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# Regulating Domestic Intelligence Collection

Emily Berman\*

## *Abstract*

*Scholars have long recognized that a Federal Bureau of Investigation wielding robust domestic intelligence-collection powers poses a threat to civil liberties. Yet the FBI's post-9/11 mandate to prevent terrorist attacks (not merely investigate completed attacks) demands that the agency engage in broad intelligence-collection activities within the United States—activities that can threaten fundamental freedoms. This Article argues that strategies derived from administrative law principles can help alleviate the tendency of threat-prevention efforts to erode civil liberties.*

*The fundamental problem this Article tackles is that the traditional governance mechanisms we rely upon to protect individual rights are ineffective in the domestic intelligence-collection realm. This failure of traditional checks stems from, first, the absence of practical constraints to channel the enormous discretion that the Justice Department and the FBI enjoy in determining the scope and nature of the FBI's domestic intelligence-collection activities; second, the lack of judicial or political checks on these activities, resulting in a deficit of democratic legitimacy and accountability; and third, the risk that the FBI's singular focus on terrorism prevention will overwhelm rights-protection concerns.*

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*Drawing on principles of administrative law, this Article explains how regulatory strategies can be employed to improve governance of domestic intelligence gathering. It recommends imposing procedural requirements on the exercise of discretion, facilitating meaningful pluralist input into relevant decision making processes, and augmenting the attention given to civil liberties concerns by requiring the Justice Department to prepare Civil Liberties Impact Statements and by including in the process an entity whose primary goal is the protection of civil liberties. These governance reforms will prompt domestic intelligence regulation to take account of civil liberties while preserving the ability of law enforcement to pursue security.*

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### *I. Introduction*

In the summer of 2013, former National Security Agency contractor and Central Intelligence Agency employee Edward Snowden shook the world with revelations of extensive United States government surveillance activities—including surveillance of American citizens.<sup>1</sup> The revelations sparked a renewed debate about the proper scope of intelligence collection in a democracy. What has gone unaddressed in this debate, however, is the vast investigative powers conferred on America’s *domestic* surveillance agency—the Federal Bureau of Investigation (FBI). And unlike the foreign-intelligence programs disclosed by Snowden’s leaks, some of the FBI’s most powerful domestic intelligence-collection authorities include neither statutory limits nor judicial oversight.<sup>2</sup>

If the FBI determines that an individual’s daily life is relevant to a terrorism investigation, it can easily draw a detailed picture of that life.<sup>3</sup> With no reason at all for suspicion and no judicial approval, agents can follow the individual around the clock to ascertain where he goes. They can ask his neighbors about their conversations with him, or dispatch an informant to his house of worship to report on the individual’s religious

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1. See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> (last visited Nov. 13, 2013) (discussing the NSA’s collection of millions of American’s phone records from Verizon) (on file with the Washington and Lee Law Review).

2. See *infra* Part II (discussing the nature of intelligence collection).

3. See *infra* Part II.A (describing sophisticated data-mining tools that allow the government to “render a detailed dossier on any American”).

observance. With the minimal process associated with issuing an administrative subpoena,<sup>4</sup> the government can establish a record of the individual's movements and social dealings by acquiring financial and employment records, a list of email addresses with which he has corresponded, and a list of phone numbers he has dialed.

These broad investigative powers operate in tension with fundamental rights. Collecting extensive personal information about innocent Americans raises concerns about privacy; about impact on freedoms of expression, association, and religious practice; and to the extent that such activity is disproportionately focused on particular communities, it can raise equal protection concerns as well.<sup>5</sup> The challenge, then, is how to mitigate these civil liberties threats without unduly interfering with the FBI's ability to prevent terrorist attacks.

This Article argues that administrative law strategies suggest several measures that, taken together, would represent a domestic intelligence governance regime better equipped to safeguard civil liberties. This argument bridges a gap between two growing areas of literature. The first, which I label "risk-management literature," advocates taking a regulatory approach to the threat of terrorism—to treating it not as an enemy to defeat, but, like environmental or health and safety risks, as a chronic problem to be assessed and managed.<sup>6</sup> The other, the

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4. *Infra* note 63 and accompanying text.

5. *See infra* Part II.A (discussing the FBI's broad intelligence-collection powers and the negative impact those powers can have on individual liberties).

6. *See* Samuel Rascoff, *Domesticating Intelligence*, 83 U.S.C. L. REV. 575, 582 (2010) (advocating a regulatory approach to domestic intelligence); Eric Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL'Y 681, 696 (2002) (describing the need for regulation in order to reduce the risk of terrorist attacks); Jessica Stern & Jonathan B. Wiener, *Precaution Against Terrorism*, 9 J. RISK RESEARCH 393, 413 (2006) (analogizing the push for antiterrorism legislation to previous movements for more health and environmental legislation); Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 129–31 (2003) (describing the effect public fear and probability neglect play in movements for environmental and health legislation and speculating what that effect should mean for counterterrorism regulation); James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 2D 439, 442–44 (2007) (discussing the importance of adhering to legal institutions, even in the intelligence community).

“rights-protection literature,” argues that the current domestic intelligence-collection governance regime fails to address effectively the tension with civil liberties created by the FBI’s contemporary counterterrorism efforts.<sup>7</sup> I contend that the risk-management literature’s valuable insight that administrative law can usefully be applied to improve governance in the security context suggests a means of mitigating the rights-protection scholars’ concerns.

These rights-protection concerns arise in large part because traditional means of regulating executive power cannot effectively protect civil liberties in this area. This failure of traditional checks results from three characteristics of the regime regulating domestic intelligence collection. First, it lacks both doctrinal and practical constraints on the FBI and Justice Department’s enormous discretion in drafting and implementing the applicable rules.<sup>8</sup> Second, the checks that normally ensure the accountability and democratic legitimacy of government actions—judicial review, congressional oversight, and public scrutiny—simply do not operate effectively in the secretive world of intelligence collection.<sup>9</sup> And third, in its vigorous pursuit of

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7. See Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1027 (2013) [hereinafter Sinnar, *Protecting Rights from Within*] (discussing the legislature and courts’ reluctance to restrict the executive’s power when it infringes on civil liberties in furtherance of national security); Amna A. Akbar, *Policing “Radicalization”*, 3 U.C. IRVINE L. REV. (forthcoming 2014) (discussing the government’s monitoring of religious groups in an effort to prevent members of those groups from turning to violence); Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41, 42 (2011) [hereinafter Sinnar, *Questioning Law Enforcement*] (discussing the First Amendment concerns raised when law enforcement selects individuals for questioning based on their speech and associations); Rascoff, *supra* note 6, at 586 (stating that the protection of civil liberties should factor into the review of intelligence gathering actions).

8. See *infra* Parts II.A & II.B.1 (discussing the lack of judicial and legislative oversight over intelligence collection and the lack of practical restraints on the FBI when it prioritizes the collection of data over everything else).

9. See *infra* Part II.B.2 (describing the lack of judicial, political, and public oversight over intelligence collection).

terrorism prevention, the FBI is not subject to any structural checks to prevent it from undervaluing rights protection.<sup>10</sup>

This broad discretion, democracy deficit, and absence of counterweight to the FBI's prevention goal means that—despite the privacy and liberty implications of the FBI's activities—the responsibility of striking a balance between security needs and other important interests is left almost entirely to the Attorney General and the FBI itself. Restraints on the FBI's domestic intelligence-collection activities come from the Attorney General's Guidelines for Domestic FBI Operations (Guidelines)<sup>11</sup> and the Domestic Investigations and Operations Guide (DIOG).<sup>12</sup> The Guidelines are developed by the Attorney General and set out a basic framework for the FBI's operations; the several-hundred-page DIOG, promulgated by the FBI, specifies more detailed rules for the Guidelines' implementation.<sup>13</sup> The Guidelines were originally created to forestall impending legislative efforts to cabin the Bureau's intelligence-collection powers<sup>14</sup> but due to subsequent changes—particularly post-9/11 changes aimed at promoting terrorism-prevention efforts—the Guidelines and DIOG now serve to facilitate rather than limit the Bureau's intelligence-collection role.

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10. See *infra* Part II.B.3 (describing the FBI's primary focus on national security and intelligence gathering, and the fact that privacy concerns are viewed as a hurdle to effective policymaking).

11. OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008) [hereinafter GUIDELINES].

12. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2011) [hereinafter DIOG].

13. *Id.* Initially secret in its entirety, Freedom of Information Act requests prompted the Justice Department to release the DIOG—with significant redactions. See *Muslim Advocates v. U.S. Dep't of Justice*, 833 F. Supp. 2d 106, 109 (D.D.C. 2012) (concluding that the release of the DIOG under a FOIA request was proper, but that the FBI was permitted to redact certain portions of the DIOG); *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 174 (D.D.C. 2011) (directing the Department of Justice to release more detailed descriptions of the U.S. and European Union's discussions over the international exchange of personal information).

14. See *infra* Part II (discussing the original goal of the Levi Guidelines to “strictly curtail domestic intelligence investigations”).

Conceptualizing the threat of terrorism as a regulatory challenge represents a significant first step toward devising an improved governance regime for the Guidelines and the DIOG. But there are additional steps that the existing risk-management literature has not yet taken. The idea of how administrative law would apply to intelligence collection remains undertheorized—an unsurprising state of affairs given the recent emergence of this line of inquiry. Scholars have not yet tackled the thorny question of how to truly reap the benefits that the regulatory approach offers, while simultaneously taking into account the unique governance challenges presented by the domestic-intelligence context. Nor has the literature to date sufficiently grappled with civil liberties concerns.<sup>15</sup>

This Article seeks to fill these gaps, drawing on administrative law principles to suggest novel governance designs custom tailored to address the civil liberties concerns inherent in domestic intelligence collection. To do so it looks to areas of administrative law that present similar governance challenges, identifies how those challenges have been addressed in the administrative state, and suggests how to adapt those strategies to function in the intelligence-collection context.<sup>16</sup>

Each of the governance challenges this Article identifies has an analog in the administrative state. Take first the scope of discretion conferred on federal officials. This delegation of discretionary authority to the Attorney General and the FBI resembles the broad delegations in statutes establishing administrative agencies' powers and responsibilities. Concerns arising from the scope of these delegations are addressed through

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15. A recent proposal to develop a risk-management approach to intelligence-collection governance by employing traditional agency oversight tools—centralized cost-benefit analysis, judicial review, and pluralist input into decision making, see Rascoff, *supra* note 6, at 633–47 (outlining a plan for regulatory governance of intelligence gathering agencies)—fails to incorporate effective civil liberties protections. *See infra* Part IV.A (discussing reform proposals that focus on improving the FBI's ability to correctly assess the risks and account for the psychological costs of terrorism, while not addressing the civil liberties concerns the Guidelines implicate).

16. *See infra* Part II.B.3 (discussing the fact that the Guidelines and DIOG place civil liberties in a secondary role to the FBI's intelligence gathering mission).



the Administrative Procedure Act's (APA)<sup>17</sup> procedural requirements.<sup>18</sup> Second, the absence of judicial, legislative, or public involvement in the design and implementation of the Guidelines is reminiscent of the democracy deficit inherent in the promulgation of regulations by technical experts so often at the heart of debates over the legitimacy of the administrative state. The administrative state has responded to this deficit by developing mechanisms to increase the participatory nature of administrative activity.<sup>19</sup> And third, the risk that the Guidelines privilege the FBI's primary mission—the prevention of terrorism and protection of national security—over concerns for fundamental rights mirrors the many circumstances where agencies are charged simultaneously with multiple, competing goals. A menu of regulatory tools has been developed to reconcile competing agency missions.<sup>20</sup> Looking to the lessons that can be gleaned from these administrative governance strategies provides a useful roadmap for filling the intelligence-collection governance gap in a way that also protects civil liberties.

The Article proceeds in three parts. Part II first argues that the expansive scope of investigative authority that the current Attorney General's Guidelines and the FBI's implementing procedures confer on the Bureau exist in tension with the protection of civil liberties. It then contends that the lack of practical, traditional judicial or political, and structural checks to impose effective oversight on domestic intelligence gathering necessitates the implementation of alternative governance mechanisms.

In Part III, the Article harnesses administrative law strategies to suggest regulatory tools custom tailored to yield

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17. Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 500-706 (2012)).

18. See *infra* Part III.A (describing the improvements that could be made by implementing administrative law strategies in the intelligence-collection context).

19. See *infra* Part III (describing the broad opportunities for participation in administrative rulemaking, and the democratic legitimacy that approximating such participation could create in the intelligence-collection realm).

20. See *infra* Part III.D (describing the methods that administrative governance uses to reconcile and balance competing policy goals).

regulatory benefits that protect fundamental rights in the context of the FBI's Guidelines regime. To do so, it first explores the underlying purposes and justifications of traditional administrative law tools that are used to address governance challenges conceptually similar to those that the Guidelines regime presents.<sup>21</sup> It then suggests specific reforms designed to achieve the same ends as those traditional tools in the intelligence-collection context.<sup>22</sup> First, the Attorney General's discretion in the development and implementation of the Guidelines should be subject to a reason-giving requirement. Specific procedural limitations should require that the Attorney General or FBI Director provide both notice of a decision to amend the Guidelines or the DIOG and written justifications for their ultimate decisions. Second, to enable meaningful pluralist input into the process, the FBI must go beyond the cursory meetings with interested stakeholders that it has relied upon to date. Instead, a variety of entities inside the government should be empowered to participate in the amendment process. Third, to balance the government's interest in security with privacy and liberty concerns, (1) any changes to the Guidelines regime should be accompanied by a "Civil Liberties Impact Statement" prepared by the Justice Department, and (2) stakeholders whose primary goal is the protection of liberties—rather than the pursuit of security—should be involved in the process of drafting or modifying the Guidelines and their implementing regulations.<sup>23</sup> This approach will impose a meaningful governance regime crafted for domestic intelligence gathering that mitigates concerns about the impact on civil liberties without sacrificing security.

Part IV addresses some possible sources of skepticism for this proposal. It first explains why reliance on existing administrative law tools—even if those tools are partially modified to operate in the intelligence-collection realm—will be

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21. See *infra* Part III.C.1 (describing the administrative state's response to the inherent democracy deficit present in administrative actions).

22. See *infra* Part III.C.2 (discussing methods that could be used to introduce administrative procedures into intelligence collection).

23. See *infra* Part III.D.2 (proposing solutions which would allow the FBI to balance competing intelligence collection and civil liberties interests).

insufficient to protect civil liberties.<sup>24</sup> It then responds to questions about how to enforce these reforms in the absence of judicial review, suggesting alternative compliance mechanisms.<sup>25</sup>

## *II. The FBI's Domestic Intelligence-Collection Powers*

Since the FBI's inception, there has been tension embedded in its mission. It is charged not only with solving crimes but also with preventing them.<sup>26</sup> While the two goals often complement one another, they call for very different types of investigative activities. Focus on crime solving argues for a set of investigative powers enabling inquiries into specific acts, with an eye toward successful prosecution of the perpetrators.<sup>27</sup> Preventive work, by contrast, requires the collection of much broader swaths of information—information about illicit organizations, their members, their goals, their capacities, and their sources of funding as well as information about possible targets.<sup>28</sup>

Over time, both the Bureau's focus and the rules governing its activities have swung back and forth along the spectrum between the targeted investigations of crime solving and the broader intelligence gathering associated with prevention. The Guidelines themselves are the product of the FBI's early-1970s move away from intelligence collection. After the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, commonly known as the Church Committee for its chair Senator Frank Church (D-ID),

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24. See *infra* Part IV.A (describing the inadequacies of administrative law tools alone).

25. See *infra* Part IV.B (addressing the fact that by its nature intelligence collection cannot be as transparent as traditional administrative procedures, and suggesting alternative compliance methods which can still alleviate some of the governance concerns implicated by intelligence collection).

26. See *infra* Part II.A (discussing the nature of the FBI).

27. See DIOG, *supra* note 12, Preamble (discussing broadly the investigative role of the FBI).

28. See Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1139–40 (2006) (discussing the hundreds of data mining operations being carried out by the United States government in order to prevent terrorist attacks).

revealed that decades of unregulated intelligence collection by the FBI had resulted in widespread abuses of the government's investigative powers,<sup>29</sup> Congress determined that the FBI should be subject to a legislative charter setting out strict limits on its intelligence-collection authority.<sup>30</sup> In an effort to stave off potentially more restrictive legislative action, President Gerald Ford's Attorney General, Edward Levi, issued in 1976 the first set of Attorney General's Guidelines—known as the Levi Guidelines.<sup>31</sup>

The Levi Guidelines strictly curtailed domestic intelligence investigations through a basic regulatory structure that subsequent versions of the Guidelines have largely retained.<sup>32</sup>

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29. The Church Committee exposed a litany of intelligence-collection programs (most implemented under infamous long-time FBI Director J. Edgar Hoover) in which the FBI used widespread surveillance to harass and discredit law-abiding—though often antiwar or civil rights—groups and individuals based on their political beliefs. See SUPPLEMENTARY DETAILED STAFF REPORTS OF INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: BOOK III: FINAL REPORT OF THE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at 27 (1976) [hereinafter CHURCH COMM. REPORT] (detailing the Committee's findings).

30. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 35 (2005) [hereinafter AGG COMPLIANCE REPORT] (discussing these limits). Other reforms prompted by the Church Committee include Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976) (banning assassinations) and the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1885(c) (2012)) (imposing limits on electronic foreign-intelligence surveillance).

