of the most tenuous connections between the information sought and specific criminal activity, the scope of information which an informant may surreptitiously obtain is virtually unlimited.\(^5\)

\(^{44.}\) Id. at 116.
\(^{45.}\) Id. at 118.

\(^{48.}\) See, e.g., Socialist Workers Party v. Attorney Gen., 510 F.2d 253, 254 (2d Cir. 1974); Statement of the Los Angeles Board of Police Commissioners, supra note 5.

\(^{50.}\) Witnesses at the Senate Hearings amply testified to the lack of any limits on the scope of their investigations: "There were no guidelines as to what information was important or wasn't important. My financial arrangement with [the FBI] was ... that I would turn over all information gathered. ... They didn't define my context ... " Senate Hearings at 112 (testimony of Mary Jo Cook, FBI informant, Dec. 2, 1975).

Mr. Schwarz: What kind of information did you report back to the FBI about the Klan?

Mr. Rowe: Any and everything that I observed or heard pertaining to any Klansman.

The implications of this lack of control often are more serious than the invasions of privacy discussed above. In order to infiltrate an organization effectively or to serve as an effective agent provocateur, the informant may either participate in or encourage illegal activities by organization members. In order to secure the confidence of members of the group, he may cultivate a reputation of being "game," to show "[t]hat [he] would not just say something, [he] would go through with it. . . ." The results can be brutal. One informant testified before the Senate Intelligence Committee that he participated with Klan members in beating people with chains at a county fair and beating the Birmingham Freedom Riders. Another FBI informant testified that, pursuant to FBI instructions, he infiltrated a peaceful anti-war group in Camden, New Jersey, and instigated a burglary at a Camden draft board. The tools, money, and technical assistance with which members of the group were supplied were all provided or financed by the FBI. When the agent began to believe that this activity had escalated to the level of a conspiracy, he tried to call off the burglary, but was instructed by his FBI superiors to carry it out. In San Diego, California, an informant utilized by the FBI from 1967 through 1972 to infiltrate a right-wing paramilitary group became involved in such things as "firebombing, smashing windows, placing stickers bearing the group's symbols on cars and buildings, propelling lug nuts through windows with sling shots, and breaking and entering."

That illegal methods are used is not suprising in view of the type of person usually recruited to be an informant. According to James Adams, Assistant to the Director of the FBI, "the informants you develop are not recruited from Sunday Schools." Most informants

51. Although there is often no more than a fine line between illegal entrapment and the activities of an agent provocateur, it is generally held that no entrapment exists where government agents "merely afford opportunities or facilities for the commission of the offense." Sorrells v. United States, 287 U.S. 435, 441 (1932).

52. See Senate Committee Report at 231.


55. Id. at 118.


57. Id. at 92, col. 1, n.541.

58. Id. at 91, col. 1.

59. Senate Committee Report at 267-70.

recruited from outside the law enforcement agency have had experience in dealing with criminal elements. They are generally compensated with cash, the amount often depending on how incriminating the information which they furnish is. Since the more incriminating the information, the more money the informant receives, an informant of already dubious character has an incentive to do his utmost to discover, encourage, or even create criminal activity.

Infiltration of the defense camp of a criminal defendant is another abusive tactic attributable to the absence of controls over the use of informants. In addition to her duties as an infiltrator of the VVAW, Cook insists that she also infiltrated the defense camp of defendants in the trials stemming from the Attica, New York, prison rebellion of 1971, in order to report to the FBI details of the defendants' legal strategy. Douglass Durham, who was the chief aide and confidante of Dennis Banks, co-leader of the American Indian Movement, served as an informant for the FBI during Banks' trial on federal charges in connection with the occupation of Wounded Knee, South Dakota.

Although the recent testimony before the congressional investigating committees has been confined largely to federal intelligence agencies, abuses by informants are widespread among local police forces as well. *People v. Collier* is a case in point. There, an undercover agent named Alvarez, assigned to New York City's Bureau of Special Services (BOSS), covertly gathered intelligence and prepared daily reports of what he heard and observed throughout the Lower East Side community of New York from May 1971 through July 1973. In the course of his operations, Alvarez met the defendant, who, despite a prior criminal record, had become well-known for his deep

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61. *Id.* at 91, col. 2. Statutory authorization for the payment of informants by the Justice Department is found in 28 U.S.C. § 524 (1966).
62. *See* text accompanying notes 19-29 *supra.*
65. 85 Misc. 2d 529, 376 N.Y.S.2d 954 (Sup. Ct. N.Y. County 1975).
66. BOSS was formed in October 1912... Its function remain[s] the same—to investigate and control trouble-making subversives, whoever they happen to be...

... The Bureau was remarkably successful in infiltrating radical groups on the left and on the right throughout the decade, and it was especially good at putting police agents into the myriad black groups that blossomed in the city.

involvement in community affairs. He became the focus of the operation for "[n]o articulable, credible reasons," and certainly not because he was suspected of any criminal activity. Alvarez became defendant's constant companion and kept voluminous records of defendant's associates and his conversations and dealings with them. As the court noted, "[Alvarez] reported to BOSS officials, seemingly, each and every movement by defendant during the two year infiltration...."

The extent and pervasiveness of activities of this kind are compelling evidence of the need for more effective controls on the use of informants for official intelligence gathering. These activities are inimical to the first amendment guarantees of free and uninhibited expression of ideas and unrestrained freedom to associate. It is from this point of view that the relationship between first amendment adjudication and the use of informants to gather intelligence will be examined.