31. The Guidelines, officially entitled *Domestic Security Investigation Guidelines*, "were intended . . . to diminish the perceived need for legislation to regulate and restrict" FBI activity. *United States v. Salemme*, 91 F. Supp. 2d 141, 190-91 (D. Mass. 1999); see also EDWARD LEVI, U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS (Nov. 4, 1976) reprinted in *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 18-26 (2d Sess. 1978) (describing the Guidelines as "intended . . . to diminish the perceived need for legislation to regulate and restrict" FBI activity); *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 307 (1976) (discussing a possible statutory charter for the FBI).

32. See EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 11 (2011), <http://www.brennancenter.org/sites/default/files/legacy/AGGReportFINALed.pdf> (discussing the fact that the "basic structure" from the Levi Guidelines "has been retained in all subsequent versions of the Guidelines").

This structure consists of multiple investigative levels. For each successive level, a higher threshold of suspicion is necessary to proceed; the investigative tools agents may use are more intrusive; and procedural safeguards, such as the need for supervisory approval and limits on the temporal length of investigations, are more robust.<sup>33</sup> The Guidelines continue to function as the primary constraint on the FBI's operations and remain a justification for the lack of a statutory charter governing the FBI's activities, but they have not remained static.<sup>34</sup> Multiple modifications made in the years between 1976 and 2001 eased, though ultimately retained, restrictions on intelligence collection.<sup>35</sup>

With 9/11, however, came a wholesale rejection of the anti-intelligence-collection mindset of the Levi era, resulting in a dramatic shift in favor of an aggressive prevention paradigm. The FBI's prioritization of preventing terrorism was reflected not only in the allocation of its resources, its focus, and its conception of its core mission but also in some dramatic modifications to the Guidelines themselves.<sup>36</sup> The eventual result was a set of

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33. See THE ATTORNEY GENERAL'S GUIDELINES ON DOMESTIC SECURITY INVESTIGATIONS (Nov. 4, 1976), reprinted in *FBI Statutory Charter: Hearings on S.1612 Before the Senate Comm. on the Judiciary, Pt. 3*, 95th Cong., 18–26 (2d Sess. 1978) (setting out the standards for opening an investigation, the investigative tactics available for each type of investigation, and what level of supervisory approval each type of investigation and tactic required, as well as time limits on investigations). For a more detailed description of the Levi Guidelines, see BERMAN, *supra* note 32, at 10–13.

34. See AGG COMPLIANCE REPORT, *supra* note 30, at 59 (“Attorneys General and FBI leadership have . . . referred to the FBI's adherence to the Guidelines as the reason why the FBI should not be subjected to a general legislative charter or to statutory control.”).

35. For a detailed account of the historical evolution of the Guidelines, see BERMAN, *supra* note 32, at 8–25.

36. See Dan Eggan & Bob Woodward, *F.B.I. Probe of Al Qaeda Implies Wide Presence*, WASH. POST, Dec. 30, 2001, at A1 (“Attorney General John D. Ashcroft and FBI Director Robert S. Mueller III have repeatedly said they view preventing another terror attack as their main priority, rather than securing criminal convictions.”); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 27–28 (2005) (discussing Attorney General Ashcroft's statements that terrorism prevention was the FBI and Justice Department's “overriding priority”); Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1204, 1228 (2004) (discussing the shifting

Guidelines—which were implemented by Attorney General Michael Mukasey in 2008 and remain in effect today—embodying an unprecedented license for domestic intelligence collection and delegating to the FBI responsibility for imposing limits on that power.<sup>37</sup>

In this Part, Section A demonstrates the scope of some of the FBI’s contemporary intelligence-collection powers and their potential to create tension with privacy; rights of association, expression, and religious exercise; and equal protection principles.<sup>38</sup> Section B then argues that the absence of nondoctrinal checks—whether practical, judicial, political, or

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priorities caused by the 9/11 terrorist attacks); JOHN ASHCROFT, U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS, § VI (2002) [hereinafter ASHCROFT GUIDELINES] (proclaiming the FBI’s “central mission” as “preventing the commission of terrorist acts against the United States and its people”).

37. MICHAEL MUKASEY, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008) [hereinafter MUKASEY GUIDELINES]. Attorney General Mukasey’s Guidelines, which remain in operation today, consolidate the Guidelines for criminal and domestic intelligence investigations with those for National Security Investigations and Foreign Intelligence Collection Guidelines. *Id.* § I.D.1. They also incorporate rules formerly contained in the Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence; the Guidelines for Reporting and Use of Information Concerning Violation of Law and Authorization for Participating in Otherwise Illegal Activity in FBI Foreign Intelligence, Counterintelligence, or International Terrorism Intelligence Investigations; and the Guidelines for Reporting on Civil Disorders and Demonstrations Involving a Federal Interest. *Id.*

38. See Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 162 (2012) (noting the friction with the Constitution’s Establishment Clause caused by the government espousing particular interpretations of Islam). The Guidelines have been subject to much criticism along these lines since 9/11. See, e.g., Lininger, *supra* note 36, at 1231–54 (analyzing Attorney General Ashcroft’s new Guidelines and the dangers they pose to religious freedom, the threat that they create for racial and religious profiling, and the risk of inefficient use of resources); see also Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 151–59 (2007) (suggesting that First Amendment claims arising out of domestic investigations should be cognizable); Linda E. Fisher, *Guilty by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 643–57 (2004) (arguing that the law should bar federal officials from engaging in surveillance triggered by First Amendment activity without reasonable suspicion of a crime).

structural—on domestic intelligence collection means that the only constraints on the FBI’s intelligence-collection powers are the internal rules that the Justice Department and the FBI have imposed on themselves.

### A. *The Scope of the FBI’s Intelligence-Collection Powers*

Statutory and constitutional doctrine provides very few limits on government access to a vast amount of information about innocent Americans.<sup>39</sup> Any information that we have disclosed to a third-party individual or business entity, for example, lacks Fourth Amendment protection against unreasonable searches and seizures.<sup>40</sup> Thus the Constitution places no limits on the collection of information contained in credit card transactions, bank records, Internet service provider (ISP) records, Amazon.com transaction histories, Facebook activities, electronic toll records, cell-tower location data (in some jurisdictions<sup>41</sup>), and even statements made to undercover agents or government informants—regardless of whether the agent or informant discloses his intention to share the contents of the conversation.<sup>42</sup> The First Amendment similarly lacks purchase

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39. See Rascoff, *supra* note 6, at 589 (describing the “doctrinal vacuum” in the law of domestic intelligence); Anjali Dalal, Administrative Constitutionalism and The Re-Entrenchment of Surveillance Culture 24–29 (Mar. 4, 2013) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2236502](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236502) (arguing that contemporary constitutional norms surrounding surveillance practices are in part a result of the entrenchment over time of the policy preferences of the FBI, the Attorney General, and the President) (on file with the Washington and Lee Law Review).

40. See *United States v. Miller*, 425 U.S. 435, 442 (1976) (stating that disclosure to a third party negates any expectation of privacy, and therefore Fourth Amendment does not apply); *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (stating that when Smith dialed a phone number he was disclosing that number to the phone company, and therefore had no legitimate expectation of privacy over the fact that he dialed that number).

41. See, e.g., *United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012) (stating that DEA did not violate Fourth Amendment when using cell phone to track location without a warrant). The Supreme Court has not ruled on this question.

42. See *Hoffa v. United States*, 385 U.S. 293, 300–02 (1966) (stating that when an undercover informant was invited into the hotel room of the defendant, there was no expectation of privacy and therefore no Fourth Amendment issue).

here. Intelligence-collection powers that impact religious practice would likely run afoul of the Free Exercise Clause as a facial matter only if they were being implemented with the purpose of suppressing religious exercise.<sup>43</sup> And if the Guidelines chill expression or curtail association, the activities they permit would be immune to facial constitutional challenge so long as they were narrowly tailored to further the compelling interest in preventing terrorism, an interest that has been afforded great weight by the courts.<sup>44</sup> Statutes provide only slightly more protection.<sup>45</sup>

The permissiveness of the doctrine means that the FBI's intelligence-collection powers face very few external legal constraints. In this doctrinal vacuum, the Attorney General was able to make several post-9/11 amendments to the Guidelines that facilitate an aggressive intelligence-collection role for the FBI. The first relevant amendment is the Guidelines' expression of the FBI's newly adopted preventive mission. Specific language explicitly affirms the FBI's role in the intelligence community and specifies authority to collect, retain, and analyze information for intelligence purposes. The Guidelines declare that "[t]he FBI is an intelligence agency as well as a law enforcement agency . . . [whose] functions accordingly extend beyond limited

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43. See *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993) (noting that laws of general application need not be motivated by an important government interest, even if they infringe on individuals' religious rights).

44. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705, 2730 (2010) (holding that the First Amendment burden imposed by the criminal material support statute was outweighed by the government's interest in national security). The Guidelines could be implemented in ways that are vulnerable to an as-applied challenge, but such challenges are likely futile for reasons explained in Part II.B.2.

45. See, e.g., Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-91, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.) (requiring the Attorney General to create guidelines that protect the privacy of patient information); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2510–2522 (2000)) (protecting the privacy of electronic communications, but expressly permitting disclosure to law enforcement agencies); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 U.S.C.) (authorizing under specified circumstances electronic surveillance to obtain foreign intelligence information).



investigations of discrete matters”<sup>46</sup> and urge the Bureau to use its analytic authority to “identify and understand trends, causes, and potential indicia of criminal activity and other threats to the United States that would not be apparent from the investigation of discrete matters alone.”<sup>47</sup> To facilitate this analytical project, the Guidelines provide that all information collected “at all stages of investigative activity is . . . to be retained and disseminated for [intelligence purposes to facilitate the solution and prevention of crime, protect the national security, and further foreign intelligence objectives] regardless of whether it furthers investigative objectives in a narrower or more immediate sense.”<sup>48</sup> Even information that wholly exonerates a group or individual from suspicion remains in government databases for storage, analysis (sometimes by algorithmic data-mining), and dissemination for inclusion in other government agencies’ databases.<sup>49</sup>

The 2008 Mukasey Guidelines also expanded the Bureau’s collection powers to further its preventive mission—both with respect to what information it is permitted to collect and what tactics it may employ in that collection. The most significant of these expansions is the authorization of “assessments”—a new investigative stage. Assessments, which are inquiries designed to determine whether further investigation is warranted, require only an “authorized purpose,” meaning that the FBI must merely determine that it is acting to protect against criminal or national-security threats, or to collect foreign intelligence.<sup>50</sup> There is no need for any concrete facts, evidence, or reason to believe that the subject of an assessment is involved in criminal or threatening

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46. MUKASEY GUIDELINES, *supra* note 37, at Intro. B.

47. *Id.* § IV.

48. *Id.* § II.

49. The National Counterterrorism Center, a central depository for counterterrorism information, recently revised its guidelines to permit the retention for five years of information about Americans even when there is no suspicion of terrorist ties—increased from 180 days. Charlie Savage, *U.S. Relaxes Limits on Use of Data in Terror Analysis*, N.Y. TIMES (Mar. 22, 2012), [http://www.nytimes.com/2012/03/23/us/politics/us-moves-to-relax-some-restrictions-for-counterterrorism-analysis.html?\\_r=0](http://www.nytimes.com/2012/03/23/us/politics/us-moves-to-relax-some-restrictions-for-counterterrorism-analysis.html?_r=0) (last visited Nov. 13, 2013) (on file with the Washington and Lee Law Review).

50. MUKASEY GUIDELINES, *supra* note 37, § II.

activity.<sup>51</sup> In other words, assessments may be undertaken in the absence of any “factual predicat[e].”<sup>52</sup> Until 2008, some form of factual predication was required to initiate any level of investigation.<sup>53</sup> The introduction of nonpredicated investigations is thus a significant expansion of the FBI’s power.

Despite the absence of the need to establish a factual basis for an assessment, agents conducting assessments under the new Guidelines have available to them a wide array of highly intrusive investigative tools. During an assessment, the FBI may: (1) recruit and task informants to attend surreptitiously First Amendment-protected gatherings—such as religious services or political demonstrations—to collect information about what takes place there and who attends;<sup>54</sup> (2) engage people in conversation while misrepresenting the agent’s status as a federal official (so-called “pretext interviews”)—such as posing as an investigative target’s new neighbor or business associate in order to gather information about her from friends, neighbors, and colleagues;<sup>55</sup> (3) station agents outside a target’s home or office—or even have

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51. *Id.*

52. *Id.*

53. See Letter from Laura W. Murphy, Director, Washington Legislative Office, ACLU et al., to Eric H. Holder, Att’y Gen. of the United States (Oct. 20, 2011), [http://www.aclu.org/files/assets/aclu\\_letter\\_to\\_ag\\_re\\_rm\\_102011\\_0.pdf](http://www.aclu.org/files/assets/aclu_letter_to_ag_re_rm_102011_0.pdf) (noting that in “2008 [the Guidelines] removed *any* requirement of a factual predicate to justify a new type of investigation, called an ‘Assessment’”).

54. See MUKASEY GUIDELINES, *supra* note 37, § II.A.4.e; J.M. Berger, *Does the F.B.I. Have an Informant Problem?*, FOREIGN POL’Y (Sept. 7, 2012), [http://www.foreignpolicy.com/articles/2012/09/07/does\\_the\\_fbi\\_have\\_an\\_informant\\_problem](http://www.foreignpolicy.com/articles/2012/09/07/does_the_fbi_have_an_informant_problem) (last visited Nov. 14, 2013) (discussing “growing media scrutiny” over the FBI’s professional informants’ conduct) (on file with the Washington and Lee Law Review). Historically, the FBI has infiltrated political and religious groups for the purpose of disrupting their operations and creating a chilling effect on antigovernment expression. See Lininger, *supra* note 36, at 1235–36 (discussing government infiltration of religious organizations); FREDERICK A. O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 31–36 (2007) (describing the Church Committee’s findings regarding the FBI’s politically motivated investigations); Don Edwards, *Reordering the Priorities of the FBI in Light of the End of the Cold War*, 65 ST. JOHN’S L. REV. 59, 73 (1991) (describing politically motivated investigations in the 1980s).

55. See MUKASEY GUIDELINES, *supra* note 37, § II.A.4.f (“Interview or request information from members of the public and private entities.”).

them followed—so that their movements are tracked day and night;<sup>56</sup> and (4) search commercial online services and resources, records maintained by “other federal, state, local, or tribal, or foreign governmental entities or agencies,”<sup>57</sup> and all FBI and Justice Department records.<sup>58</sup> This includes the FBI’s National Security Branch’s data set “[c]omposed of government information, commercial databases and records acquired in criminal and terrorism probes”<sup>59</sup> that includes international travel records of citizens and aliens; financial forms; hotel and rental car records; and credit card transaction records.<sup>60</sup> The government can not only search these databases for particular information, but also use them to perform analysis based on a “pattern of behavior and search for that pattern in data sets.”<sup>61</sup> Ever-more sophisticated data-mining tools render a detailed dossier on any American—even one entirely above suspicion—just one mouse click away. Thus, the Guidelines now permit, with no factual predicate, tactics that before 9/11 had been reserved for investigative stages whose initiation required at least some relevant evidence.<sup>62</sup>

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56. See *id.* § II.A.4.h (“Engage in observation or surveillance not requiring a court order.”).

57. *Id.* § II.A.4.c. As of 2009, the FBI planned to expand this data set to include tax records from nonprofit organizations, see U.S. DEP’T OF JUSTICE, FBI, NAT’L SECURITY ANALYSIS CTR., AN ELEMENT OF THE FBI’S NATIONAL SECURITY BRANCH (2006), and the Bureau has launched a database of biometric information, which includes “[d]igital images of faces, fingerprints and palm patterns.” Ellen Nakashima, *FBI Prepares Vast Database of Biometrics: \$1 Billion Project to Include Images of Irises and Faces*, WASH. POST, Dec. 22, 2007, at A1.

58. See Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1425 (2003) (quoting Attorney General Ashcroft); ASHCROFT GUIDELINES, *supra* note 36, §§ VI.A. & B (allowing the FBI to use other governmental agencies’ information and information from previous investigations when pursuing intelligence collection in counterterrorism activities).

59. Ryan Singel, *Newly Declassified Files Detail Massive FBI Data-Mining Project*, WIRED.COM (Sept. 23, 2009, 7:00 AM), <http://www.wired.com/threatlevel/2009/09/fbi-nsac/> (last visited Nov. 13, 2013) (on file with the Washington and Lee Law Review).

60. See *id.* (describing the breadth of the FBI’s data-mining project).

61. *Id.*

62. See BERMAN, *supra* note 32, at 13–21 (discussing the erosion of the

Even investigative tactics statutorily limited to instances in which there is a factual basis for suspicion may be permitted based on very tenuous links to suspected wrongdoing. Agents can issue National Security Letters (NSLs)—a form of administrative subpoena—to access without a court order certain information about individuals that is “relevant” to a terrorism investigation.<sup>63</sup> The relevance standard means that the individual about whom the FBI seeks information—internet or telephone subscriber information (possibly including cell-phone-generated location data providing a minute-by-minute account of an individual’s movements<sup>64</sup>), internet search records, financial records—need not herself be a target of an investigation. And after acquiring a court order under § 215 of the PATRIOT Act<sup>65</sup>, the FBI may demand an even broader swath of information—“any tangible thing” that is “relevant to” “a full investigation,”<sup>66</sup> a definition the government has interpreted to include the authority to collect all noncontent data regarding phone calls into, out of, and within the United States.<sup>67</sup>

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protections provided by the Levi Guidelines).

63. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365 (codified in scattered sections of U.S.C.) (setting out a “relevance” standard for obtaining information through use of National Security Letters); DIOG, *supra* note 12, § 18.6.6 (discussing the National Security Letter process).

64. See David Kravets, *Surveillance Strategy Is Privileged and Confidential, FBI Says*, WIRED.COM (Jan. 16, 2013, 4:38 PM), <http://www.wired.com/threatlevel/2013/01/fbi-surveillance-strategy/> (last visited Nov. 13, 2013) (discussing FBI’s assertion that cellphone location data does not enjoy a reasonable expectation of privacy and therefore can be obtained without a warrant based on probable cause) (on file with the Washington and Lee Law Review).

65. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 505, 115 Stat. 272 (codified in scattered sections of U.S.C.).

66. *Id.* § 215. Other post-9/11 statutes also relaxed limits on the use of investigative tactics. See, e.g., Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified in scattered sections of U.S.C.) (extending authority to collect electronic communications under FISA to “lone wolf” terrorists—individuals engaged in terrorist activities but not connected to an international terrorist organization); FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. §§ 1881, 1812, 1885) (expanding authority to collect electronic communications under FISA to targets “reasonably believed to be outside the United States” without any showing of probable cause or particularized suspicion).

67. See Greenwald, *supra* note 1 (discussing a court order that “compels

In addition to the obvious privacy concerns raised by these rules, Professor Daniel Solove has also pointed out the potential for chill to First Amendment-protected activity when the FBI is engaged in widespread intelligence-gathering activities such as acquisition of internet search history; book purchases; phone call or email records; banking records; questioning an individual's friends, neighbors, or colleagues; infiltrating religious or political gatherings; or using ISPs to identify individuals writing anonymous political blogs.<sup>68</sup> Indeed, there is evidence that the FBI's tactics have had this very effect in Muslim communities, where there is evidence of chill on attendance at political demonstrations, donations to political causes, speaking out against U.S. foreign policy, participating in community organizations, internet use, and book purchase habits.<sup>69</sup>

Law enforcement surveillance of antiwar protesters and other political dissenters raises similar concerns about expressive and associational activities. A 2010 Justice Department review found that investigations of Greenpeace, People for the Ethical Treatment of Animals, and antiwar groups used "troubling" tactics.<sup>70</sup> In the course of these investigations, the FBI classified nonviolent civil disobedience as "acts of terrorism," extended investigations "without adequate basis," and unnecessarily placed several Greenpeace members on federal watch lists.<sup>71</sup> Members of similarly situated groups may harbor concerns that their political activities will attract government attention, the result of which

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Verizon to produce to the NSA electronic copies of 'all call detail records or "telephony metadata" created by Verizon for communications between the United States and abroad' or 'wholly within the United States, including local telephone calls' (internal citations omitted)).

68. See Solove, *supra* note 38, at 151–76 (discussing the First Amendment implications of modern intelligence gathering).

69. See Sinnar, *Questioning Law Enforcement*, *supra* note 7, at 69–71 (discussing the chilling effects on the Muslim community caused by law enforcement actions).

70. Richard A. Serrano, *FBI Improperly Investigated Activities, Justice Department Review Finds*, L.A. TIMES (Sept. 21, 2010), <http://articles.latimes.com/2010/sep/21/nation/la-na-fbi-activists-20100921> (last visited Nov. 13, 2013) (on file with the Washington and Lee Law Review).

71. *Id.*

could be inclusion on a watch-list or even becoming the target of an investigation.

The FBI's aggressive investigation and infiltration of houses of worship can also chill the exercise of religious freedoms.<sup>72</sup> As a result of the FBI's use of undercover agents or informants in mosques, Muslim leaders across the country have reported "a reduction in attendance at mosques, a change in the language used at worship services, a decrease in contributions to Muslim charities, and an erosion of the trust and good will that are essential to the vitality of a religious community."<sup>73</sup> Studies have also shown that these tactics have also deterred members of the Muslim community from wearing clothing that expresses religious or cultural identities.<sup>74</sup>

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72. Reports suggest that the DIOG requires a Special Operations Review Committee (SORC) to approve surveillance inside mosques. See Jessica Chasmar, *Mosques Off-Limits by Government Snooping Since 2011*, *IBD Editorial Says*, WASH. TIMES (June 13, 2013), <http://www.washingtontimes.com/news/2013/jun/13/mosques-limits-government-snooping-2011-ibd-editor/> (last visited Nov. 13, 2013) (discussing the intersection of FBI intelligence-gathering and religious observation) (on file with the Washington and Lee Law Review). But the rules regarding undisclosed participation in political and religious events are redacted from the public version of the DIOG pursuant to FOIA's exemption for law enforcement material, as are the provisions regarding the responsibilities and makeup of the SORC. See DIOG, *supra* note 12, §§ 16, 18.5.5.3, 18.6 (describing undisclosed participation procedures, the fact that the FBI should use the least intrusive method possible, and the authorized investigation methods used in preliminary investigations); 5 U.S.C. § 552(b)(7)(E) (2012) (exempting from disclosure information compiled for law enforcement purposes "if such disclosure could reasonably be expected to risk circumvention of the law").

73. Lininger, *supra* note 36, at 1233–34 (citations omitted); Fisher, *supra* note 38, at 647–49 ("The chilling of protected expression that accompanies political surveillance impedes the group's ability to realize fully its political or religious purposes."); see also *Int'l Religious Freedom Report, Hearing Before the Subcomm. on Int'l Operations, House Int'l Relations Comm.*, 108th Cong. 67 (2002) (statement of Nihad Awad, Exec. Dir. of Council on American-Islamic Relations) (stating that at least three Muslim charities "have been effectively shut down"). Impediments to charitable giving interfere with Muslims' ability to practice the Islamic duty of zakat (alms giving). See *id.* at 67–68 ("These closures [of Muslim charities] have had a wide impact . . . Donors view such organizations as essential to the ability of Muslims to practice the religious duty of zakat (alms giving), a pillar of their faith.").

74. See Sinnar, *Questioning Law Enforcement*, *supra* note 7, at 69–71 (detailing evidence that members of the Muslim Community refrain from expressing their religious or cultural identities).

Any of these intelligence-collection tactics may also be discriminatorily implemented, disproportionately burdening particular minorities. The use of unpredicated investigations in particular opens the door to investigative decisions based on the use of race, ethnicity, national origin, or religion. Historically, when law enforcement officials have been permitted to collect intelligence on groups and individuals suspected—without any objective basis—of harboring ill will toward the United States, the burden of that investigative activity has fallen on groups that espouse disfavored ideologies, minorities, or others who are perceived as threatening.<sup>75</sup>

The more specific DIOG rules magnify concerns about discriminatory implementation. Under the DIOG, the FBI may collect information regarding ethnic and racial behaviors “reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community.”<sup>76</sup> Official expressions regarding how individuals become “radicalized” actually identify certain religious activities—such as Muslim men growing beards—as potential precursors to violent extremism, thus providing theoretical grounds for investigative decisions based at least in part on exactly these types of activities.<sup>77</sup>

Investigative activity based in part on racial or ethnic characteristics is not limited to scrutiny of individuals. FBI policy also embraces “community mapping”—the practice of collecting and storing information about particular ethnic communities.<sup>78</sup>

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75. The Supreme Court has noted that protections against intrusive surveillance “become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.” *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 314 (1972).

76. DIOG, *supra* note 12, § 4.3.3.2.4.

77. See Aziz Z. Huq, *Modeling Radicalization Theory*, 2 DUKE F.L. & SOC. CHANGE 39, 46–47 (2010) (“The ‘typical signatures’ of the pre-radicalization phase, for example are . . . ‘[w]earing traditional Islamic clothing, growing a beard’; and ‘[b]ecoming involved in social activism and community issues.’” (alterations in original) (quoting MITCHELL D. SILBER & ARVIN BHATT, N.Y. POLICE DEP’T, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* 31 (2d ed. 2009))). *But see* MUSLIM AM. CIVIL LIBERTIES COAL., *COUNTERTERRORISM POLICY, MACLC’S CRITIQUE OF THE NYPD’S REPORT ON HOMEGROWN RADICALISM* 6–7 (2008), <http://maclcnypdcritique.files.wordpress.com/2008/11/counterterrorism-policy-final-paper3.pdf> (critiquing the NYPD’s position).

78. See DIOG, *supra* note 12, § 4.3.3.2.2 (“[I]f information about community

The rules “permit the FBI to identify locations of concentrated ethnic communities” as well as to collect “the locations of ethnic-oriented businesses and other facilities” (including religious facilities such as mosques) because “members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity.”<sup>79</sup> The DIOG justifies such activity by asserting that concentrations of certain ethnic communities provide an opportunity for “identified terrorist subjects from certain countries [to] relocate to blend in and avoid detection.”<sup>80</sup> Under these authorities, the FBI has collected information about religious, ethnic, and national-origin characteristics of American communities, identifying “Arab-American and Muslim communities in Michigan as a potential terrorist recruitment ground” as well as noting “an increase in the African-American population of Georgia when analyzing

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demographics may be collected, it may be ‘mapped.’ Sophisticated computer ge-mapping technology visually depicts lawfully collected information and can assist in showing relationships among disparate data.”)

79. *Id.* § 4.3.3.2.1. This same idea was proposed by local law enforcement authorities in Los Angeles but ultimately abandoned when the Muslim and civil liberties communities noted that it was likely to alienate Muslim residents. See Richard Winton et al., *LAPD to Build Data on Muslim Areas*, L.A. TIMES (Nov. 9, 2007), <http://articles.latimes.com/2007/nov/09/local/me-lapd9> (last visited Nov. 13, 2013) (discussing the proposal and its demise) (on file with the Washington and Lee Law Review); Richard Winton & Teresa Watanabe, *LAPD’s Muslim Mapping Plan Killed*, L.A. TIMES (Nov. 15, 2007), <http://articles.latimes.com/2007/nov/15/local/me-muslim15> (last visited Nov. 13, 2013) (same) (on file with the Washington and Lee Law Review). Reports that the NYPD has engaged in similar practices with respect to Muslim communities in New York have sparked significant controversy. See, e.g., Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, ASSOC. PRESS (Aug. 21, 2012), <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases> (last visited Nov. 13, 2013) (“The Demographics Unit is at the heart of a police spying program, built with help from the CIA, which assembled databases on where Muslims lived, shopped, worked and prayed.”) (on file with the Washington and Lee Law Review); Rocco Parascandola, et al., *NYPD Commissioner Raymond Kelly Defends Police Spying on Muslims*, N.Y. DAILY NEWS (Feb. 27, 2012), <http://www.nydailynews.com/new-york/nypd-commissioner-raymond-kelly-defends-police-spying-muslims-article-1.1029190> (last visited Nov. 13, 2013) (“[C]ops . . . watch[ed] Muslim neighborhoods and bought . . . computers they used to store reams of information about innocent Muslim college students, mosque sermons and social events . . .”) (on file with the Washington and Lee Law Review).

80. DIOG, *supra* note 12, § 4.3.3.2.1.



‘Black Separatist’ groups,” pointing to Chinese and Russian communities in San Francisco “as a place to look for organized crime syndicates,” and “highlighted Latino communities as potentially harboring the Central American gang MS-13.”<sup>81</sup>

The Guidelines are not blind to the concerns these tactics raise. In fact, they bar the FBI from initiating investigations into U.S. persons “solely for the purpose of monitoring activities protected by the First Amendment.”<sup>82</sup> Nor may the Bureau “predicat[e] an investigation simply based on somebody’s race.”<sup>83</sup> But the Guidelines as well as the DIOG prevent such activity only when it is motivated *solely* by the desire to monitor First Amendment-protected activities, or by race, religion, or national origin.<sup>84</sup> Investigative activity prompted *in part* by these factors is not barred.<sup>85</sup> Individuals thus can be singled out for scrutiny due, at least in part, to their political or religious expressions,

81. Charlie Savage, *F.B.I. Scrutinized for Amassing Data on American Communities*, N.Y. TIMES (Oct. 20, 2011), [http://www.nytimes.com/2011/10/21/us/aclu-releases-fbi-documents-on-american-communities.html?\\_r=0](http://www.nytimes.com/2011/10/21/us/aclu-releases-fbi-documents-on-american-communities.html?_r=0) (last visited Nov. 13, 2013) (on file with the Washington and Lee Law Review).

82. MUKASEY GUIDELINES, *supra* note 37, § I.C.3.

83. Michael Mukasey, Att’y Gen. of the U.S., Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the Oregon Anti-Terrorism Conference & Training (Aug. 13, 2008) [hereinafter Mukasey Speech], available at <http://www.justice.gov/archive/ag/speeches/2008/ag-speech-0808133.html>.

84. See, e.g., MUKASEY GUIDELINES, *supra* note 37, § I.C.3 (“These Guidelines do not authorize investigating or collecting or maintaining information . . . solely for the purpose of monitoring activities protected by the First Amendment . . .”); DIOG, *supra* note 12, § 4.2 (“[I]nvestigative activity may not be based solely on the exercise of rights guaranteed by the First Amendment . . .”).

85. See Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 842 (2011) (“[L]aw enforcement and prosecutors turn to religious speech as a signal of terrorist risk.”). Note also that after the Supreme Court decision in *Holder v. Humanitarian Law Project*, any speech undertaken in coordination with a designated Foreign Terrorist Organization (FTO) is criminal. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010) (“We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations [through 18 U.S.C. § 2339B], Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.”). Thus, any indication that an individual supports an FTO or its political positions could trigger government scrutiny.

activities, or associations. This profiling on the basis of “national origin plus” could expose a large population of innocent persons to FBI scrutiny. Indeed, as law enforcement officials told the Associated Press, “[a]mong the factors that could make someone the subject of an investigation is travel to regions of the world known for terrorist activity . . . along with the person’s race or ethnicity.”<sup>86</sup> Thus, every individual of Pakistani origin who travels to Pakistan to visit family is conceivably at risk of being subjected to FBI investigation merely on that basis.

A final notable modification to the Guidelines implemented in 2008 was the elimination of the vast majority of oversight provisions contained in prior iterations of the Guidelines—time limits on investigations, the need to obtain supervisory approval, requirements to report regularly to FBI Headquarters or the Justice Department.<sup>87</sup> Instead, these restrictions have been relegated to the DIOG, thereby empowering the FBI to determine the scope of its own power in this regard.<sup>88</sup> Indeed, the DIOG may be changed whenever the FBI—not the Attorney General—determines that it should be (as it was in 2011<sup>89</sup>), and FBI

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86. Lara Jakes Jordan, *AP Impact: Race Profiling Eyed for Terror Probes*, USA TODAY (July 2, 2008), [http://usatoday30.usatoday.com/news/topstories/2008-07-02-926742133\\_x.htm](http://usatoday30.usatoday.com/news/topstories/2008-07-02-926742133_x.htm). (last visited Nov. 13, 2013) (on file with the Washington and Lee Law Review).

87. See MUKASEY GUIDELINES, *supra* note 37, § II (“These Guidelines do not impose supervisory approval requirements in assessments . . .”); *id.* § II.B.2 (providing that “a predicated investigation requires supervisory approval” only if “relating to foreign intelligence”); *id.* § II.B.5 (requiring FBI Headquarters be notified of predicated investigations only in limited instances); *id.* (imposing no limits on the duration of investigations).

88. See DIOG, *supra* note 12, §§ 3.4, 18 (setting supervisory approval requirements, placing time limits on some investigations, and requiring periodic reviews for all investigations); *id.* § 10 (increasing oversight for “sensitive investigative matters,” such as investigations of politicians, political or religious organizations, or members of the news media).

89. The 2011 changes to the DIOG loosened some existing restrictions. The DIOG now authorizes a number of investigative techniques even before opening an assessment, such as accessing information in the databases of federal, local, or state governments; interviewing a “complainant”; and searching publicly available information (including social media sites). See Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES, (June 12, 2011), <http://www.nytimes.com/2011/06/13/us/13fbi.html> (last visited Nov. 13, 2013) (“The new rules add to several measures taken over the past decade to give agents more latitude as they search for signs of criminal or terrorist activity.”)

leadership can authorize departures from the DIOG's requirements.<sup>90</sup>

There may have been good reason for some of these changes. Indeed, some of them were the result of recommendations made by the 9/11 Commission to improve America's counterterrorism capacity.<sup>91</sup> There have, after all, been significant changes since 1976—in the threats that we face, in the need for intelligence gathering, in Americans' expectations of what their government should do to protect them and their interests. The limits on FBI intelligence activities imposed in the 1970s, however, reflected concerns expressed by the legislature and the public.<sup>92</sup> The current Guidelines, by contrast, have fundamentally transformed the role of America's primary domestic federal law enforcement agency with almost no public debate and with no legislative action.<sup>93</sup> Thus, regardless of what one thinks about the propriety of the changes themselves, we might question the adequacy of the process leading to such a transformation.

### *B. Existing Failures of Intelligence-Collection Governance*

If the FBI's intelligence-collection authorities do not run afoul of existing legal limits, why is the way in which they are governed a cause for concern? Because despite these authorities'

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(on file with the Washington and Lee Law Review).

90. See DIOG, *supra* note 12, § 2.7.2 (providing the authorization to depart from DIOG procedures). Such departures must not violate the Guidelines themselves. *Id.*

91. See Jordan, *supra* note 86 (“Law enforcement officials say the proposed policy would help them do exactly what Congress demanded after the Sept. 11, 2001, attacks: root out terrorists before they strike.”).

92. See Frederick A.O. Schwarz, Jr., *The Church Committee, Then and Now*, in U.S. NATIONAL SECURITY, INTELLIGENCE AND DEMOCRACY 25 (Russell A. Miller ed., 2008) (“Attorney General Edward Levi and President Gerald Ford, followed by President Jimmy Carter, had issued guidelines and executive orders in response to the Church Committee’s revelations that went part of the way toward the goals of the Church Committee.”).