III. THE USE OF INFORMANTS AND THE FIRST AMENDMENT:
HOW CHILLING MUST THE EFFECT BE?

A. Laird v. Tatum

In opening the session of the Senate Hearings on the FBI's use of informants, Senator Tower observed:

When an informant is used to penetrate an organization to provide intelligence information, the possible impact of... his influence on that organization... cannot be ignored. Surely, the infiltration of

67. 85 Misc. 2d at 538-39, 376 N.Y.S.2d at 964-65.
68. Id. at 542, 376 N.Y.S.2d at 968.
69. Intimate human relationships depend largely on the sense that the participants are free from the observation of others, and that sense is essential to the development of individual points of view and modes of life. Continuing contacts with those looking for damaging information are both highly unpleasant and deeply disturbing to any sense of security. Moreover, the more wide-sweeping the power to gather evidence, the greater the danger that the power will be arbitrarily used to harass those "out of favor" or those against whom particular officials have personal grievances; the greater also the danger that information obtained will fall into inappropriate hands or be misused.

informants into groups and organizations who seek to bring about political, socio-economic, or other changes in our society represents, at the very least, a chilling effect upon the freedom of citizens to gather and to debate and to work for such change.  

The term "chilling effect" is used in first amendment adjudication to denote an inhibition, as opposed to a direct prohibition, of the full exercise of first amendment freedoms caused by the threat of some governmental action. Chilling effects have been held to emanate from threats of governmental sanction, of interference with the right to pursue a particular profession or employment, and of exposure of private associational activities.

Since "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions," traditional rules of standing and ripeness have frequently been modified by the Supreme Court in order to accommodate claims of a chilling effect. For instance, where an allegedly overbroad regulatory statute is claimed to chill protected expression, attacks on the statute have been permitted even though the attacker has not demonstrated that his own conduct could not be constitutionally regulated by a more narrowly drawn statute. One need not violate a statute and risk criminal prosecution in order to be procedurally able to challenge it as inhibiting protected expression, particularly since the risk of prosecution itself may constitute a chilling effect. The Court has "molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to [its] overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated

70. Senate Hearings at 108.
76. See Note, supra note 74.
77. See, e.g., Thornhill v. Alabama, 310 U.S. 88 (1940).
by vagueness, overbreadth, and unbridled discretion to limit their exercise.”

Nevertheless, in *Laird v. Tatum* the Court held, in a 5-4 decision, that no justiciable controversy was presented by a claim that the mere existence of an intelligence gathering and distributing system created an unconstitutional chilling effect, where the plaintiffs were not the specific targets of governmental action. At issue was a nationwide intelligence plan adopted by the Army in response to civil disorders in Detroit during the summer of 1967. Information about persons “thought to have at least some potential for civil disorder” was gathered principally from the news media and generally circulated publications, but reports submitted by Army agents who attended public meetings and from civilian law enforcement agencies were utilized as well. The information was distributed to Army posts around the country and stored in computer data banks.

The Court reasoned that in none of the previous cases in which unconstitutional chilling effects were found did the chilling effect arise merely from the individual’s knowledge that a government agency was engaged in certain activities or from the individual’s concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of government power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptive, or compulsions that he was challenging.

In his dissenting opinion, Justice Douglas disagreed with the conclusion that a chilling effect can be shown only when the governmental power is regulatory, proscriptive, or compulsory. Quoting from Justice Brennan’s concurrence in *Lamont v. Postmaster General*, he insisted that the proper test should be whether there is a significant present in-

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80. 408 U.S. 1 (1972).
81. Chief Justice Burger delivered the opinion of the Court, in which Justices White, Blackmun, Powell and Rehnquist joined. Dissenting opinions were either written or joined by Justices Douglas, Brennan, Stewart and Marshall.
82. 408 U.S. at 6.
83. *Id.* at 11.
84. *Id.* at 16.
85. 381 U.S. 301 (1965).
hibitory effect\textsuperscript{86}: "'inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.'"\textsuperscript{87} Applying this test to the allegations, Douglas concluded that the plaintiffs had standing to challenge the Army surveillance program on first amendment grounds. His determination was based on the following factors: (1) The surveillance was "not casual" but was "massive and comprehensive." (2) The agents' reports were routinely and widely circulated, and were exchanged with local police departments, the FBI, and the CIA. (3) The surveillance went beyond merely collecting information from already public records. It included "staking out teams of agents, infiltrating undercover agents, creating command posts inside meetings, posing as press photographers and newsmen, posing as TV newsmen, posing as students, and shadowing public figures." (4) There was evidence of past misuse and abuse by the Army of its intelligence system.\textsuperscript{88}

Whatever the merits of the Laird majority's formulation of the appropriate first amendment test, it is important to note what was not decided in that case. First, the Court refrained from ruling on the question of the propriety or desirability of the type of surveillance at issue in Laird, holding only that its challengers there did not allege sufficient injury to raise a justiciable controversy. In fact, the Court cautioned, in dicta, that it found military intrusion into civilian affairs generally abhorrent, and that should a case which satisfied the majority's test of a chilling effect be presented, it would seek to provide an appropriate remedy.\textsuperscript{89}

Second, and most significant here, the majority, unlike Justice Douglas, did not view this case as one involving the use of a secret agent. Quoting from the opinion of the court below, the Court found

"... no evidence of illegal or unlawful surveillance activities. \textit{We are not cited to any clandestine intrusion by a military agent.} So far as is yet shown, 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."\textsuperscript{90}

\textsuperscript{86} 408 U.S. at 25. This was the position of the court of appeals in deciding the case. Tatum v. Laird, 444 F.2d 947, 954 (D.C. Cir. 1971).
\textsuperscript{87} 408 U.S. at 26-27 (quoting 381 U.S. 301, 309 (1965) (Brennan, J., concurring)).
\textsuperscript{88} 408 U.S. at 26-27 (Douglas, J., dissenting).
\textsuperscript{89} Id. at 15.
\textsuperscript{90} Id. at 9 (emphasis added) (quoting 444 F.2d 947, 953 (D.C. Cir. 1971)).
Third, the Court did not foreclose the possibility of legislative action designed to limit domestic surveillance and protect related first amendment interests. Rather, it expressly invited Congress to do so.01

B. Informants and the Chilling Effect in the Aftermath of Laird

The courts, in interpreting Laird, generally have predicated their threshold determinations of the existence of a justiciable controversy on (1) the severity and immediacy of the injury alleged; (2) the degree to which the surveillance is a surreptitious invasion of private activity (as opposed to mere observation of activity already exposed to the public at large); and (3) the extent and nature of any abusive conduct on the part of undercover agents.