93. See Dalal, *supra* note 39, at 14–24 (discussing the “steady unmooring of the Attorney General Guidelines from the rights-protecting framework enshrined in 1976”).

undisputed implications for civil liberties<sup>94</sup>—indeed, their tendency to result in civil liberties infringements is what inspired the implementation of the Guidelines in the first instance—they are untouched by the nondoctrinal constraints that usually accompany law enforcement activities. This means that the only constraints on the FBI's intelligence-collection powers are the internal rules the Justice Department and the FBI have imposed on themselves.

Several inherent differences between intelligence collection and crime-solving investigations account for the inapplicability of constraints that usually limit government action. First, the very nature of the intelligence-collection enterprise is inherently more expansive in scope—proactive rather than reactive and less narrowly targeted.<sup>95</sup> Consequently, practical constraints that usually serve to limit law enforcement agencies' activities—resource limitations and a focus on solving individual crimes—are inapplicable. Second, the secretive nature of intelligence-collection activities renders them effectively immune to judicial review as well as scrutiny from the legislature and the public.<sup>96</sup> And third, the Justice Department and the FBI generate the Guidelines and the DIOG in the context of the FBI's post-9/11 focus on terrorism prevention.<sup>97</sup> This means that the rules are crafted by government officials with security and intelligence-collection expertise. There are, therefore, no structural checks to remove from the hands of security technocrats the normative judgments that must be made about the relative importance of

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94. See Schwarz, *supra* note 92, at 25 (noting the uneasy truce between the FBI's authority and civil liberty).

95. See ASHCROFT GUIDELINES, *supra* note 36, § III.B.2 (“The immediate purpose of a terrorism enterprise investigation is to obtain information concerning the nature and structure of the enterprise . . . with a view to the longer range objectives of detection, prevention, and prosecution of the criminal activities of the enterprise.”).

96. See *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 655 (6th Cir. 2007) (noting that the state secrets doctrine would prevent discovery of whether plaintiffs were actually wiretapped).

97. See FBI, QUICK FACTS, <http://www.fbi.gov/about-us/quick-facts> (last visited Oct. 20, 2013) (listing “[p]rotect[ing] the United States from terrorist attack[s]” as the FBI's number one priority) (on file with the Washington & Lee Law Review).

aggressive intelligence collection and rights protections.<sup>98</sup> The result is that, despite the fact that intelligence collection implicates important values, the only constraints on that collection are effectively self-imposed.

### 1. *Intelligence Collection and Practical Constraints*

Intelligence collection compliments and overlaps with criminal investigation, but it is a distinct endeavor. Crime-solving efforts are tied to individual cases. They focus on the investigations of specific acts in an effort to collect evidence related to each element of a completed or impending crime, and tend to end with a decision to prosecute or not to prosecute.<sup>99</sup> As previous versions of the Guidelines recognize, criminal investigations are more circumscribed in scope and tend to be shorter in duration than intelligence investigations.<sup>100</sup> Intelligence investigations, by contrast, call for much different—and much broader—investigative activities, which “may continue for several years.”<sup>101</sup> Furthermore, the focus of such investigations “may be less precise than that directed against more conventional types of crime. . . . For this reason the investigation is broader and less discriminate than usual,”<sup>102</sup> seeking information about potential targets as well as criminal or terrorist organizations, their members, their goals, and their sources of funding.<sup>103</sup> Thus, the goal of intelligence collection is to gather as much information as possible for future analysis, rather than seeking only information connected to a discrete incident.

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98. See *infra* Part III.C.1 (discussing the deficiencies of administrative self-governance).

99. See ASHCROFT GUIDELINES, *supra* note 36, § III (“As a general rule, an investigation of a completed criminal act is normally confined to determining who committed that act and securing evidence to establish the elements of the particular offense.”).

100. See, e.g., *id.* § III (recognizing the difference between criminal and intelligence investigations).

101. *Id.*

102. *Id.* (quoting *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 322 (1972)).

103. *Id.* § III.B.3.

A law enforcement agency focused on crime solving is less likely to allocate time and resources to the types of activities currently taking place under the Guidelines. While that agency may be permitted, for example, to place an individual under twenty-four-hour surveillance or attend political rallies,<sup>104</sup> it is unlikely to devote scarce manpower to such activities if there is no factual basis for doing so.<sup>105</sup> If an agency's primary goal, however, is to collect as much information as possible to include in a database because it is impossible to know what information might eventually lead to the prevention of a threat or crime, then its ability to engage in that collection will be supported by sufficient funds and manpower. Recent technological advances exacerbate this phenomenon because they have made the collection and storage of information infinitely cheaper and easier than ever before.<sup>106</sup>

In order to ensure that the FBI engages in the broad investigative activities associated with intelligence collection, the Guidelines—initially imposed to restrict domestic intelligence collection—have been transformed into Guidelines expressly facilitating and encouraging such activity. They remind agents that they “cannot be content to wait for leads to come through the action of others” and thus “must proactively draw on available sources of information.”<sup>107</sup> In so doing, they both expand the FBI's

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104. See *id.* § II.B(5)(b), (6)(g) (authorizing the use of nonconsensual electronic surveillance, physical or photographic surveillance, or any other investigative technique covered under chapter 119 of Title 18 of the U.S. Code).

105. See *id.* § II.C(1) (“A general crimes investigation may be initiated by the FBI when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed.”).

106. See, e.g., Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1013–15 (2010) (recognizing that the digital storage of data means that unlimited data, which can be located anywhere, can be made available to the government); *Privacy and Civil Liberties Oversight Board, Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, Transcript at 300 (July 9, 2013) (statement of Greg Nojeim, Ctr. for Democracy & Tech.), <http://www.pclob.gov/SiteAssets/9-july-2013/Public%20Workshop%20-%20Full.pdf> (noting that “something has to substitute for the friction that used to be in the system because there wasn't an ability to collect all this information about all human interaction . . . that we have now”).

107. MUKASEY GUIDELINES, *supra* note 37, § II.

authorized powers and relax the limits on how those powers may be used. Because they will be utilized far more expansively than their crime-solving counterparts, which existing doctrine evolved to regulate, the FBI's powers present a greater threat to fundamental values than existing doctrine may indicate.

## *2. Intelligence Collection and Judicial or Political Constraints*

In engaging in the broad intelligence-collection activities envisioned by the Guidelines, the FBI will elude traditional checks on power, such as judicial review and congressional or public oversight. The result is that the Guidelines and their implementation lack both the accountability and the democratic legitimacy that usually accompanies government policy.<sup>108</sup>

There are several obstacles to judicial review of the Guidelines and the activities undertaken pursuant to them. As an initial matter, the Guidelines themselves disclaim any intention to create enforceable rights, so any action taken pursuant to them can be challenged only if it is otherwise unlawful.<sup>109</sup> In addition, the secrecy of these activities ensures that individuals who seek to challenge intelligence-collection regimes will struggle to demonstrate a sufficiently concrete injury to establish standing to sue.<sup>110</sup> Surveillance tactics are designed to prevent targets from being alerted to the fact that law enforcement is gathering information about them, so it is difficult to point to specific government action causing harm.<sup>111</sup> Moreover, courts have held

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108. See *infra* notes 121–138 and accompanying text.

109. See MUKASEY GUIDELINES, *supra* note 37, § I.D.2 (“The[se guidelines] are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal . . .”).

110. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[S]tanding . . . [requires the plaintiff to suffer an] ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical”’” (footnote omitted) (citations omitted)).

111. See 50 U.S.C. § 1861(d) (2012) (imposing gag orders on entities receiving requests for information from the FBI); 18 U.S.C. § 3103a(b) (allowing law enforcement to delay warrant notice requirements under certain circumstances); Rascoff, *supra* note 6, at 596 (“[I]ndividuals who allegedly are

that neither allegations of general chill nor an “objectively reasonable likelihood” that a plaintiffs’ communications will be subject to surveillance are sufficient.<sup>112</sup> Thus, standing remains a bar to the courthouse door.

Another barrier that has proved fatal to judicial review of intelligence collection is the state secrets privilege,<sup>113</sup> which allows the government to withhold evidence whose disclosure might endanger national security.<sup>114</sup> At times the privilege results in a case being dismissed outright.<sup>115</sup> In other instances, a

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being spied on illegally tend to be unaware of that fact. . . .” (footnotes omitted)).

112. See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1152 (2013) (“Because respondents do not face a threat of certainly impending interception under § 1881a, the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance . . . [this] is insufficient to create standing.” (footnote omitted)); *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; ‘the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.’” (quoting *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947))); *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644, 660 (6th Cir. 2007) (quoting the “subjective chill” language from *Laird*); *Rascoff*, *supra* note 6, at 596 (“[I]f certain individuals have some basis for thinking that they have been the subjects of illegal surveillance, they are often unable to make . . . [a] definitive showing of injury . . . for constitutional standing.” (footnotes omitted)).

113. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010) (en banc) (dismissing foreign nationals’ claims of harm caused by the Central Intelligence Agency’s extraordinary rendition program pursuant to the state secrets doctrine); *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007) (dismissing a foreign national’s claim of harm caused by the Central Intelligence Agency’s extraordinary rendition program pursuant to the state secrets doctrine); *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644, 655 (6th Cir. 2007) (noting that the state secrets doctrine would prevent discovery of whether plaintiffs were actually wiretapped); *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1049 (C.D. Cal. 2012) (dismissing claims that the FBI illegally directed agents to gather information on Southern California Muslim Communities pursuant to the state secrets doctrine); *Rascoff*, *supra* note 6, at 596 (“[E]ven if [a plaintiff has standing], the government is free to invoke the state secrets privilege and, in effect, unilaterally have the case dismissed . . .”).

114. See *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (“[T]he privilege against revealing military secrets . . . is well established in the law of evidence.” (footnote omitted)).

115. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010) (en banc) (dismissing foreign nationals’ claims of harm caused by the Central Intelligence Agency’s extraordinary rendition program pursuant to the state secrets doctrine).



suit may proceed with evidence that the government is willing to share only *ex parte*,<sup>116</sup> undermining the proceedings' adversarial nature.

The government's investigative actions are most frequently scrutinized through motions to suppress evidence collected in violation of the Fourth Amendment.<sup>117</sup> But this process generally eludes the targets of surveillance. When the government gathers information for the purposes of criminal prosecution and seeks to introduce it as evidence at trial, only the individual about whom the information was gathered—the criminal defendant—will have the opportunity to challenge the government's actions through a suppression motion.<sup>118</sup> This means that these practices will face challenges in those circumstances where the government's case is most compelling—when a guilty person seeks to exclude probative inculpatory evidence.<sup>119</sup> Moreover, much of the government's intelligence-collection activity never leads to prosecution. As a result, innocent targets of surveillance—those whose information is collected because it is deemed “relevant” to an investigation, or members of a house of worship who change their religious practices due to fear of surveillance—will be unable to invoke judicial protection.<sup>120</sup>

The accountability gap left by the absence of judicial review will not be filled by legislative or public scrutiny. The origin story of the original Attorney General Guidelines included a significant role for Congress.<sup>121</sup> Having been prompted by the Church

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116. See, e.g., *United States v. Felt*, 491 F. Supp. 179, 183–84 (D.D.C. 1979) (concluding that *in camera*, *ex-parte* review of documents obtained by the FBI from foreign intelligence sources was appropriate).

117. See FED. R. CRIM. P. 41(h) (providing the ability to file a motion to suppress evidence obtained in violation of the Fourth Amendment).

118. See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[S]tanding to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search.”).

119. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 796–97 (1994) (“Under the exclusionary rule, the more guilty you are, the more you benefit.”).

120. See *Calandra*, 414 U.S. at 348 (discussing who may challenge government surveillance tactics).

121. See Schwarz, *supra* note 92, at 25 (noting early legislative involvement in the Guidelines).

Committee's findings of misconduct and the resulting public outrage, the legislature was intimately involved in developing the contents of the Guidelines.<sup>122</sup> Congress held a series of hearings on the issue over the course of several years, and saw its suggestions ultimately reflected in the Levi Guidelines.<sup>123</sup> Given that the Guidelines were implemented, at least in part, to avoid more stringent legislative action,<sup>124</sup> this is not a surprise. Surely Attorney General Levi knew that if the rules he instituted did not appear to address Congress's concerns, they would fail to sap the momentum for enacting a statutory charter for the FBI.

The contemporary political economy of congressional oversight in this area means that legislative oversight will not provide any more effective a check than judicial action. Legislators' incentives weigh against aggressive involvement. The downside risks of unsuccessful counterterrorism policies (additional attacks) are high.<sup>125</sup> If those policies are developed outside of the legislative process, Congress can share (if not entirely evade) blame. Moreover, counterterrorism policy "is a subject matter that is especially prone to legislative delegation because it often entails hard trade-offs," which are the types of questions Congress is least likely to address.<sup>126</sup> In addition to undermining legislative involvement in counterterrorism policy formulation, existing institutional features also render

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122. See *FBI Statutory Charter Part 1, Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 3–35 (1978) [hereinafter *FBI Statutory Charter Part 1*] (questioning the Attorney General about the content of the Guidelines).

123. See, e.g., *id.* at 1–3 (voicing concerns about illegal FBI activities); *FBI Statutory Charter Part 2, Hearings Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 95th Cong. 3–4 (1978) (voicing concerns about undercover FBI operations); Schwarz, *supra* note 92, at 25 ("Attorney General Edward Levi . . . issued guidelines and executive orders in response to the Church Committee's revelations that went part of the way toward the goals of the Church Committee.").

124. See *FBI Statutory Charter Part 1, supra* note 122, at 25 (noting that the Guidelines were prompted by the Church Committee's findings and sought to avoid drastic legislative action).

125. Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 921 (2002) ("Errors on the security side are more likely to be widespread, affecting many people and imposing a high political cost.").

126. See *id.* at 923 ("[L]egislators will tend . . . to delegate decisions rather than . . . resolve hard questions themselves.").

congressional oversight of domestic intelligence-collection policy ineffectual. Congress, of course, retains oversight authority over the FBI.<sup>127</sup> If it wants to play a more active role in overseeing the Guidelines, it has the tools to do so.<sup>128</sup> After all, Congress determines whether and to what degree the FBI's intelligence-collection activities are funded.<sup>129</sup> Moreover, the relevant committees of jurisdiction conduct regular oversight hearings at which the Attorney General and FBI Director appear.<sup>130</sup> Legislators can ask Justice Department and FBI officials for information about the Guidelines or the FBI's activities at any time.<sup>131</sup>

Perhaps as a result of the existing incentive structure, however, Congress has shown little appetite to pursue Guidelines-related issues of late.<sup>132</sup> The most recent modification to the Guidelines, for example, failed to reflect congressional input. The Justice Department provided the Senate Judiciary

127. See U.S.H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, ABOUT, HISTORY AND JURISDICTION, <http://intelligence.house.gov/about/history-jurisdiction> (last visited Oct. 29, 2013) (“The HPSCI is charged with the oversight of the United States Intelligence Community, which includes the intelligence and intelligence related activities of 17 elements of the U.S. Government, and the Military Intelligence Program.”) (on file with the Washington and Lee Law Review); ABOUT U.S.S. SELECT COMM. ON INTELLIGENCE, <http://www.intelligence.senate.gov/about.html> (last visited Oct. 29, 2013) (“The Committee meets roughly twice a week for 1 1/2 to 2 hours, generally in closed session. Most hearings involve appearances by senior Intelligence Community officials . . . who present testimony and answer Senators’ questions.”) (on file with the Washington and Lee Law Review).

128. See U.S. CONST. art. I, § 1 (vesting all legislative power in Congress); *id.* art. I, § 2, cl. 5 (vesting the House of Representatives with the power to impeach public officials); *id.* art. I, § 3, cl. 6 (vesting the Senate with the power to try all impeachments); *id.* art. I, § 9, cl. 7 (providing the spending power).

129. See U.S. CONST. art. I, § 9, cl. 7 (providing the spending power).

130. See, e.g., *FBI Oversight*, C-SPAN VIDEO LIBRARY, <http://www.c-spanvideo.org/program/FBIOver> (last visited Oct. 31, 2013) (documenting FBI Director Robert Mueller’s testimony at an FBI oversight hearing before the House Judiciary Committee on June 13, 2013) (on file with the Washington and Lee Law Review).

131. See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”).

132. See Rascoff, *supra* note 6, at 597–98 (providing possible reasons why congressional oversight of intelligence collection lacks “vitality”).

Committee a completed draft of the Mukasey Guidelines a few months before they were implemented.<sup>133</sup> A handful of senators requested that Attorney General Mukasey delay their implementation until Congress had the opportunity to develop suggestions regarding ways to minimize civil liberties concerns.<sup>134</sup> Their request went unanswered. And even when FBI Director Robert Mueller III inaccurately testified in 2010 before Congress that the FBI did not have the authority to conduct unprejudicated investigations, legislators took no follow-up action.<sup>135</sup>

While Congress has shown little interest in scrutinizing the Guidelines, the public is not given a choice in the matter. Activity undertaken pursuant to the Guidelines is secret and therefore rarely apparent on its own or reported in sufficient detail in the news media.<sup>136</sup> Moreover, information about how the Guidelines are used is exempt from disclosure under the Freedom of Information Act on the basis of either the law enforcement or the classified-information exemption contained in that statute.<sup>137</sup> The public also lacks means to scrutinize how the rules are

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133. See Letter from Sens. Russell Feingold, Edward Kennedy, Richard Durbin, & Sheldon Whitehouse, to Michael Mukasey, Att’y Gen. of the United States (Aug. 20, 2008), <http://www.brennancenter.org/sites/default/files/legacy/Justice/20080820.Letter.from.Senators.to.AG.Mukasey.re.FBI.Guidelines.pdf> (noting that a draft of the Mukasey Guidelines was made available to the Senate Judiciary Committee during August of 2008).