In Handschu v. Special Services Division,02 a federal district court refused to dismiss a claim of a first amendment violation stemming from the use of informants and infiltrators by the New York Police Department. Although conceding, in accordance with Laird, that the mere existence of the surveillance system of the Special Services Division was not in and of itself unconstitutional, the court found that the complaint presented a justiciable controversy. In Handschu, plaintiffs alleged that agents provoked, solicited, and induced members of political groups to engage in unlawful activities, provided funds and equipment for that purpose, compiled lists of attendance at group meetings in order to assemble dossiers on individual members, and attempted in other ways to disrupt lawful political activity by inciting intragroup mistrust and suspicion. It was further alleged that an antiwar veterans group already had disbanded as a result of the disruption caused by the informants. These claims, if proven, were held to be sufficient for a finding of a chilling of constitutionally protected political expression.03

91. 408 U.S. at 15.
93. Compare Fifth Avenue Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974) (no justiciable controversy where chilling effect claimed to stem from covert activities including examination of the special bank account of an antiwar demonstration's organizer, ascertainment of the number of buses obtained to transport demonstrators from New York to Washington, and observation of the actual bus departures); Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975) (no judicially cognizable chilling effect where surveillance activities were limited to police photographing and gathering data at public meetings); Donahue v. Duling, 465 F.2d 196 (4th Cir. 1972) (no judicially cognizable chilling effect where uniformed police photographed those present at a public demonstration).
In *Socialist Workers Party v. Attorney General*, it was alleged that members of the party's youth organization, the Young Socialist Alliance (YSA), would be dissuaded from full participation and attendance in their annual convention because it was well known that the FBI intended to infiltrate it, and because of a risk that the FBI would maintain a file on those in attendance, which could be used against them if they sought public employment. Justice Marshall, sitting as circuit justice, found that the complaint alleged a sufficiently specific, concrete injury to form a justiciable controversy, distinguishing *Laird*. On the merits, however, petitioners' request for relief in the form of a preliminary injunction prohibiting the FBI from infiltrating the meeting was denied. Nevertheless, petitioners ultimately prevailed on the question of whether the FBI would be able to forward names to the Civil Service Commission or other agencies.

*Socialist Workers Party* highlights one specific type of injury toward which the courts might be especially sympathetic when applying the *Laird* test to the infiltration of a group or organization—an interference with the first amendment freedom of association:

*[T]here is a valid First Amendment claim presented when a governmental authority seeks to obtain information about the identities of the members of organizations . . . [where] the organizations have standing to protect their members from unwarranted invasions by the government of rights to association and privacy.*

That government surveillance can inhibit freedom of association was first established in *Local 309, United Furniture Workers of America v. Gates*, where a first amendment violation was found in police presence and note-taking at labor union meetings. This was relevant in *Socialist Workers Party*, where the possibility of disclosure to gov-

95. Id. at 1318.
ernment agencies of the names of those attending a convention was held to have a profound chilling effect on the right to associate with a lawful political organization.\(^9\)

One difficult problem posed by claims based on an interest in maintaining the privacy of one's associational activity is the possibility that the more active and public the role one takes in advocating the organization's causes, the weaker one's claim to first amendment protection may become. As noted in *Laird*,\(^{100}\) first amendment considerations do not require police agents to ignore information which has been exposed widely and is available to the general public. In *Socialist Workers Party*, the district court confronted this problem by categorizing the YSA convention as "semi-public"\(^{101}\) and found that those in attendance manifested a sufficient desire to maintain the privacy of their associations to claim an abridgement of their first amendment rights.\(^{102}\) The court of appeals disagreed, finding that public reporting of the event by the news media, which was to be allowed by the YSA, constituted at least as significant a chilling effect as the presence of FBI informants.\(^{103}\) Thus, it appears that associational activities must be private to some degree in order to constitute the basis for a valid claim of chilling effect.\(^{104}\)

Rights of association also played a significant role in *People v. Collier*.\(^{105}\) Noting that "rhetoric often exceeds intent" at a political

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100. See text accompanying note 90 *supra*.
101. The court found that:
   Although the meetings contemplated have various degrees of public or private characteristics . . . basically the intention is to have only persons coming to participate in the meetings as interested observers or participants, and it would appear that if someone attempted to attend any of these meetings and was considered undesirable by the YSA or the SWP, those organizations would have the right to refuse admission to such unwanted persons.
387 F. Supp. at 749.
102. I do not believe that a person who attends a meeting such as the one we are talking about inevitably waives his right to have his attendance a more or less private matter and not subject to Government surveillance. If he goes beyond this and manages to get his picture and name published in the party paper or something like that, this would be a different matter, but we are not talking about that kind of people. We are talking about the rank and file of the young people who apparently wish to attend this type of meeting with something less than that much notoriety.
   *Id.* at 751.
103. 510 F.2d at 257.
105. 85 Misc. 2d 529, 376 N.Y.S.2d 954 (Sup. Ct. N.Y. County 1975). For a discussion of the facts of this case, see text accompanying notes 65-68 *supra*. 
meeting of a controversial nature, the court reasoned that "many persons may hesitate to attend" such meetings "if their attendance and comments will be reported and permanently recorded in a police dossier." Thus, an "unrestrained surveillance operation calculated to stifle the willingness of people to exercise those preferred freedoms of speech, association and assembly" was held to violate the first amendment. Since one basic purpose of infiltration of a group or organization is to acquire membership lists, the holding in Collier suggests that courts might bring much covert intelligence gathering within the proscriptions of the first amendment.

There also is some indication that infiltration of groups held in disfavor by those controlling the apparatus of government surveillance sometimes not only has the effect of inhibiting first amendment freedoms but is intended to do so. Dissident organizations have been made targets of intelligence operations in order to "enhance the paranoia endemic in these circles and [to] further serve to get the point across [that] there is an FBI agent behind every mailbox." Justice Douglas has commented that: "More than our privacy is implicated. Also at stake is the reach of the Government's power to intimidate its critics." Paranoia and intimidation may not be the only intended results. Continuing government investigation of this kind may also result in the official stigmatization of dissident groups.

An intelligence investigation need not, however, focus on a specific organization or individual in order to chill first amendment rights. In

106. Id. at 558, 376 N.Y.S.2d at 983.
107. Id. at 560, 376 N.Y.S.2d at 985.
108. See Senate Hearings at 261 (testimony of Norman Dorsen, New York University Professor of Law, Dec. 9, 1975).
112. When the official investigation long outlives its initially professed justification—that is to say, reasoned suspicion of criminal activity imminent or actually carried out—at that point it is inescapable . . . that an important consequence, if not necessarily a purpose, of the continuing investigation will be the imposition of an official stigma on the political or research activity being carried out by the "subject."

White v. Davis, 113 a recent California case, police agents posed as university students and covertly recorded class discussions, reported on public and private meetings of various campus organizations, and filed dossiers and intelligence reports on students and professors. It was alleged that the investigation was unrelated to any specific criminal activity. The court deemed the alleged injury sufficient to present a cognizable claim, finding "a substantial probability that [the] alleged covert police surveillance will chill the exercise of First Amendment rights."114

These cases illustrate that the relationship between the first amendment and the use of undercover agents and informants to gather information is somewhat flexible. On the one hand, the Court has thus far refused to find standing to challenge governmental surveillance on first amendment grounds where the only injury alleged is the mere existence of a surveillance system. On the other hand, it has yet to decide a case in this area where it has found a cognizable claim of a chilling effect. The first amendment, therefore, has not been rejected

113. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975). In White, which was brought under California law as a taxpayer action, plaintiff, a university professor, sought to enjoin the expenditure of public funds for on-campus intelligence activities. Cf. Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

114. 13 Cal. 3d at 761, 533 P.2d at 224, 120 Cal. Rptr. at 96. In an analysis of the first amendment injury which is useful for purposes of the discussion, the court in White reasoned as follows:

(1) The courts have never given blanket approval for all undercover surveillance. Where no specific criminal activity is alleged as justification for surveillance that may infringe on first amendment rights, closer judicial regulation is called for. The fact that the police have a legitimate interest in preventing future criminal activity does not mean that government officials may exercise totally unbridled authority to conduct undercover surveillance.

(2) Ongoing police surveillance of a university community may inhibit the first amendment freedom of association, through the gathering of political ideas and affiliations of individuals who could not constitutionally be compelled to disclose them, as well as through the infiltration of university-sponsored organizations.

(3) The free expression of ideas in a university classroom may be chilled by such surveillance. The content of classroom activity should receive special protection from governmental intrusion. Id. at 765-69.

Having thus established a substantial chilling effect, the court remanded the case in order to provide the police with an opportunity to demonstrate that the surveillance was justified by a compelling governmental interest. Id. at 761.

The two-step analysis of White—first, the finding of a substantial inhibitory effect, and second, an analysis of the relevant governmental interest and a determination of whether it outweighs the constitutional violation—had been used in two notable pre-Laird cases dealing with police surveillance and the first amendment. See Bee See Books Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) (unconstitutional chilling effect where uniformed policemen stationed in plaintiff's book store in order to discourage sales of pornographic literature); Local 309, Furniture Workers v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948).
as a major protection against the use of informants by the government, and in at least one case, *Laird*, the Court has indicated that in an appropriate case first amendment interests would be protected. Despite the lack of clear guidance from the Supreme Court since *Laird*, some state and lower federal courts have begun to carve out standards for determining the constitutionality of specific forms of intelligence gathering. In so doing, they have made it increasingly clear that where surveillance is found to abridge first amendment rights, only a compelling governmental interest will suffice as a justification. Presumably, such an interest must be related to recognized functions of law enforcement, for example, the investigation or prevention of specific criminal activity. There is no compelling, or even legitimate, governmental interest in the indiscriminate gathering of data about the private or political lives of individuals or groups not suspected of specific criminal activity. The risks inherent in wholesale and unrestricted intelligence gathering cannot be taken lightly:

> We cannot live in a free society where we have a sense of being observed by government watchers.

> Unwarranted police surveillance will destroy our capacity to tolerate—and even encourage—dissent and nonconformity; it promotes a climate of fear; it intimidates, demoralizes, and frightens the community into silence. . . . A ubiquitous secret police and an obsequious society go hand in hand.

The relevant inquiry is then: What is the best method of restricting the official use of informants, infiltrators, and other undercover police agents to investigating or preventing only specific criminal activities?

IV. CONTROLLING THE GOVERNMENT'S USE OF INFORMANTS THROUGH PRIOR JUDICIAL REVIEW

A. *The Need for Prior Judicial Review*

The most appropriate and effective method of controlling the use of informants would be a requirement that a judicial warrant precede the commencement of any covert intelligence gathering. The warrant

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116. 85 Misc. 2d at 554, 376 N.Y.S.2d at 979.
would issue upon a finding that the use of a secret agent is necessary in connection with the prevention or investigation of specific, articulable criminal activity.

The requirement of prior judicial review traditionally has served as the major safeguard against unreasonable searches and seizures prohibited by the fourth amendment. The rationale underlying the fourth amendment warrant provision is that executive officers responsible for law enforcement, investigation, or prosecution "should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." Well-intentioned efforts on the part of executive officers may lead to overzealous attempts to gather evidence which overlook constitutional values. Therefore,

the very heart of the Fourth Amendment directive [is] that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate." . . . The further requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.