134. See *id.* (“Before you sign the guidelines, we urge you to make them available publicly, and to solicit input not only from members of Congress but also from national security and civil liberties experts . . .”).

135. See Letter from Stephen Kelly, Asst. Dir., FBI Office of Cong. Affairs, to Sen. Richard J. Durbin (July 28, 2010), <http://www.bordc.org/press/fbidurbin/letter.pdf> (alerting the Senator to the fact that the FBI Director “misspoke” when he asserted during an oversight hearing that there is “a requirement of ‘suspicion of wrongdoing’ in order for the FBI to engage in surveillance of an individual or location”).

136. See 50 U.S.C. § 1861(d) (2012) (imposing gag orders on entities receiving requests for information from the FBI); 18 U.S.C. § 3103a(b) (2012) (allowing law enforcement to delay warrant notice requirements under certain circumstances).

137. See 5 U.S.C. § 552(b)(7)(E) (2012) (exempting information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law”).

implemented. In some cases even the rules themselves are secret. The publicly available version of the DIOG, for example, entirely redacts the rules governing undisclosed participation in religious or political gatherings.<sup>138</sup>

### 3. *Intelligence Collection and Structural Constraints*

The governance concerns posed by the FBI's intelligence-focused mission and the lack of traditional oversight are compounded by the FBI's tendency to emphasize that mission over other concerns. The Attorney General and the FBI are responsible for incorporating two sometimes conflicting responsibilities into intelligence-collection policies—terrorism prevention and civil liberties protection.<sup>139</sup> Given the incentives to err on the side of security, the Guidelines risk short-changing civil liberties concerns when the two missions conflict. The FBI declares on its website that “[a]s an intelligence-driven and a threat-focused national security organization with both intelligence and law enforcement responsibilities,” its mission is to “to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.”<sup>140</sup> Similarly, the Bureau identifies as its top priority protecting the United States from terrorist attack, followed by combatting foreign intelligence operations, cyberattacks, high-technology crimes, and public corruption.<sup>141</sup>

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138. *See supra* notes 11–13 and accompanying text. Even if these rules were public, the majority often lacks incentive to object to problematic provisions because much of the burden of intelligence collection falls on minority communities. *See* DAVID COLE, *ENEMY ALIENS* 88–179 (2003) (providing a discussion of the historical pattern of dealing with threats to national security by focusing on noncitizens with the rationale that they have diminished rights).

139. *See supra* Part II.A (discussing how the FBI's policies affect the prevention of terrorist attacks and protecting civil liberties).

140. *Quick Facts*, FBI, <http://www.fbi.gov/about-us/quick-facts> (last visited Oct. 20, 2013) (on file with the Washington and Lee Law Review).

141. *Id.*

In other words, despite its location in the Department of Justice and its law-enforcement responsibilities, the FBI is now primarily a national security and intelligence-focused agency.<sup>142</sup> In all of the FBI's statements listing its goals and priorities, protecting civil liberties falls far below protecting against terrorist attacks and other security threats.<sup>143</sup> Like the FBI's other statements of its priorities, the post-9/11 Guidelines themselves present "[p]rotection of the United States and Its people" as the goal that the FBI's investigative authorities are designed to further.<sup>144</sup> And while the Guidelines have always explicitly required investigators to use the least intrusive method possible to achieve their investigative goals,<sup>145</sup> as of 2002 the Guidelines include a caveat: agents should not "hesitate to use any lawful techniques consistent with these Guidelines, even if intrusive,"<sup>146</sup> where the degree of intrusiveness is warranted in light of the seriousness of a threat, or in light of the importance of foreign intelligence sought in the United States' interests.<sup>147</sup> This

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142. See Hamed Aleaziz, *Want to Sue the FBI for Spying on Your Mosque? Sorry, That's Secret*, MOTHER JONES (Aug. 8, 2011), <http://www.motherjones.com/politics/2011/08/state-secrets-fazaga-v-fbi> (last visited Nov. 13, 2013) (quoting University of Texas Law Professor Bobby Chesney's assertion that "[a]t the end of the day, the FBI is part of the intelligence community as well—it's not necessarily thought of as any different than the NSA") (on file with the Washington and Lee Law Review).

143. See, e.g., *Quick Facts*, FBI, *supra* note 140 (listing civil rights protection as fifth on the FBI's list of priorities); *Intelligence Overview*, FBI <http://www.fbi.gov/about-us/intelligence/intel-driven/intelligence-overview> (last visited Oct. 20, 2013) (discussing "safeguarding civil liberties" last on the "Intelligence Overview" page) (on file with the Washington and Lee Law Review).

144. MUKASEY GUIDELINES, *supra* note 37, § I.C.1.

145. Until 2002, the Guidelines instructed that inquiries and investigations should "be conducted with as little intrusion into the privacy of individuals as the needs of the situation permit." Memorandum from Charles Doyle, Sr. Specialist, Am. Law Div., Cong. Research Serv., to Senate Select Comm. on Intelligence 13 (Sept. 22, 2008) (citations omitted) (on file with the Washington and Lee Law Review).

146. ASHCROFT GUIDELINES, *supra* note 36, § I.

147. See *id.* (instructing agents to balance the importance of the information sought with the intrusiveness of the techniques necessary).

point is to be observed in particular, agents are instructed, in investigations relating to terrorism.<sup>148</sup>

The DIOG presents even larger concerns on this front. Those rules are devised and implemented within the FBI itself.<sup>149</sup> Thus, any nonsecurity perspective that Justice Department officials may bring is absent from the DIOG. And because the terms of the Guidelines are relatively skeletal, the FBI is left to fill in most of the details itself. The DIOG does include hortatory language regarding the need to be solicitous of civil liberties; to refrain from infringing on First Amendment rights and from profiling on the basis of race, religion, ethnicity, or national origin; and to limit appropriately the scope and intrusiveness of FBI activity.<sup>150</sup> It also instructs that “when First Amendment rights are at stake, the choice and use of investigative methods should be focused in a manner that minimizes potential infringement of those rights.”<sup>151</sup> But after warning agents to take privacy, equal protection, and First Amendment rights into account, the DIOG concludes by reiterating that “FBI employees may use any lawful method allowed, even if intrusive, where the intrusiveness is warranted by the threat to the national security or to potential victims of crime.”<sup>152</sup>

A recent quote from former Director of National Intelligence Mike McConnell captures the sentiment of many security policymakers. In his view, the American people have “very little appreciation for the threat,” and “special interests, particularly civil liberty groups with privacy concerns,” prevent the intelligence community from doing its job as well as it otherwise could.<sup>153</sup> This view of the need to consider privacy concerns as a

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148. *See id.* § I.C.2. (providing particular guidance relating to terrorism).

149. *See* DIOG, *supra* note 12, Preamble (“To assist the FBI in its mission, the Attorney General signed [DIOG] on September 29, 2008. The primary purpose of the [DIOG] is to standardize policy so that . . . investigative activities are accomplished in a consistent manner.”).

150. *See id.* § 4.1.2 (barring the FBI from investigating solely to monitor the exercise of constitutional rights, such as the free exercise of speech, religion, assembly, press and petition” or based “solely on the race, ethnicity, national origin or religious beliefs” of the subject).

151. *Id.* § 4.4.4.

152. *Id.* § 4.4.5.

153. Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He*

hurdle to effective policy, rather than as an integral part of policymaking, illustrates the tension that sometimes arises between the FBI's primary mission and its responsibility to protect civil liberties. As others have pointed out, the FBI will value success in carrying out its primary mission and will favor terrorism prevention "over competing concerns such as the protection of civil liberties."<sup>154</sup>

Pointing out the elevation of the FBI's anti-terrorism mission over other considerations is not meant to be an indictment. That mission is a vital one that should be pursued vigorously. And with over a century of experience conducting criminal and security investigations, the FBI is the agency in the best position to determine the most effective means of pursuing that mission. This includes decisions regarding which investigative methods will be most successful in countering threats to the country. This expertise should not be undervalued.

At the same time, the decision about what level of intrusiveness society is prepared to accept in pursuit of security is not a matter of technical, investigative, or intelligence-collection expertise. Determining the intrusiveness of an investigation justified by any particular set of circumstances necessarily involves normative judgments implicating fundamental values. As should now be clear however, the only true constraints on the FBI's intelligence-collection activities are the Guidelines and the DIOG. This leaves decisions regarding the appropriate balance between the FBI's security mission and the interests on the other side of the scale in the hands of the Attorney General. He, in turn, has delegated many of those

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*Leaked Data on Surveillance*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html> (last visited Nov. 13, 2013) (on file with the Washington and Lee Law Review).

154. Lininger, *supra* note 36, at 1267; *see also* Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 418–23 (1996) (explaining the potential monetary and nonmonetary costs of a wholly preemptive ethics code generated by the Attorney General); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429, 449 (1996) (“[T]he DOJ . . . is likely to allow institutional or membership interests to dominate its substantive value choices.”).



decisions to the FBI itself. Thus, concerns over security will have a prominent role in such decision making and other interests will be short-changed.

### *III. Administrative Strategies as Governance*

If the usual tools of governance fail to apply effectively to the Guidelines and the DIOG, how do we devise mechanisms to fill this governance gap? This Part argues that we can borrow from the institutional design principles of the administrative state to address three specific challenges presented by the Guidelines regime. First, the absence of both doctrinal and practical limits on the FBI's intelligence collection confers expansive discretion on the Attorney General and the FBI. Second, the lack of judicial, legislative, or public scrutiny of FBI policy results in a deficit of both accountability and democratic legitimacy. And third, the FBI's focus on threat prevention creates a risk that its rulemaking decisions will give insufficient attention to liberty and privacy interests. With respect to each of these challenges, this Part identifies strategies the administrative state employs, and uses those strategies to develop concrete suggestions to improve intelligence-collection governance.

This examination of administrative law strategies—designed to channel discretion, increase accountability and legitimacy, and ensure that competing priorities are afforded sufficient attention—suggests the following concrete reform proposals. First, a reason-giving framework should be implemented that (1) requires the Attorney General to provide notice of his or her intention to modify the Guidelines; and (2) specifies that any modifications must be justified in writing.<sup>155</sup> Second, to promote meaningful pluralist input, the Attorney General should be obligated to consider as part of the Guidelines-development process the views of stakeholders outside the intelligence community (though not necessarily outside the government).<sup>156</sup> Third, in order to ensure liberty interests are not marginalized,

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155. *See infra* Part III.B.

156. *See infra* Part III.C.

(1) the Justice Department should be required to prepare a statement indicating the likely impact on civil liberties of any changes to the Guidelines, and (2) the Privacy and Civil Liberties Oversight Board should be empowered to participate meaningfully in the Guidelines' development.<sup>157</sup> Before beginning the analysis that suggests these particular reforms, however, a few preliminary points are in order.

### A. Preliminary Questions

This subpart will preemptively address several questions raised by the discussion that follows. First, it acknowledges (and rejects) concerns, based in political realities, that these proposals can be no more than a thought exercise. Then it clarifies the role that the Administrative Procedure Act plays in the argument, and finally it recognizes that the addition of procedural requirements may impose costs as well as benefits. With these first-order questions addressed (if not entirely resolved), the Article turns to the recommendations themselves.

First, some brief thoughts on political economy. This Article aims to propose some plausible reforms in an area where what Professor Heather Gerken calls the “here to there” problem is a significant obstacle.<sup>158</sup> Perhaps even more than in other policy areas, expectations that Congress will act to implement these recommendations—through legislation or through other available levers of power—are likely to be disappointed. Indeed, congressional oversight of national security policy has long been considered ineffective by government officials, outside task forces, and scholars.<sup>159</sup> The dearth of public information about national

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157. See *infra* Part III.D.

158. See Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1583–88 (2009) (discussing the difficulty of implementing reforms in the election-administration context and proposing an information-forcing mechanism as a possible catalyst).

159. See, e.g., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 419–20 (2004) [hereinafter THE 9/11 COMM'N REPORT] (finding widespread “dissatisfaction with congressional oversight”); AMY B. ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 31 (2011) (“[N]early all of [the former intelligence officials,

security policy, which makes oversight significantly more challenging, is partially to blame.<sup>160</sup> But there are also perverse incentives at work: legislators have no incentive to engage in aggressive oversight of intelligence-collection powers.<sup>161</sup> Legislators gain little by taking ownership over security policy.<sup>162</sup> Meanwhile, so long as Congress can label such policies “executive,” it cannot be blamed for intelligence failures.<sup>163</sup> The result is that all electoral incentives point toward congressional deference to executive policy preferences in this area.<sup>164</sup> This is

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legislators, and legislative staff interviewed by author] complained that oversight was nowhere close to meeting their expectations. And most believed that oversight was consistently ineffective and getting more so.”); Vicki Divoll, *The “Full Access Doctrine”: Congress’s Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL’Y 493, 539–41 (2011) (arguing for intelligence oversight reform because “[f]orty years of tweaking the [existing] statutes has not worked”); Loch K. Johnson, *Ostriches, Cheerleaders, Skeptics, and Guardians: Role Selection by Congressional Intelligence Overseers*, 28 SAIS REV. INT’L AFF. 93, 104–06 (2008) (calling on members of Congress to exercise more diligent intelligence oversight).

160. See AMY ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 222–28* (1999) (“[I]t is difficult for interest groups to serve as low-cost information providers.”); Rascoff, *supra* note 6, at 597 n.81 (noting fire alarm oversight “typically depends on a public that is positioned to observe official actors and to call attention to their potential abuses”); Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?* 21–30 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-53, 2010) (describing challenges to congressional oversight stemming from secrecy).

161. See Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 FORDHAM L. REV. 1777, 1818–20 (2013) (explaining why the legislature is strategically disadvantaged in national security matters compared with the executive).

162. See *id.* at 1825–26 (“[L]egislators can derive scant electoral rewards from associating themselves with particular counterterrorism policy . . .”).

163. See *id.* at 1826 (“Since counterterrorism legislation provides small upside value and enormous downside risk, legislators are best served, electorally, by ensuring that any catastrophe cannot be laid at their feet through voting in . . . a ‘pro-security’ direction.”).

164. See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 12 (2008) (noting that in both the United States and Britain, legislators lacking full information about the nature and scope of the threat will “err on the side of caution”); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 92 (2012) (“Members [of congressional intelligence committees] tend not to like responsibility for national security decisions.”); MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL*

especially so for intelligence-collection policies imposing disproportionate impact on certain segments of society, such as minorities or noncitizens, whose interests carry little electoral weight with legislators.<sup>165</sup> Expectations that Congress will take action in this area are thus likely to be disappointed.

And if Congress is so impotent with respect to the oversight of the Guidelines, what would prompt either Congress or the executive branch to impose the types of restrictions proposed here? While I do not want to minimize the challenges of prompting government actors to impose restrictions on domestic security measures, opportunities for reform do arise. My hope is to generate a menu of possible options, so that when such an opportunity presents itself, it may be exploited.

These opportunities will likely arise out of one of two possible exogenous events. First, there could be an event that triggers widespread public concern about the FBI's activities and places sufficient pressure on Congress, or the Attorney General, or the President that they have to take some action. After all, the revelations about the activities of COINTELPRO are exactly what brought the Attorney General's Guidelines into existence.<sup>166</sup> And the recent revelations regarding the NSA promise to prompt a series of policy changes. The second possible event is a judicial decision invalidating a particular FBI policy. Such a decision is more likely to lead to modifications to particular practices—such as we saw when a court rejected as unconstitutional the provision that barred National Security Letter recipients from disclosing to anyone that they had received one<sup>167</sup>—rather than to a broad procedural framework. But like a scandal, judicial invalidation of certain FBI activities could spur a broader reform effort.

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ETHICS IN AN AGE OF TERROR 58 (2004) (“[T]he political costs of underreaction are always going to be higher than the costs of overreaction.”); ZEGART, *supra* note 160, at 35 (“What member would be willing to risk the charge that his oversight efforts ended up weakening U.S. defense capabilities or jeopardizing American national security interest?”); Berman, *supra* note 161, at 1825–26 (explaining that legislators “have good reason” to defer to the executive on national security matters).

165. See COLE, *supra* note 138, at 88–179 (providing examples).

166. See *supra* note 31 and accompanying text.

167. See *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876–81 (2d Cir. 2008) (concluding the nondisclosure requirement could not survive strict scrutiny).

Given the appropriate political environment, there are at least three reasons to think that the imposition of a framework like the one suggested here is not entirely implausible. As an initial matter, there is the FBI's concern over legitimacy. The Bureau's ability to succeed in its mission requires constructive relationships with the communities in which it operates.<sup>168</sup> Yet its aggressive intelligence-collection tactics—and their concentration in Muslim communities—has alienated many members of that community, raised suspicion and distrust of the Bureau in some quarters, and undermined cooperative relationships.<sup>169</sup> Improved governance is thus not the only benefit that would flow from implementing APA-like procedures; institutionalizing rulemaking procedures would also yield improvements in community relations, public perceptions of legitimacy, and consequently, FBI effectiveness. In addition, government documents and scholarly commentary are replete with arguments about the value of process in legitimating government action.<sup>170</sup> The FBI's practice of reaching out to nongovernmental organizations in anticipation of issuing new intelligence-collection rules indicates an awareness of the benefits of generating the support of outside stakeholders.<sup>171</sup> Subjecting itself to a set of procedural rules would go far in this regard. And finally, none of the proposals here are substantive. They do not call upon the FBI to cede any particular powers, or to discontinue existing policy. Indeed, they acknowledge the Attorney General's and FBI's role in generating the rules by which the FBI operates, so long as they can show

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168. See, e.g., BERMAN, *supra* note 32, at 34–35 (explaining the importance of community-provided information in FBI counterterrorism efforts).

169. See, e.g., CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, TARGETED & ENTRAPPED: MANUFACTURING THE “HOMEGROWN THREAT” IN THE UNITED STATES 9–18 (2011) (describing some of the FBI's post-9/11 information gathering tactics that have attracted scrutiny and criticism).

170. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES 15 (2007) [hereinafter OMB BULL.] (“As it does for legislative rules, providing pre-adopting opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.”).

171. See, e.g., BERMAN, *supra* note 32, at 43 n.286 (“The Justice Department gave the illusion, though without any substance, of consultation with stakeholders before implementing the current guidelines.”).

both that changes in the FBI's authority are needed and that the proposed changes are reasonable ones. And finally, when it comes to imposing limits on government actors, broad procedural frameworks often face less opposition than substantive policy changes.<sup>172</sup>

A second preliminary note concerns the role of the APA. While several of the proposed reforms are inspired by provisions of the APA, this Article does not argue that the APA's procedural rules apply to the FBI as a matter of binding law.<sup>173</sup> In fact, it does not take a position with respect to whether the Guidelines or the DIOG constitute legislative rules subject to APA requirements, or whether they represent informal guidance documents or "rules of agency organization, procedure, or practice," which are explicitly exempt from many of the APA's constraints.<sup>174</sup> Instead, the Article looks to the way the APA and other sources of administrative law address particular concerns and argues that intelligence-collection governance would benefit from implementing procedures inspired the animating principles behind these sources of administrative law.

The idea of imposing a governance framework on the development of rules in the absence of a statutory requirement to do so is not a novel one. The Office of Management and Budget (OMB)—part of the Executive Office of the President tasked with overseeing the regulatory decisions of administrative agencies<sup>175</sup>—in its *Final Bulletin for Agency Good Guidance Practices* "establishes policies and procedures for the development, issuance, and use of significant guidance

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172. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2323 (2006) ("[S]ometimes broad design choices are easier to impose by fiat than are specific policies.").

173. Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 500-706 (2012)).

174. 5 U.S.C. § (b)(3)(A) (2012); see also Rascoff, *supra* note 6, at 644-46 (comparing public participation in the formation of intelligence guidelines with public participation in other agency guidelines).

175. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993) ("Coordinated review of agency rulemaking is necessary . . . . The Office of Management and Budget (OMB) shall carry out that review function.").

documents.”<sup>176</sup> These policies are designed to increase the quality, transparency, consistency, fairness, and accountability of agency guidance practices.<sup>177</sup> To that end, the Bulletin suggests that agencies engage in “procedures similar to APA notice-and-comment requirements” for some types of guidance documents in order to “increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.”<sup>178</sup> Similar language appears in the Department of Homeland Security’s (DHS) official guidance on preparing Privacy Impact Assessments (PIAs),<sup>179</sup> which all agencies—including the FBI—must generate for any substantially revised or new Information Technology System that collects, maintains, or disseminates personally identifiable information from or about members of the public.<sup>180</sup> According to the DHS Guidance, requiring agencies to follow procedures designed to call attention to issues of legitimacy “demonstrates to the public and to Congress” that the new systems “have consciously incorporated privacy protections.”<sup>181</sup> In other words, both OMB and DHS policy takes the position that procedural constraints result in both better substantive rules and an increase in the perceived legitimacy of those rules, even when those constraints are self-imposed rather than statutorily required.

A final preliminary note: implementing these reforms would not be costless. As an initial matter, any increase in the onerousness of modifying the Guidelines creates pressure to shift

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176. OMB BULL., *supra* note 170, at 1.

177. *See id.* (“This Bulletin is intended to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them.”).

178. *Id.* at 15.

179. *See* U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENTS: THE PRIVACY OFFICE OFFICIAL GUIDANCE 4 (2010) [hereinafter PIA GUIDANCE] (“The PIA is a document that helps the public understand what information the Department is collecting . . . . This document builds trust between the public and the Department by increasing transparency of the Department’s systems and goals.”).

180. *See* E-Government Act of 2002, Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921–23 (codified in scattered sections of 44 U.S.C.).

181. PIA GUIDANCE, *supra* note 179, at 1.

policy-making decisions to a level where these rules do not apply, making accountability even more elusive. For this reason, any efforts at reform would have to apply to changes to the DIOG as well as the Guidelines, and consider ways to prevent further devolution of decision-making responsibility. These suggested changes would also, of course, consume time and personnel not currently devoted to the Guidelines. But these costs need not be prohibitive. As an initial matter, the costs themselves would impose a potentially valuable barrier to arbitrary or unnecessary changes. Only when changes are in fact necessary will the Attorney General or FBI Director undertake the amendment process. Moreover, the Guidelines and DIOG are modified so infrequently that the need to allocate additional resources to the project would be rare. If implemented effectively, these rare additional costs would be justified by their benefits.

### *B. Reason-Giving as Constraint*

Courts and commentators have raised a litany of reasons why extending broad discretion to administrative agencies can be problematic from a governance standpoint—reasons that apply with equal force to the FBI’s exercise of intelligence-collection powers. Agency strategy for channeling discretion, largely dominated by reason-giving requirements, is therefore an important source of ideas for addressing that concern in the context of the Guidelines regime.

#### *1. The Downsides of Discretion*

Consigning significant policy choices to administrative agencies operating with broad discretion undermines the constitutional mechanism of promoting both accountability and sound decision making. When it comes to legislation, the Constitution seeks to avoid these concerns by subjecting legislative decisions to the deliberation and contestation that serves as a bulwark against faction and tyranny.<sup>182</sup> Freed from

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182. See THE FEDERALIST NOS. 10, 51 (James Madison) (describing how the



the requirements of Article 1, § 7,<sup>183</sup> however, agency decision makers might engage in a wise and thoughtful decision-making process; but they are equally capable of making poor choices, opting for policies that are uninformed, arbitrary, irrational, self-interested, or otherwise untethered to the public interest.<sup>184</sup> Absent some alternative check on the way in which discretion is exercised, there is therefore no reason to expect an agency's decision-making process to result in the best outcome—however that is defined.

Similarly, because granting decision-making authority to bureaucrats not subject to electoral forces that constrain other policymakers removes those decisions from the field of political battle, Congress both eludes responsibility for making difficult policymaking decisions and insulates the policies themselves from electoral backlash.<sup>185</sup> Broad agency discretion thus undermines the very nature of participatory democracy and raises concerns about political accountability for critical decisions of national policy.<sup>186</sup>

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Constitution establishes a government conducive to liberty).

183. U.S. CONST. art. 1, § 7, cl. 2.

184. See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 336 (1999) (“[Congress’s] lawmaking power . . . is designed to ensure the combination of deliberation and accountability that comes from saying that government power cannot be brought to bear on individuals unless diverse representatives, from diverse places, have managed to agree on the details.”).

185. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545–46 (2000) (“[D]espite their considerable discretionary power to impact individual liberty and property rights, allocate benefits and burdens, and shape virtually every sector of the economy, agencies are not directly accountable to the electorate.”). *But see* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 783–90 (1999) (outlining ways in which agencies are held democratically accountable).

186. See, e.g., *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 426 n.23 (2005) (“Bicameralism and presentment form an essential component of the constitutional structure, designed to check factional influence, promote caution and deliberation, and provoke public discussion.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) (“Over the past century, the powers and responsibilities of administrative agencies have grown to an extent that calls into question the

And while the Supreme Court's decisions limiting legislative delegations to agencies were confined to the New Deal-era,<sup>187</sup> so long as Congress sets down an "intelligible principle" for the agency to follow,<sup>188</sup> many of the procedural rules developed in the administrative state serve to cabin discretion.<sup>189</sup> Thus, while agency decision makers continue to enjoy significant leeway, the threat to democracy and accountability posed by agency discretion has not gone unaddressed.

## 2. Channeling Discretion into Reasoned Decision-Making

The administrative state has grappled with legitimizing broad delegations throughout its history.<sup>190</sup> Over the years, reasoned decision making emerged as an important means of

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constitutional legitimacy of the modern federal bureaucracy."); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 79 N.Y.U. L. REV. 437, 440 (2003) ("While application of the traditional model might ensure that agencies acted within the bounds of their statutory powers, those bounds were so wide as to give agencies vast discretionary powers, creating a palpable democracy deficit and the threat of arbitrary power.").

187. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) ("We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) (invalidating portions of federal legislation for excessive delegation of authority to the executive).

188. *Am. Trucking Ass'ns*, 531 U.S. at 472 ("[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

189. See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 958 (2007) (arguing that *Chenery's* requirement that an agency provide an adequate basis for a rule "operates both to bolster the political accountability of the agency's action and to prevent arbitrariness in the agency's exercise of its discretion"). See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that many judicial rules regarding interpreting the scope of agency power are designed to address the excessive delegation concern).

190. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469-92 (2003) (arguing that initial concerns about the administrative state's role in the constitutional structure focused, first and foremost, on the dangers of arbitrary decision making and that such concerns have persisted).

limiting discretion and improving the quality of agency policymaking by requiring agencies to justify their actions.<sup>191</sup> And while these reason-giving requirements exist in part to facilitate judicial review of agency action, they also have the intrinsic value of promoting agency experts' exercise of their discretion in a thoughtful, principled fashion.<sup>192</sup> These requirements come from two sources: the Administrative Procedure Act<sup>193</sup> supplemented by the requirement from *SEC v. Chenery Corp. (Chenery II)*<sup>194</sup> that agency actions are valid only if they can be upheld according to the rationale given by the agency at the time the decision was made.<sup>195</sup>

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191. See, e.g., *id.* at 528 (noting the emergence of reasoned decision making and the “hard look” doctrine); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1777–79 (2007) (summarizing the history and rationale behind reasoned decision-making requirements in administrative law); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1779–80 (1975) (describing judicial insistence that agencies engage in reasoned decision making); see also *INS v. Chadha*, 462 U.S. 919, 951, 952 n.16 (1983) (noting that the Constitution itself insists that legislation be subjected to deliberation and that the executive’s discretion in carrying out legislative mandates is limited by the scope of the legislative delegation).

192. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (holding that the APA’s arbitrary and capricious test requires reasoned decision making); see also, e.g., *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996) (“[W]e have before us here a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation . . .”); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 79 nn.226–27 (1998) (noting that the APA facilitates deliberative agency decisions); Stewart, *supra* note 191, at 1670 (noting that APA procedures are “designed to promote the accuracy, rationality, and reviewability of agency application of legislative directives”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 60–61 (1985) (“Much of modern administrative law is a means of serving the original purposes of the nondelegation doctrine, and of promoting Madisonian goals, without invalidating regulatory statutes or relying on traditional conceptions of private property.”).

193. See Administrative Procedure Act, § 4, 5 U.S.C. § 553(b)–(c) (2012) (explaining the notice-and-comment requirements of rulemaking under the APA).

194. 332 U.S. 194 (1947).

195. See *id.* at 196 (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the

The APA procedures for informal rulemaking employ two strategies for ensuring that agencies can engage in a process of reasoned decision making.<sup>196</sup> First, the APA has a notice requirement, which is designed to broaden the range of information and perspectives the agency must take into account<sup>197</sup> in order to promote more informed decision making.<sup>198</sup> To ensure these goals are met, the APA demands that an agency's notice must "fairly apprise interested persons of the subjects and issues" at stake whenever they intend to engage in a rulemaking<sup>199</sup> and indicate the rulemaking's legal and factual basis as well as its policy purpose.<sup>200</sup> Thus, the APA aims to ensure that agencies have before them all relevant information when making policy decisions.

The second element of the APA's strategy for channeling discretion is the obligation that agencies issue a public statement when announcing a final rule.<sup>201</sup> Just as written judicial opinions demonstrate that a court's decision is supported by facts, law, and

agency."); Stack, *supra* note 189, at 956 ("The [*Chenery*] principle now applies in review of every form of agency action, from agency rulemaking to informal adjudication, as well as in review of all manner of deficiencies in agency fact-finding and insufficient statements of reasons . . .").

196. The APA lays down procedures for two forms of agency action, rulemaking and adjudication, each of which may be pursued through either formal or informal proceedings. 5 U.S.C. §§ 553, 554, 556, 557.

197. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) ("[N]otice improves the quality of agency rulemaking by ensuring that agency regulations will be 'tested by exposure to diverse public comment.'" (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979))).

198. *Id.*; *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir. 1982) ("The process of notice and comment rulemaking is . . . to be a process of reasoned decision-making.").

199. *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002).

200. Administrative Procedure Act, § 4, 5 U.S.C. § 553 (2012); see also *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977) (noting that scientific data used in an agency's rulemaking analysis should be disclosed during the notice process); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of . . . data . . . known only to the agency.").

201. See *id.* § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

precedent, these statements of purpose serve to demonstrate that agency officials considered all of the information before them and engaged in a “process of reasoned decision-making.”<sup>202</sup> To that end, the statement must include the rule’s basis and purpose as well as a justification of the decisions that led to its adoption, and it must “indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did.”<sup>203</sup> Moreover, under *Chenery II*, only if the purpose provided by the agency constitutes a valid justification for the decision will it be legitimate.<sup>204</sup>

Rules should similarly dictate that the Attorney General or FBI Director provide notice explaining the reasons for any proposed changes to the Guidelines or the DIOG and a justification for the ultimate decisions that demonstrates that all of the relevant available information was taken into consideration and that there was a valid basis for the change. The distinctions between traditional administrative law and national security administration require, however, some adjustments to the usual procedural design. While most agency notices of proposed rulemaking are part of the public record and freely available for wide dissemination, the classified nature of much of the FBI’s activity and some of the rules contained in the DIOG requires that the dissemination of the notice and justification will often be limited to individuals with the necessary security clearance.<sup>205</sup> Imagine, for example, a proposed rule-change designed to modify surveillance operations to make them less likely to be detected by the target. Publicizing that intention and

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202. *Conn. Light & Power Co.*, 673 F.2d at 528.

203. *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987); *see also* S. REP. NO. 752-79, pt. IV(4)(b) (1945) (“The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.”).

204. *See* Stack, *supra* note 189, at 956 (“The *Chenery* principle makes the validity of agency action depend upon the validity of contemporaneous agency reason-giving.”).

205. *See* 5 U.S.C. § 552(b)(7) (2012) (exempting from public disclosure obligations records or information that could reasonably disclose confidential sources, law enforcement procedures or techniques, or lead to circumvention of the law).

the resulting rule might undermine entirely the purpose of the revision.

While the effect of limited dissemination of notice and justification will not be as robust as a process that is entirely transparent, limits on dissemination need not render written notice and justification worthless. In addressing concerns over excessive discretion, the crucial elements of the relevant administrative strategy are (1) that the notice broaden the range of information and perspectives that the agency considers and (2) that the written justification demonstrates that the agency's decision enjoys sufficient factual and legal support. To accomplish this, the notice and justification must go to individuals or entities whose participation would serve to expand the information and perspectives available to the decision makers and whose scrutiny of the ultimate justification would encourage the adoption of rules supported by reasoned argument and available evidence.

Candidates to receive this notice and justification are both inside and outside the Justice Department. The Justice Department's Civil Rights Division and Office of Privacy and Civil Liberties as well as the National Security Division could be invited to comment. Similarly, other members of the intelligence community, such as the Office of the Director of National Intelligence should be involved. But the Privacy and Civil Liberties Oversight Board (PCLOB) should contribute its perspective as well. This is not meant to be an exhaustive list of possibilities. Nor will each of these institutions necessarily take on the role of civil-liberties champion or do so effectively.<sup>206</sup> For now, it is enough to say that so long as they have access to the relevant information and bring a perspective different from the one within the Attorney General's office or the FBI, their participation would help to channel discretion in a productive direction.

The 2008 modifications to the Guidelines provide a concrete example of how the requirement that the Attorney General provide reasons justifying amendments could impact the process.

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206. Neither the Justice Department's Office of Privacy and Civil Liberties nor the Civil Rights Division have been particularly successful in counteracting the policy preferences of the FBI.

One proffered justification for amending the Guidelines in 2008 was that they were necessary to provide tools the FBI needed to support its preventive role.<sup>207</sup> But the then-existing Guidelines already described prevention as the FBI's "central mission," and included several provisions added in 2002 that were aimed at empowering and enabling this aspect of the FBI's activities.<sup>208</sup> In asserting that the 2008 Guidelines were necessary for terrorism prevention, the Bureau had no obligation to explain how its activities were unacceptably constrained by the rules that were then in effect, which were drafted for the same purpose.<sup>209</sup> Under these proposed rules, the Attorney General would have had to make that case, allowing those entities that were notified the opportunity to question the need for changes and possibly even make those concerns public.<sup>210</sup> And if the Attorney General could not do so satisfactorily, it would have made altering the Guidelines a much more controversial proposition.

Requiring written justification of the final rules also might have had an impact on the 2008 revisions. On the one hand, the Justice Department downplayed the extent to which the Guidelines expanded the FBI's powers. The new Guidelines were characterized as merely consolidating several existing sets of rules without making substantive changes.<sup>211</sup> In fact, Justice Department officials asserted that assessments were nothing

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207. See Mukasey Speech, *supra* note 83 (explaining how the new Attorney General Guidelines would help to transform the FBI into an "elite national security organization" by shifting focus from "investigating crimes after they occur to collecting the intelligence necessary to detect and prevent attacks before they occur").