Prior judicial review, however, has been held to be of significant value not only in safeguarding fourth amendment rights, but also in protecting the free and uninhibited expression guaranteed by the first amendment. In a good-faith but overzealous effort to enforce the law, law enforcement officials might overlook potential invasions not only of privacy, but of protected speech as well. Moreover, a convergence of first and fourth amendment values is not uncommon. This is particularly true in cases where "national security" is the sole

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117. "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
118. 407 U.S. at 317.
122. 407 U.S. at 317.
justification for a police investigation. In such cases, there is a "greater jeopardy to constitutionally protected speech. . . . History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies."124

Recognizing the particular dangers to first amendment freedoms that may be engendered by the use of informants, the House Select Committee has recommended to the full House of Representatives that

judicial warrants must issue, on probable cause, before an informant or any other agent of the FBI may infiltrate any domestic group or association, when investigation of such group or association or its members is based solely on Title 18 U.S.C. §§ 2283, 2384, 2385.125

It is difficult to evaluate fully the Committee proposal at this time because of the suppression of the House report.126 Nevertheless, the recommendation is significant and laudable as an attempt to persuade the Congress, based on the extensive testimony which the Committee received, that prior judicial review is necessary to control the use of informants by the FBI.127

There are many advantages to the use of prior judicial review in this context. For example, an impartial magistrate can determine whether there is a "substantial relationship between the information sought and some compelling governmental interest"128 which justifies intrusion on first amendment freedoms. Furthermore, if the informant may be used only where the magistrate is convinced that specific criminal activity is involved, there would be significantly less chance of infringing the first amendment freedoms of those engaged in lawful

125. Recommendations of the House Select Committee on Intelligence, Recommendation "T (1)," issued February 1976 (emphasis added). Title 18 U.S.C. §§ 2283, 2384 and 2385 deal with rebellion or insurrection, seditious conspiracy and advocating the overthrow of the government, respectively.
126. See note 46 supra.
127. The Senate Committee has also received testimony that a warrant based on probable cause should be required as a precondition to the use of an informant for official intelligence gathering. Senate Hearings at 262-66 (testimony of Norman Dorsen, New York University Professor of Law, Dec. 9, 1975); see id. at 221 (testimony of Ramsay Clark, former U.S. Attorney General, Dec. 3, 1975). The former Attorney General maintained in his testimony that the use of paid informants, which he found to be "inimical to freedom," should be so stringently regulated that "the standards should exceed those that the courts have now imposed upon Fourth Amendment procedure regarding search and seizure." Id. at 224 (emphasis added).
128. 85 Misc. 2d at 560, 376 N.Y.S.2d at 984. See also note 115 supra & accompanying text.
political, social, or community activities. Wholesale, unrestricted
gathering of unnecessary information would decrease, while bona fide
attempts to investigate or prevent crime through the use of informants
could continue. Since "[i]t is difficult to conceive how surveillance
and infiltration of persons and associations engaged in lawful . . . act-
... -
tivity bear any relationship to the important mission of the police to
control crime,"129 there is no apparent reason why the legitimate per-
formance of law enforcement duties would be impaired.

Prior judicial review also would limit surveillance so that it would
be no more intrusive than necessary under the circumstances. The
magistrate could restrict the informant's activities, the number of
people about whom information may be gathered, and the duration
of the surveillance.130 Absent this kind of review, it is extremely
difficult to fix responsibility for an informant's actions, since his in-
structions are usually provided orally with no witnesses.131 If prior
judicial review were required, the limitations imposed on the in-
formant would be recorded. Perhaps most important in the first
amendment context, the public might be reassured that indiscriminate
spying on innocent citizens would decrease.132

Post hoc review does not serve these interests adequately. For
those who may eventually be accused of a crime, the absence of prior
judicial review means that there is no record available indicating
whether the informant's actions were initially justified. More impor-
tant, since domestic intelligence gathering often does not lead to arrest
and prosecution, post hoc review offers no protection in the vast ma-
ajority of cases.

It should be emphasized that to say that informants will not be
utilized without prior judicial approval is not to say that the use of
informants will be abolished. First, the warrant requirement should

129. 85 Misc. 2d at 560, 376 N.Y.S.2d at 984.
130. The scope of an FBI informant's activities is virtually unlimited under the
FBI's manual of instructions for informants. There is no requirement that information
gathering be limited to that which relates to commission of criminal offenses or violent
activity. An FBI official characterized an informant as a "vacuum cleaner" of informa-
tion and confessed that "too much information" is generally produced. SENATE COM-
MITTEE REPORT at 229. A study by the General Accounting Office concurs in this
assessment. COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE HOUSE
COMMITTEE ON THE JUDICIARY, FBI DOMESTIC INTELLIGENCE OPERATION—THEIR
PURPOSE AND SCOPE: ISSUES THAT NEED TO BE RESOLVED 151 (Feb. 24, 1976)
[hereinafter cited as GAO REPORT].
131. HOUSE COMMITTEE REPORT in Village Voice at 91, col. 1.
132. See 407 U.S. at 321.
be limited to those situations in which there is a legitimate interest in the privacy of the conversation or activity.\textsuperscript{133} Public surveillance would therefore not be affected,\textsuperscript{134} and the plain view doctrine would continue to be applicable.\textsuperscript{135} Second, when the required prior judicial approval can be obtained, the surreptitious use of informants would still be available. Third, some of the same exigent circumstances which have been recognized as exceptions to the fourth amendment warrant requirement could be made applicable here.\textsuperscript{136} Where there is a danger of the destruction of evidence\textsuperscript{137} or to the safety of an individual and the obtaining of a warrant thereby has been made impractical, the informant could be utilized without prior judicial approval. The circumstances under which this exception would apply, however, should be narrowly and specifically delineated. Moreover, the strong preference for warrants that exists under the fourth amendment also should exist here, since in the overwhelming majority of domestic intelligence cases exigent circumstances probably do not exist.\textsuperscript{138}

Despite its many advantages, prior judicial review has never been judicially or legislatively mandated as a prerequisite for the use of informants. At present, the determination of when and how to utilize an informant is a matter solely within the discretion of law enforcement officials.\textsuperscript{139} The standards which have been applied voluntarily are

\begin{itemize}
\item \textsuperscript{133} See notes 98-109 \textit{supra} & accompanying text.
\item \textsuperscript{134} One commentator has suggested a separate standard for public surveillance, which would not require judicial review:
[Public surveillance should be limited] to those situations in which the Government reasonably suspects that the individual or individuals under surveillance have committed or are likely to engage in criminal activity, or in which there is a reasonable possibility that violence is likely to occur even if it is impossible to specify in advance which individual or individuals are likely to commit acts of violence.
\item \textsuperscript{135} See Coolidge v. New Hampshire, 403 U.S. 443, 464-71 (1971).
\item \textsuperscript{136} See, e.g., Chimel v. California, 395 U.S. 752 (1969).
\item \textsuperscript{137} Obviously, this would not apply to simply any spoken word; to do so would allow the police constantly to claim the existence of this exigent circumstance. Furthermore, where the possible destruction of evidence could have been prevented but for unreasonable delay on the part of the police, the "exigent circumstance" exception should not be available.
\item \textsuperscript{139} Under the new Justice Department guidelines, see notes 142-46 \textit{infra} & accompanying text, the FBI would retain this discretion. Preliminary and limited in-
invariably less stringent than that of probable cause, and frequently ambiguous or nonexistent. At the Senate Hearings, an FBI official testified that the applicable standard has been "something less than probable cause of a crime, [but] more than mere suspicion." The Senate Committee found that the FBI manual of instructions for informants, which up to now has been the principal document governing the use of this investigative technique,

does not set independent standards which must be supported by facts before an organization can be the subject of informant coverage. Once the criteria for opening a regular intelligence investigation are met, and the case is opened, informants can be used without any restrictions. There is no specific determination made as to whether the substantial intrusion represented by informant coverage is justified by the government's interest in obtaining information. There is nothing that requires that a determination be made of whether less intrusive means will adequately serve the government's interest. There is also no requirement that the decisions of FBI officials to use informants be reviewed by anyone outside the Bureau. In short, intelligence informant coverage has not been subject to the standards which govern the use of other intrusive techniques such as wiretapping or other forms of electronic surveillance.

These shortcomings have not been adequately remedied by the lately promulgated Justice Department guidelines for domestic intelligence issued by Attorney General Levi in January 1976. Some attempt has been made to impose greater restrictions on the implementation of a "full" investigation, which under the guidelines may not be commenced except "on the basis of specific and articulable facts giving reason to

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vestigations may be initiated by FBI field offices and full investigations by FBI headquarters. Proposed Guidelines, Domestic Security Investigations, United States Department of Justice, January 6, 1976 [hereinafter cited as Proposed Guidelines]. Some police departments require that the determination be made by specified upper-echelon law enforcement officers. Guidelines promulgated in New York City in 1973 require that all intelligence investigations unrelated to organized crime be approved by the Police Commissioner, the First Deputy Police Commissioner, the Chief of Inspectional Services, or the commanding officer of the intelligence division, New York Times, Feb. 9, 1973, at 70, col. 2. Often, however, the determination is made at lower levels of the law enforcement agency. See People v. Collier, 85 Misc. 2d 529, 537-38, 376 N.Y.S.2d 954, 964-65 (Sup. Ct. N.Y. County 1975) (requirement of upper-level approval ignored); Developments in the Law, supra note 74, at 1280-81.

140. HOUSE COMMITTEE REPORT in Village Voice at 90, col. 3. Moreover, prior to the issuance of Attorney General Levi's guidelines, FBI standards for the use of domestic intelligence informants were not available to the public. SENATE COMMITTEE REPORT at 229.

141. SENATE COMMITTEE REPORT at 229.
believe that an individual or a group is or may be engaged in activities which involve or will involve the violation of federal law,” and which are intended to further one or more of several enumerated purposes.¹⁴² In addition, the guidelines require a balancing of the intrusion on rights of privacy and free expression with “the magnitude of the threatened harm; the likelihood it will occur; [and] the immediacy of the threat.”¹⁴³ However, in 1974, 90 per cent of the domestic intelligence cases opened by the FBI were not classified as “full” investigations, but as “preliminary” investigations.¹⁴⁴ To initiate a preliminary investigation, the guidelines require only “allegations or other information” that an individual or a group may be engaged in activities

¹⁴² Proposed Guidelines at II(I). The enumerated purposes are:

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

Id. at I(A). Local guidelines have also been undergoing some reform. Proposed guidelines for the Los Angeles Police Department would permit the initiation or maintenance of an intelligence file on organizations or individuals who “threaten, attempt, plan, or perform acts disruptive of the public order.” In addition, “[f]iles may be maintained with respect to organizations that possess or attempt to acquire quantities of arms, ammunition or explosives for the purpose of disruption of the public order.” Files may also be maintained under the guidelines “with respect to organizations” classified above, and on individuals “who are officers of, who officially act for, or who determine or execute the policies” of those organizations. The Los Angeles Police Department Public Disorder Intelligence Division, Standards and Procedures, Draft (Oct. 27, 1975).

¹⁴³ Proposed Guidelines at II(I).

¹⁴⁴ GAO Report at 112. Under the guidelines, domestic intelligence investigations are divided into three categories: preliminary investigations, limited investigations and full investigations. Preliminary investigations include:

1. examination of FBI indices and files;
2. examination of public records and other public sources of information;
3. examination of federal, state, and local records;
4. inquiry of existing sources of information and use of previously established informants; and
5. physical surveillance and interviews of persons not mentioned in [1-4] for the limited purpose of identifying the subject of an investigation.

Proposed Guidelines at II(E) (emphasis added). Limited investigations include those techniques listed above under preliminary investigations plus physical surveillance and interviews “for purposes other than identifying the subject under investigation.” Id. at II(F). A full investigation can involve a full array of investigative techniques, including the recruiting and placing of new informants as well as the use of mail covers and electronic surveillance. Id. at II(G).
[for at least one of the enumerated purposes] which involve or will involve the use of force and violence and which involve or will involve the violation of federal law...”\textsuperscript{145} Moreover, the determination of when to initiate an investigation and make use of an informant remains in the hands of the FBI.\textsuperscript{146} In assessing the past performance of the Bureau’s field offices in initiating preliminary investigations, the General Accounting Office found that they did not distinguish adequately between preliminary and full investigations, did not limit properly the scope of preliminary investigations, and commenced preliminary investigations on the basis of “weak or minimal evidence.”\textsuperscript{147} The guidelines fail to provide for any congressional or judicial oversight to ensure the rectification of this situation.