208. ASHCROFT GUIDELINES, *supra* note 36, at 11.

209. See *supra* Part II.B.

210. See *supra* Part III.B.

211. See *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 8 (2008) (statement of Robert S. Mueller, Director, FBI) ("[T]he new guidelines are not designed to give the FBI any broad new authorities."); Mukasey Speech, *supra* note 83 ("The new consolidated guidelines will, in short, integrate more completely and harmonize the standards that apply to the FBI's activities."); Press Release, U.S. Dep't of Justice, Briefing with Department Officials on Consolidated Attorney General Guidelines (Sept. 12, 2008) [hereinafter DOJ Briefing] ("[O]n the national security side, it was a new concept to have what were called 'threat assessments . . . . That was new in 2003; this is not anything different now.").

new, and that under the pre-2008 Guidelines it could already conduct assessments using pretext interviews, physical surveillance, and the tasking of informants.<sup>212</sup> But there was no “assessment” level in the pre-2008 Guidelines.<sup>213</sup> Indeed, they explicitly prohibited both pretext interviews and physical surveillance until a preliminary inquiry—a predicated investigation—had been opened.<sup>214</sup> “Threat assessments” were permitted in some contexts under the 2003 National Security Investigation Guidelines, but by the FBI’s own admission, some of the techniques available in today’s assessments were prohibited in that context.<sup>215</sup> Had the Attorney General or FBI Director been required to explain exactly what changes were being made and provide the rationale for the new rules, the creation of assessments in their current form—the central innovation of the 2008 Guidelines—might have met with more resistance. In particular, the ways in which assessments expanded the FBI’s powers, for example permitting use of several investigative techniques historically reserved for predicated investigations, would have become clear and consequently would have been subject to closer examination. As it was, the Attorney General could simply disclaim the idea that new powers were being granted without having to substantiate that statement.

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212. See DOJ Briefing, *supra* note 211

And the changed techniques are the physical surveillance, which had been available if you were investigating under general crimes, but not under national security; recruiting and tasking of sources, which again had been available if it was general crimes, but not national security; and then the pretext interviews.

213. *Cf. id.* (“[T]he decision was reached in 2003 that there needed to be some level of activity before a formal investigation [to] allow the FBI to be proactive. . . . What has changed are some of the techniques that are available in the assessment level.”).

214. See ASHCROFT GUIDELINES, *supra* note 36, § II.B.6 (listing those investigative techniques available “without any prior authorization from a supervisory agent”).

215. U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION § II.A (2003), <http://www.fas.org/irp/agency/doj/fbi/nsiguilines.pdf> (listing activities available at the threat assessment stage without opening an investigation, not including pretext interviews or physical surveillance).



In addition to any substantive differences to the 2008 Guidelines that would have resulted, a notice and justification requirement would have provided other concrete benefits. First, it would have guaranteed that decision makers had the benefit of additional perspectives while they were still developing the policy. It is much easier—and therefore more likely—for policymakers to incorporate alternative perspectives into policy still being developed than once that policy is nearing its final form.<sup>216</sup> Second, obligating the Attorney General to address the information that was submitted to him and to explain in writing why the Guidelines should be implemented in his chosen format would force him to digest that information and therefore might actually result in a more informed decision.<sup>217</sup> Third, it would have added additional legitimacy to the final product if<sup>218</sup> the 2008 Guidelines development had been based on specific, reasoned arguments regarding the need for modifications.

### *C. Participatory Policymaking*

Nowhere does the Constitution provide for the existence of administrative agencies, much less for specific means of ensuring that their actions do not infringe on fundamental rights or that they are subject to democratic accountability.<sup>219</sup> The administrative state has grappled with this “democracy deficit” almost since its inception.<sup>220</sup> One means employed to address it has been through increasing opportunities for broad participation in agency decision making. Designing ways to employ these

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216. See Bressman, *supra* note 190, at 542 (explaining that notice-and-comment rulemaking facilitates prospective policymaking including broader perspectives).

217. See *supra* notes 190–92 and accompanying text.

218. See Bressman, *supra* note 190, at 542–43 (arguing that notice-and-comment rulemaking leads to a decrease in arbitrariness because of the input from affected parties).

219. See *id.* at 462 (describing the struggle to reconcile the administrative state with our constitutional structure).

220. See *id.* (explaining the constant attempt to square the administrative state with a constitutional structure that presumes the accountability of policymakers).

strategies for increased participation could lend increased democratic legitimacy to the intelligence-collection realm.

### *1. Administrative Agencies' Democracy Deficit*

Administrative agencies initially were viewed either as entities merely implementing congressional will or as bastions of expertise, making decisions on the basis of scientific or technical knowledge.<sup>221</sup> By the latter half of the twentieth century, however, it had become clear that many congressional delegations are vague and that many agency decisions cannot be resolved definitively through substantive expertise.<sup>222</sup> Instead, such decisions often rest on subjective judgments about policy priorities, the value of human well-being, and who should bear the costs of inevitable risks. The Guidelines are thus not alone in their undemocratic nature. This democracy deficit “has spawned an extensive literature concerning the legitimacy of the administrative state.”<sup>223</sup> Indeed, Professor Jody Freeman has suggested that “[a]dministrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy”<sup>224</sup> based on the unaccountability of agency officials, a lack of transparency, and limited opportunities for public participation.<sup>225</sup>

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221. *See id.* at 470–74 (explaining the early models of administrative agencies); Stewart, *supra* note 186, at 1671–75 (discussing “the Traditional Model” of American administrative law); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977) (discussing the role of scientific data in an agency’s rulemaking analysis).

222. *See* Stewart, *supra* note 186, at 440–41 (discussing the New Deal regulatory regime which led to the enactment of the Administrative Procedure Act).

223. David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 653 (2006).

224. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 (2000).

225. *See, e.g.*, Croley, *supra* note 192, at 27 (describing the administrative process as the “proverbial black box that mysteriously translates legislative inputs into regulatory outcomes”); *id.* at 97 (asserting that the administrative state does not “encourage widespread participation”).

## 2. *Increasing Democracy, Increasing Participation*

One answer to the democracy deficit implemented by the administrative state has been to boost the democratic pedigree of agency rules by insisting on broad participation.<sup>226</sup> A variety of procedural and doctrinal rules in the administrative state promote the broad participation of interested stakeholders. As with limits on discretion, the informal rulemaking process set out in the APA promotes participation through the implementation of strategies that can help improve the democratic pedigree of the Guidelines and the DIOG.

The first element of the strategy for improved democratic legitimacy is that the notice of proposed rulemaking itself must be provided in such a way as to facilitate meaningful participation,<sup>227</sup> such as including the legal and factual basis for the proposed rule<sup>228</sup> and the data on which the agency relied in making its proposal.<sup>229</sup> These mandates ensure that stakeholders who want to participate have enough information to permit them to raise objections, provide additional information, or offer alternative perspectives. The notice, therefore, not only alerts diverse interested parties that there is a decision being contemplated for which they might want to provide input, but also ensures that input can be meaningful. Second, the agency must actually consider this input. A final rule's statement of basis and purpose must "indicate the major issues of policy that

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226. See Stewart, *supra* note 186, at 444 (stating that various methods of "[p]ublic participation . . . have become central foundations of administrative law and practice"); Schuck, *supra* note 185, at 781 ("Today, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective.").

227. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 552 (D.C. Cir. 1983) (defining a situation where the EPA's regulations were struck down by the court because the notice of proposed rulemaking was insufficient to put the public fully on notice).

228. See *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (stating that an agency must give notice to apprise interested parties of the "subjects and issues before the Agency").

229. See *United States v. Nova Scotia Food Prods., Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977) (explaining that an agency that promulgates a rule based on scientific data must make that data available to the public during the comment period).

were raised in the proceedings and explain why the agency decided to respond to these issues as it did.”<sup>230</sup> Thus any failure to take into account relevant comments can invalidate the rule. This risk of invalidation discourages the development of rules that do not take all relevant perspectives into consideration.<sup>231</sup>

Again, these requirements will also result in rules that enjoy more democratic legitimacy than a rule prepared without such input. Affected parties are more likely to view agency decisions as legitimate if the process provides for a meaningful opportunity for presentation and consideration of their views. And if the rules are considered legitimate, the FBI will be much more likely to enjoy the full support and cooperation of the communities it is policing, leading to more effective intelligence collection.

Devising rulemaking mechanisms that are inclusive and allow for meaningful input from interested stakeholders presents a challenge when it comes to the domestic-intelligence regime because secrecy presents a formidable barrier to inclusion.<sup>232</sup> Even with respect to rules that are themselves public, such as the Guidelines, robust public participation in the process is impractical because there is insufficient public information about how those rules are implemented. The public may know, for example, that FBI agents are permitted to attend any religious service that is open to the public.<sup>233</sup> But it will not know how

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230. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987); *see also* S. DOC. NO. 79-248, at 20 (2d Sess. 1946) (“The statement of the ‘basis and purpose’ of rules . . . should be fully explanatory of the complete factual and legal basis as well as the object or objects sought.”).

231. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 489 (1999) (discussing how the rulemaking process allows individuals to advance perspectives while others scrutinize those perspectives); *see also* *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir. 1982) (“One particularly important component of the reasoning process [in rulemaking] is the opportunity for interested parties to participate in a meaningful way. . .”).

232. *See, e.g.*, Kerry E. Rodgers, *The Limits of Collaborative Governance: Homeland Security and Environmental Protection at U.S. Ports*, 25 VA. ENVTL. L.J. 157, 160–65 (2007) (noting secrecy of policy, lack of publicly available information, and difficulty in identifying stakeholders as barriers to collaborative governance in the security context).

233. *See* DIOG, *supra* note 12, § 4.2.2 (explaining that the FBI may investigate activities or persons so long as it does not infringe on the free exercise of religion guaranteed in the First Amendment).

often agents engage in this activity, what information they collect, or what is done with the information. Rules that are themselves secret, such as portions of the DIOG, present an even more formidable challenge. To be sure, a strong case can be made that the existing levels of secrecy—with respect to both the rules and the policy implementation—are excessive.<sup>234</sup> Unless and until that secrecy is reduced, however, intelligence-collection policies will struggle to gain the benefits that inhere in broadly inclusive agency rulemaking.

Yet, the Justice Department clearly hopes to realize at least some of the benefits of democratic input when it comes to the Guidelines. Recall the Department's 2008 briefing of relevant congressional committees and other interested parties prior to the Guidelines' adoption.<sup>235</sup> The Bureau did the same thing in 2001 when it revised the DIOG.<sup>236</sup> These meetings allowed the FBI to characterize these documents as rules developed with input from an array of stakeholders and thus deserving of the enhanced legitimacy that broad participation confers.<sup>237</sup> So even if the consultations themselves failed to result in meaningful participation beyond the Justice Department,<sup>238</sup> they indicate recognition that agency decision makers desire (at least the appearance of) an inclusive process.

The benefits of participatory decision making require a more robust process than the one undertaken in 2008. Recognizing that

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234. See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. POL'Y REV. 399, 415–16 (describing the legitimacy of “national security secrecy” and problems of “bureaucratic secrecy”).

235. See DOJ Briefing, *supra* note 211 (describing the way in which the FBI and DOJ included relevant congressional committees in discussions about consolidating the multiple sets of guidelines into one).

236. See Rascoff, *supra* note 6, at 644–48 (explaining that the FBI consulted various groups before the new Attorney General's Guidelines were issued); Savage, *supra* note 89 (noting that the FBI consulted the ACLU about the new Guidelines prior to their issuance).

237. *Supra* note 236 and accompanying text; see Elisebeth Collins Cook, Assistant Attorney Gen. & Valerie Caproni, FBI Gen. Counsel, Joint Statement to the Senate Select Committee on Intelligence: New Attorney General Guidelines for Domestic Intelligence (Sept. 23, 2008), <http://www.justice.gov/olp/pdf/ag-domestic-intel-guidelines.pdf> (discussing the revisions).

238. See *infra* notes 329–30.

the public at large will not be able to play a meaningful role, a second-best measure is to seek out proxies for points of view currently not formally represented in the process of developing the Guidelines and the DIOG. An example comes from Professors DeShazo and Freeman's empirical case study of the licensing practices of the Federal Energy Regulatory Commission.<sup>239</sup> In the amended Electric Consumers Protection Act of 1986,<sup>240</sup> "Congress [required the Commission] to consult with fish and wildlife agencies prior to issuing licenses [and demanded] that nondevelopmental values be given 'equal consideration' with power concerns."<sup>241</sup> DeShazo and Freeman explain that this amendment was specifically intended to strengthen the role of resource agencies in the Federal Energy Regulatory Commission's decision-making process<sup>242</sup> and that it did in fact have the desired effect.<sup>243</sup>

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239. See J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221 (2005) ("We argue . . . agencies can be prompted to take their secondary missions more seriously when Congress enhances interagency lobbying by increasing the power of *other* agencies, which derive relevant expertise and interests from their own statutory mandates, to lobby the implementing agency." (emphasis added)); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T'L L. REV. 1, 5–6 (2009) (suggesting that in DeShazo & Freeman's model, "the impact of the comments will be based primarily on their persuasiveness or political import, and on the pressure they may place on the decision-making agency to develop better measures of performance on secondary goals").

240. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (codified as amended at 16 U.S.C. §§ 7977b, 823b (2012)).

241. DeShazo & Freeman, *supra* note 239, at 2253.

242. The Electric Consumers Protection Act (ECPA) required the Federal Energy Regulatory Commission (FERC), rather than the license applicant, to consult with state and federal resource agencies before submitting their applications to FERC, required that FERC establish a dispute resolution process to mediate its disagreements with other agencies, demanded that FERC provide an explanation whenever it chose not to implement the recommendations of other agencies, and forced FERC to engage in monitoring to ensure that dam operators complied with any imposed environmental conditions. See *id.* at 2225–26 (explaining the added obligations placed on the FERC by the ECPA).

243. See *id.* at 2226–27, 2275–80, 2289 (discussing the purpose and effect of the amendment); Biber, *supra* note 239, at 43

DeShazo and Freeman show through statistical analysis that, after the passage of the statutory changes, FERC consistently imposed more environmental conditions on the approval or renewal of dam

A procedural regime governing the Guidelines' development could similarly mandate the participation of particular entities that will bring alternative perspectives to the discussion. Each of the entities noted as a potential recipient of notice and source of information could play this role. One especially promising candidate for this role is the Privacy and Civil Liberties Oversight Board (PCLOB), a statutorily created independent agency charged with ensuring that privacy and civil liberties concerns are considered in the development and implementation of laws, regulations, and policies related to terrorism.<sup>244</sup> The PCLOB took several years to get off the ground.<sup>245</sup> In the wake of recent revelations regarding NSA surveillance, however, it has demonstrated its ability to participate in the surveillance-policy conversation by insisting on a classified briefing about the controversial surveillance programs, meeting with the President,<sup>246</sup> holding a public hearing seeking concrete suggestions for improving the civil liberties protections included as part of those programs.<sup>247</sup> Based in part on what members of the Board learned at that meeting, the PCLOB issued a detailed report recommending specific changes to one existing surveillance program and anticipates issuing similar reports about other programs.<sup>248</sup> Whether any of the PCLOB's recommendations will

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licenses, and that this is correlated with increased participation in  
FERC licensing programs by fish and wildlife agencies.

244. See 42 U.S.C. § 2000(e) (2012) (establishing the PCLOB and mandating that it "review proposed legislation, regulations, and policies related to efforts to protect the Nation from terrorism").

245. See Phillip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 383 & nn.352-53 (2011) (explaining that the PCLOB was established under the Intelligence Reform and Terrorism Prevention Act of 2004 but became independent in 2007 by the Implementing Recommendations of the 9/11 Commission Act).

246. See Privacy & Civil Liberties Oversight Bd., Statement (June 20, 2013) (thanking the President for meeting with the board and for providing briefings) (on file with the Washington and Lee Law Review).

247. See generally PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., WORKSHOP REGARDING SURVEILLANCE PROGRAMS OPERATED PURSUANT TO SECTION 215 OF THE USA PATRIOT ACT AND SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2013), <http://www.pclob.gov/All%20Documents/July%209,%202013%20Workshop%20Transcript.pdf> (seeking suggestions about how to protect civil liberties in light of NSA surveillance programs).

248. See PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE

be adopted remains to be seen. But giving the Board an official role in the process in which the Guidelines and the DIOG are formulated would ensure that the civil liberties point of view is represented.

This participation could take one of several forms, ranging from an opportunity to express views to veto power.<sup>249</sup> If the requirement is modeled on the concept behind the participation requirements included in notice-and-comment rulemaking, then it will end up somewhere between these two extremes, with something like the following arrangement: The PCLOB would have the opportunity to submit its perspective; having received this input, the Attorney General or the FBI Director would be required to demonstrate that it was taken into consideration.

Finding ways to broaden the perspectives involved when it comes to the DIOG is particularly important. Currently, nobody outside the FBI must be involved. Ensuring that alternative perspectives are voiced and requiring that the final rules reflect, or explain why they fail to reflect, these perspectives may provide some of the benefits of the multilateral, deliberative process that truly pluralist rulemaking procedures promote.<sup>250</sup>

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TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (2013), <http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf> (analyzing the NSA's telephony metadata collection program and making twelve recommendations for reform); Alston, *supra* note 245, at 383 (explaining that the PCLOB's task is "to scrutinize privacy and civil liberties issues raised by national security policies and programs").

249. See generally Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies* (U. Mich. Pub. Law Research Paper No. 353, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2322797](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322797) (describing various mechanisms used in the administrative state to infuse agency action with a particular desired value or viewpoint).

250. Any entities involved in decision making regarding the Guidelines' or DIOG's contents also should be entitled to suggest a change to the rules in the same way that the public has the right to petition an agency to issue, modify, or rescind a rule. See 5 U.S.C. § 553(e) (2012) (providing this right).