B. The Arguments Against Prior Judicial Review and Some Responses

Several arguments have been advanced in support of the broad discretion exercised by the executive branch and in opposition to a requirement of prior judicial approval for the use of informants. Some of those most frequently mentioned follow.

1. Domestic intelligence gathering activities are generally anticipatory or preventive in nature. They are, therefore, “broader than investigations strictly designed to collect evidence for criminal proceedings... [and] require[e] continuing investigative activity in cases wherein criminal conduct remains a future possibility.”\textsuperscript{148} A requirement of prior judicial approval based on probable cause would be impractical under these circumstances.\textsuperscript{149} The duties of the police un-

\textsuperscript{145} Proposed Guidelines II(C) (emphasis added). See note 142 supra.

\textsuperscript{146} The guidelines do provide for annual review by the Justice Department of full investigations. Proposed Guidelines at III(C). Thus, ultimate responsibility remains within the executive branch. While there is no apparent reason to believe that this responsibility will not be carried out in good faith, even the highest-ranking officials within the Justice Department are not immune from overzealousness in enforcing the law, as was amply demonstrated by the revelations of Watergate.

\textsuperscript{147} GAO REPORT at 111-12.

\textsuperscript{148} House Committee Report in Village Voice at 90, col. 3.

\textsuperscript{149} At the Senate Hearings, James Adams, Assistant to the Director, elaborated further on the FBI’s position:

In the intelligence field we are not dealing necessarily with an imminent criminal action. We are dealing with activities such as with the Socialist Workers Party... where they say publicly we’re not to engage in any violent activity today, but we guarantee you we still subscribe to the tenets of communism and that when the time is ripe, we’re going to rise up and help overthrow the United States.

... You can’t show probable cause if they’re about to do it because
doubtedly include the prevention as well as the investigation of crime. However, vague justifications such as "national security," "subversiveness," or "strategic intelligence gathering" should not be enough, in and of themselves, to trigger an investigation which inhibits open and free expression and association, and which invades the confines of private, personal relationships. Unless a law enforcement agency can demonstrate to a neutral, detached magistrate that an informant is needed to help prevent violations of the criminal law, no compelling governmental interest that outweighs the inhibition of first amendment interests is served.

The fact that most intelligence operations are anticipatory does not render the standard of probable cause untenable. Law enforcement agencies need not be required to show that a crime has been committed. Probable cause to believe that specific criminal activity is about to occur and a showing that alternative, less intrusive methods of investigation would be ineffective or dangerous would suffice.⁵⁰

Nevertheless, in formulating new controls over the use of informants, Congress or the courts may wish to distinguish undercover investigations of ordinary street crime from domestic intelligence investigations, to the extent of requiring something less than probable cause¹⁵¹ as the standard applicable to the latter.¹⁵² The precise level to which proof of the connection between the requested investigatory methods and specific criminal activity must rise is not the crucial factor. The key advantages of prior judicial review—indepen-dent oversight, restrictions on the nature and duration of the investigation,

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¹⁵¹. An exact definition of the standard of "probable cause" has proved to be elusive. However, probable cause to search is generally considered to mean "a substantial probability that the invasions involved in the search will be justified by the discovery of offending items." Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U. Chi. L. Rev. 664, 687 (1961). See also N.Y. Crim. Proc. Law § 690.35 (McKinney 1971). Probable cause to arrest exists when "the facts and circumstances within [the government's] knowledge, and of which [it] had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

¹⁵². The Supreme Court has indicated that this lesser standard may be appropriate in cases affecting the national security. United States v. United States District Court, 407 U.S. 297, 322 (1972).
the establishment and preservation of a record, and the adducement of evidence demonstrating some measure of a substantial connection with criminal activity—remain intact whether the standard is termed "probable cause," "reasonable cause," or something else. What is important is the need to establish, before an informant is utilized, that he is needed for purposes of a legitimate governmental objective, that no less intrusive means will accomplish that objective, and that this can be demonstrated convincingly to someone outside the agency, preferably to a disinterested magistrate.

2. The judicial process is not equipped to evaluate the sensitive national security interests which may be at stake. This contention was succinctly answered by the Supreme Court in United States v. United States District Court, where the Court held that a warrant must be obtained for domestic national security wiretaps: "If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance."

3. Where national security interests are involved, judicial process entails too much danger of a security leak. This argument overlooks the fact that judges are constantly required to maintain the confidentiality of day-to-day criminal investigations. There is no reason to believe that they could not do the same with respect to national security information. The warrant proceeding is ex parte and only the magistrate need be present. If clerical assistance is required, the government, if it feels the need, can supply its own. In addition, post hoc review in the context of a lawsuit may present greater danger of leakage. Where prior judicial review is required, only facts sufficient to establish an appropriate connection with criminal activity need be divulged; disclosing every item of vital security information at the disposal of the government would not be necessary.

4. The delay inherent in the warrant proceeding will lead to the loss of essential information. This contention fails to consider the availability of the "exigent circumstance" exception to the warrant requirement. Even without this exception, however, there is no reason

155. Id. at 320.
157. Id. at 641.
158. Id.
to believe that the relatively brief time required to secure a warrant
would inordinately delay the typical intelligence operation, which
usually involves strategic planning rather than on-the-street confronta-
tions. 159

5. Resort to a system of prior judicial approval would place too
great an administrative burden on the courts. 160 Where constitutional
rights are threatened, judicial expediency should not stand as an ob-
stacle to needed safeguards. Moreover, the apparatus required for a
warrant proceeding is not exceedingly intricate, and courts do not
appear to be incapable of handling the present volume of applications
for warrants. In addition, a byproduct of the imposition of a warrant
requirement might be to discourage unjustified attempts to utilize in-
formants, thus decreasing any additional workload which the courts
might have to take on.

6. A judicially enforced standard for the use of informants is im-
practical because of a lack of effective remedies when the standard is
violated. 161 To the contrary, a wide range of remedies would be avail-
able. Post hoc suits for damages or injunctive relief that present justi-
ciable controversies would continue to exist. Furthermore, an exclu-
sionary rule could be applied in those cases where evidence gathered
by an informant acting without prior judicial approval is used for a
criminal prosecution. Statutes might also prescribe civil or criminal
penalties for violations. 162

It should be noted, however, that an important part of the ra-
tionale underlying a requirement of prior judicial review is that law
enforcement agencies will attempt to comply, thereby reducing the
number of obtrusive, unnecessary, and unconstitutional domestic in-
telligence operations. The fact that some undetected or irremediable
violations of the warrant requirement would exist does not subvert
this goal.

7. Although no uniform articulated standard is currently applied
by law enforcement agencies, ideological biases have never been suffi-
cient justification for an intelligence investigation. The FBI enunciated
this position at the hearings before the House Committee. 163 It is a view

159. See Bergstrom, supra note 138, at 813.
160. See Zweibon v. Mitchell, 516 F.2d 594, 641 (D.C. Cir. 1975); Christie, supra
note 134, at 888.
161. See Developments in the Law, supra note 74, at 1281.
163. House Committee Report in Village Voice at 90, col. 3.
officially shared by the New York\textsuperscript{164} and Los Angeles\textsuperscript{165} police departments. Unfortunately, such claims find little historical support, especially with respect to the FBI. For example, the House Committee found that the mere writing of a letter by a high school student to the Socialist Workers Party was enough to trigger an "anticipatory" intelligence investigation, although there was no evidence of any sort of criminal or violent behavior.\textsuperscript{166} Law enforcement officials frequently tend to single out for investigation those groups that are held in official disfavor, without regard to whether the investigation will further compelling governmental interests.\textsuperscript{167} Even if political motivations had not historically played such a prominent role, there would be no convincing reason for restricting solely to executive discretion the determination of when and how to utilize an informant. If law enforcement agencies have evidence warranting something more than mere suspicion, it is difficult to see why such evidence could not be evaluated properly by a magistrate.

The concept of prior judicial approval does pose other problems. First, there is the possibility that simple logistics will require pro forma approval, thus legitimating surveillance activity that might otherwise be subject to challenge.\textsuperscript{168} Second, there is always the danger that charges of criminal behavior and statements of affiants will be falsified. Both problems could in part be remedied through the use of suppression hearings, where the record could be examined to determine if the requisite showing had been made when the warrant was issued. More important, there is no reason to believe that a warrant


\textsuperscript{165} See Statement of the Los Angeles Board of Police Commissioners, The Public Disorder Intelligence Function of the Los Angeles Police Department (Apr. 10, 1975).

\textsuperscript{166} House Committee Report in Village Voice at 90, col. 3.

\textsuperscript{167} See Greenwalt, supra note 69. For instance, the FBI's COINTELPRO "was a series of covert counterintelligence programs aimed at identifying, penetrating, and neutralizing subversive elements in the United States" which existed from approximately 1956 through 1971. This program was justified by the FBI on the ground "that it was dictated by the mood of the times." As is pointed out by the House Committee:

The FBI, as implementors of the program, thereby become the barometer of the country's mood, instead of fulfilling their statutory function of enforcing Federal laws. Evidence received by the Committee of FBI racism, bias, and strong conservative ideology hardly qualifies it to review people's politics. Moreover, the Constitution prohibits such a role and protects the very things the FBI was attempting to punish.

House Committee Report in Village Voice at 90, col. 3.

\textsuperscript{168} See Senate Hearings at 625 (testimony of Norman Dorsen, Dec. 9, 1975).
requirement designed to safeguard first amendment interests would pose or encounter obstacles more formidable than those associated with the fourth amendment's warrant requirement.

CONCLUSION

It is not likely that the federal courts will insist on prior judicial review. In Hoffa, the Warren Court accepted the use of informants, and in Laird, the present Court ruled that one who is the target of official surveillance must show a high degree of injury before he may present first amendment objections. The Burger Court has also steadily whittled away the scope of the exclusionary rule. While state courts are free to go beyond the minimal constitutional protections recognized by the Supreme Court, they rarely do so. New controls over the government's use of informants therefore must emanate from the legislature. Now that the House Committee on Intelligence has recognized that prior judicial approval is needed, it is hoped that the full House and subsequently the Senate will enact appropriate legislation in the near future.

Under prevailing legal theory, law enforcement agencies have virtually unlimited discretion in determining when, where, how, and against whom informants may be used for the purposes of domestic intelligence gathering. The fourth and fifth amendments to the Constitution have been rejected by the Supreme Court as limiting or qualifying the government's power to infiltrate. Any safeguards provided by the sixth amendment attorney-client privilege, the defense of entrapment, the due process clauses of the fifth and fourteenth amendments, and the supervisory powers of the federal courts are either inadequate or ineffective to prevent widespread official spying, with its deleterious effect on constitutional rights. The chilling of first amendment freedoms caused by pervasive, unrestrained and frequently unprincipled official spying makes compelling the need for prior judicial review of the government's use of informants. In Laird, Justice Douglas observed:

Those who already walk submissively will say there is no cause for alarm. But submissiveness is not our heritage. The First Amendment

was designed to allow rebellion to remain as our heritage. The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every noncomformist's shoulder in the library, or walks invisibly by his side in a picket line, or infiltrates his club, the America once extolled as the voice of liberty around the world no longer is cast in the image which Jefferson and Madison designed . . . .

MARTIN L. PERSCHETZ

171. Laird v. Tatum, 408 U.S. 1, 28-29 (1972) (dissenting opinion).