### *D. Reconciling Conflicting Missions*

Administrative governance also has developed ways to address the challenges posed when agencies are responsible for pursuing multiple, competing goals. The FBI must carry out its mission of preventing security threats from manifesting while simultaneously protecting fundamental rights. The principles behind the administrative state's tactics for reconciling conflicting missions offer ideas about how to implement structural checks to prevent the FBI's intelligence-collection mission from overwhelming these other important interests.

#### *1. Juggling Mandates*

Conflict among agency missions comes about when one or more statutes issue mandates to a single agency that come into tension with one another or when government-wide mandates conflict with the primary goals of individual agencies subject to those mandates.<sup>251</sup> In one example, the National Park Service must protect the natural resources of the parks while simultaneously developing facilities for visitors.<sup>252</sup> Similarly, the Fish and Wildlife Service is required to manage wildlife refuges for the conservation of plants and animals while also providing for recreation on those refuges.<sup>253</sup> And the National Environmental Policy Act of 1969 (NEPA)<sup>254</sup> requires "all federal agencies" to minimize the environmental impacts of their actions.<sup>255</sup> For an agency focused on, for example, building roads

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251. DeShazo & Freeman, *supra* note 239, at 2220 ("Congress can create the potential for interstatutory conflicts where the agency must balance multiple and potentially competing obligations arising from different statutes usually passed at different times by different enacting majorities.").

252. See Biber, *supra* note 239, at 7–8 (pointing out that 16 U.S.C. § 1 and § 668dd(a)(2)-(3)(B) mandate that the Park Service and the Fish and Wildlife Service both conserve and allow for "compatible wildlife-dependent recreation").

253. *Id.* at 7.

254. National Environmental Policy Act of 1969, §§ 2–209, 42 U.S.C. §§ 4321–4347 (2012).

255. See *id.* (citing 42 U.S.C. § 4332(B), which requires all federal agencies to consider "unquantified environmental amenities and values" along with "economic and technical considerations," and § 4332(C), which requires federal

through environmentally sensitive territory, the charge to protect the environment can be at odds with this focus.

The FBI's mandate to protect civil liberties can be viewed as a "secondary" mission—one that frequently comes into tension with its primary mission of preventing security threats.<sup>256</sup> Studies show that an agency will focus on what it considers to be its primary mission, and it will shirk on performing "secondary" or less easily evaluated goals.<sup>257</sup> As a secondary mission, protection of civil liberties is, therefore, sure to be short-changed in favor of security in the same way that environmental concerns have so often gone under-addressed in favor of development or other economically profitable activities.

## 2. *Relieving the Tension Among Multiple Missions*

Fortunately, several administrative law strategies suggest ways to ensure that the Guidelines regime sufficiently takes into account civil liberties concerns as well as security concerns.<sup>258</sup> Though all of the options discussed below are possible paths to follow, the final two approaches discussed below seem particularly promising.

*Congress Reclaims Authority.* One option, of course, is for Congress simply to relieve an agency of responsibility for one of

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agencies to develop environmental impact statements for all major federal actions).

256. *See id.* at 3 (explaining the problem of multiple-goal agencies and the inevitability that these goals will conflict with each other).

257. *See id.* at 9 (citing studies and "predict[ing] that agencies faced with conflicting tasks will systematically overperform on the tasks that are easier to measure and have higher incentives, and underperform on the tasks that are harder to measure and have lower incentives.").

258. *See generally* Biber, *supra* note 239 (discussing various strategies agencies use to meet both primary goals and secondary goals). Other commentators have addressed the issue from a more specific angle. *See, e.g.,* DeShazo & Freeman, *supra* note 239, at 2253 (discussing efforts to ensure that the Federal Energy Regulatory Commission took environmental concerns into account when making licensing decisions); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009) (discussing the challenges that arise because prosecutors have the dual role of making both charging and adjudicatory decisions).

the competing goals, reclaiming that decision-making authority for itself.<sup>259</sup> Following revelations of civil liberties violations in the 1970s, Congress reclaimed some decision-making authority regarding the executive's surveillance powers by enacting the Foreign Intelligence Surveillance Act (FISA).<sup>260</sup> Or Congress could generate more piecemeal limitations, barring particular techniques that pose threats to civil liberties, or defining the circumstances under which such techniques could be used. Congress could, for example, statutorily reinstate the rule regarding the use of undercover agents to investigate First Amendment protected activities as it existed in the Guidelines in 2001, which required that the FBI have probable cause or a reason to believe a crime had been committed before sending an agent into the meetings of a religious or political group.<sup>261</sup>

Congress need not legislate to bring such changes about. If Congress wanted to alter particular investigative tactics, or even to pressure the Justice Department to adopt of its own volition the type of procedural framework suggested in this Article, it has an array of tools at its disposal to press for its desired policy change. Just the threat of legislation, so long as it is credible, can spur executive action. Recall that the original Attorney General's Guidelines were implemented to sap the momentum from Congress's efforts to enact a legislative charter for the FBI.<sup>262</sup> So long as the option of enacting an FBI charter remains a viable means for Congress to limit the Attorney General's discretion when it comes to FBI investigations, the threat of such legislation can be used to press for Congress's desired policy outcomes. Congress possesses carrots as well as sticks—its control over the FBI and Justice Department's budget also can impose a great

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259. See Biber, *supra* note 239, at 32–33 (describing the Wilderness Act, which eliminated several land-management agencies' power to create or eliminate wilderness areas).

260. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

261. See OFFICE OF THE ATTORNEY GEN., U.S. DEPT' OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 5 (2002) (discussing when the FBI may use undercover agents to investigate a religious organization).

262. See *supra* note 31 and accompanying text.

deal of pressure for policy change. Given the political economy of this policy area,<sup>263</sup> however, reliance on Congress to reconcile the tension between the FBI's security mission and civil liberties is not the most promising route.

*Separate Agency Functions.* Another way that the administrative state deals with competing mandates is to separate agency functions, assigning one mandate to another (new or pre-existing) agency and leaving each free to focus solely on its own particular mandate. The APA's requirement that investigative and adjudicative functions be separated from one another, thereby insulating some decision making from possibly biased influences,<sup>264</sup> is a way to implement this division-of-functions idea within a single agency. Professor Rachel Barkow has advocated, for example, for the separation of adjudicative and enforcement functions within prosecutors' offices.<sup>265</sup> And in the domestic investigative context, the United Kingdom offers an illustration. Rather than relying on one agency both to enforce criminal laws and to collect intelligence, those functions are divided between two different agencies.<sup>266</sup> The police forces investigate crimes and enforce criminal law, and MI5 collects intelligence.<sup>267</sup> Some commentators have argued that the United States should consider more closely the idea of spinning off the FBI's intelligence-collection function into an independent agency.<sup>268</sup> This alone would not, of course, address many of the concerns that the FBI's current powers raise. But it is possible that, recognizing the special threats to civil liberties that

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263. See *supra* notes 125–35 and accompanying text.

264. 5 U.S.C. § 554(d) (2012).

265. See Barkow, *supra* note 258, at 874 (“The problems posed by federal prosecutors’ combination of adjudicative and enforcement functions are the very same issues raised by the administrative state—and the solutions fit equally well in both settings.”).

266. See Jodie A. Kirshner, *U.S. and U.K. Approaches to the War on Terror: The Surveillance of Religious Worship*, 14 U. MIAMI INT’L & COMP. L. REV. 217, 232–33 (2006) (explaining MI5’s authority to function solely as an intelligence agency).

267. *Id.*

268. See RICHARD POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 172–97 (2005) (discussing the potential benefits and risks of a domestic intelligence agency).

intelligence collection poses, an agency designed solely for that purpose would be subjected to more stringent limits. Indeed, to prevent overreaching, MI5's expansive intelligence-collection powers do not include arrest or detention authority.<sup>269</sup> Thus powers that are necessary for successful anti-crime efforts could nonetheless be off-limits or curtailed for the intelligence agency.

This division-of-functions solution, whether within or between agencies, is also unlikely to garner much support in the Guidelines context. As an initial matter, congressional passivity with respect to intelligence oversight will undermine any legislative efforts in this direction. But more importantly, many of the reforms to the intelligence community's structure in the past decade-plus have been explicitly designed to *consolidate*, rather than separate, functions. Perceived information-sharing failures prior to 9/11 led to a chorus of calls for breaking down barriers both within and between agencies,<sup>270</sup> and both Congress and the executive branch have responded. The USA PATRIOT Act's removal of the so-called "wall," which barred coordination between law enforcement and intelligence officials, is perhaps the most well-known, though by no means the only, post-9/11 change along these lines.<sup>271</sup> Regardless of the salutary impact that separation of functions might have on civil liberties, the perceived security value of consolidation means that neither Congress nor the executive seems likely to reverse this trend.

*Generating Information.* More promising models of reconciling conflicting priorities are focused on agency culture, rather than agency structure. One mechanism for placing pressure on agency culture and prompting decision makers to consider factors that they otherwise might not give much weight is a requirement that an agency generate certain types of

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269. See Kirshner, *supra* note 266, at 232–33 (“To underscore its separation from law enforcement, MI5 cannot make arrests or detentions.”).

270. See THE 9/11 COMM’N REPORT, *supra* note 159, at 416–19 (advocating for a unified effort in information sharing across intelligence agencies); THE COMM’N ON INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 429–50 (2005), <http://www.gpo.gov/fdsys/pkg/GPO-WMD/pdf/GPO-WMD.pdf> (proposing ways to effectuate information sharing among intelligence agencies).

271. See, e.g., USA PATRIOT Act of 2001, Pub. L. No. 109-177, § 218, 120 Stat. 192 (codified in scattered sections of U.S.C.).

information. According to Professor Eric Biber, for example, “[a] major goal of NEPA was to force agencies that formerly had focused too heavily on primary missions such as highway construction, water-project development, or the extraction of natural resources, to also consider the impacts of their actions on the environment.”<sup>272</sup> To accomplish this goal, NEPA requires all federal agencies proposing actions that will “significantly [affect] the quality of the human environment” to prepare an Environmental Impact Statement and make copies available to the public for written comments.<sup>273</sup> These statements augment the information available to agencies, including the possible impacts on the environment, and proposals about how to avoid adverse environmental effects.<sup>274</sup> And commentators agree that NEPA has been successful in integrating environmental goals into agency decision making.<sup>275</sup> Similarly, all agencies—including the FBI—must generate a Privacy Impact Assessment (PIA) for “any substantially revised or new Information Technology System”<sup>276</sup> that collects, maintains, or disseminates personally identifiable information from or about members of the public.<sup>277</sup> And the Department of Homeland Security’s Office of Civil Rights and Civil Liberties generates Civil Rights and Civil Liberties Impact Assessments when required to do so by statute, when

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272. Biber, *supra* note 239, at 35 (citing, *inter alia*, William L. Andreen, *In Pursuit of NEPA’s Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 *IND. L.J.* 205, 205 (1989)).

273. 42 U.S.C. § 4332(C)(i) (2012).

274. See Joseph F.C. DiMento & Helen Ingram, *Science and Environmental Decision Making: The Potential Role of Environmental Impact Assessment in the Pursuit of Appropriate Information*, 45 *NAT. RES. J.* 283, 297–98 (2005) (proclaiming the importance of NEPA’s environmental impact analysis requirements to environmental law).

275. See Brian L. Cole et al., *Prospects for Health Impact Assessment in the United States: New and Improved Environmental Impact Assessment or Something Different?*, 29 *J. HEALTH POL. POL’Y & L.* 1153, 1168 (2004) (“NEPA was groundbreaking in that it forced agencies, regardless of their primary mission, to consider the environmental repercussions of their actions . . .”).

276. See The E-Government Act of 2002, Pub. L. No. 107-307, § 208, 116 Stat. 2899, 2921 (requiring agencies to prepare privacy impact statements in certain circumstances) (codified in scattered sections of 44 U.S.C.).

277. *Id.*

they are requested by Department officials, or when the Officer for Civil Rights and Civil Liberties believes it appropriate.<sup>278</sup>

Generating these assessments not only facilitates oversight efforts from the public, the legislature, or internal watchdogs, but—like requiring written justifications for changes—it has other benefits as well. As an initial matter, it forces agency decision makers to consciously consider the impact their proposed policy will have.<sup>279</sup> As one set of commentators put it, “a systematic review of potential impacts during the planning process can focus the attention of decision makers on issues that they would otherwise deem to be outside their agency’s mandate.”<sup>280</sup> Requiring that effort will, at times, lead to agency choices more solicitous of the issue on which the assessment is focused. Decision-makers might simply need to be made aware of the impact of their choices. In addition, they will recognize that the substance of the assessment will be subject to scrutiny and, perhaps, criticism that they would rather avoid. And by ensuring that this information is before the decision makers while they are engaged in the decision-making process—rather than after the fact—makes the exercise all the more likely to have an impact.<sup>281</sup> In addition, DHS’s Privacy Office Official Guidance on Privacy Impact Assessments notes that the use of PIAs “demonstrates to the public and to Congress” that the new systems “have consciously incorporated privacy protections,” contributing to the legitimacy of the systems.<sup>282</sup>

In order to ensure that the Attorney General or FBI Director consider explicitly specific “secondary” goals, he or she should be required to prepare a “Civil Liberties Impact Statement,”

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278. *Civil Rights and Civil Liberties Impact Assessments*, DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/civil-rights-civil-liberties-impact-assessments> (last visited Nov. 13, 2013) (on file with the Washington and Lee Law Review).

279. See DiMento & Ingram, *supra* note 274, at 297–98 (arguing that EIAs require “conscious deliberation about the environmental effects of a proposal”).

280. Cole et al., *supra* note 275, at 1176.

281. See *id.* (arguing that the EIA process works because it incorporates relevant knowledge at the point of decision making).

282. DEP’T HOMELAND SEC., PRIVACY IMPACT ASSESSMENTS: THE PRIVACY OFFICE OFFICIAL GUIDANCE 1 (2010).

articulating the likely effects of any proposed changes to the Guidelines. Requiring the Attorney General to consider, and to explain, whether the cost to civil liberties of any particular rule or tactic outweighs its investigative benefits is sure to raise the profile of civil liberties protection in the decision-making process. And while these Statements will not include the detailed scientific analysis that forms part of Environmental Impact Statements, they will identify the potential civil liberties impacts of proposed rules and force government officials both to note those impacts, and to think about what steps can be taken to mitigate them.

*Inter-Agency Lobbying.* A final mechanism the administrative state has used successfully to force agencies to consider specific, under-emphasized perspectives is for the political branches to enlist other agencies to police the primary decision-making agency. This idea, too, has potential in the Guidelines context. In some ways, this approach is simply a form of expanding the scope of participation, including a “lobbying” agency in the decision-making process to represent a particular interest that the decision-making agency is required to consider.<sup>283</sup> In other words, for the lobbying agency, its primary mission is to promote an interest that may be a “secondary” goal to the decision-making agency. This approach can differ from merely expanding participation in the process in that it envisions a more active role for the lobbying agency than merely providing a particular view to the decision maker. Again, a recommendation already mentioned provides an example. Recall Professors DeShazo and Freeman’s study about the licensing practices of the Federal Energy Regulatory Commission and the impact of Congress’s requirement that the Commission consult with fish and wildlife agencies prior to issuing licenses.<sup>284</sup> They concluded that this requirement had a real impact on the Commission’s treatment of the fish and wildlife agencies’ concerns.<sup>285</sup>

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283. See DeShazo & Freeman, *supra* note 239, at 2222–29 (describing the impact of “interagency lobbying” on FERC’s decision-making process); Biber, *supra* note 239, at 44 (evaluating the “agency as lobbyist” model).

284. See *supra* note 239 and accompanying text.

285. See *supra* notes 239–43 and accompanying text (discussing the study and its results).



Conferring a role in the decision-making process on an agency whose priority is the protection of fundamental rights might mitigate concerns that the FBI's primary mission will unnecessarily endanger civil liberties. The Attorney General might, for example, be required to include officials from such an agency in the process of devising the FBI's investigative rules—to give them a seat at the table. Just as including the Fish and Wildlife Service in agency decision making ensures that decisions take animal habitats into account, including an agency like the PCLOB could play a similar role with civil liberties concerns in the intelligence-collection context.<sup>286</sup> Members and staff of the board—many of whom, unlike staff at the Office of the Director for National Intelligence (ODNI) or FBI charged with protecting civil liberties offices, are drawn from the privacy and civil liberties advocacy community<sup>287</sup>—could raise civil liberties concerns that particular rules present, offer alternative means of achieving the FBI's desired ends, suggest procedural protections that should accompany particular rules, or argue that certain rules should not be approved at all. Most importantly, ensuring an entity such as the PCLOB a seat at the table means that there is a voice actively involved in the process whose primary concern is not necessarily the prevention of terrorist acts.

While this type of interagency influence exertion can happen informally,<sup>288</sup> the regulatory or legislative creation of more hierarchical forms of agency interaction to vindicate “secondary” goals is likely more effective. Such a hierarchical structure causes decision makers to regulate in the “shadow” of that lobbying agency, prompting the decision-making agency “to internalize the

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286. See GARRETT HATCH, CONG. RESEARCH SERV., RL34385, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS 3 (2012) (suggesting a role for the PCLOB in providing greater oversight for the intelligence community).

287. See Schlanger, *supra* note 249, at 47–48 (arguing that for offices dedicated to a particular value to be effective, they must be staffed by individuals who identify themselves professionally as dedicated to that value, rather than to the mission of the agency in which the office is embedded).

288. See DeShazo & Freeman, *supra* note 239, at 2261 (noting that agencies might seek to influence each other to achieve a desired outcome through “lobbying,” much like a private lobbyist).

secondary mandates.”<sup>289</sup> Consider the role of the OIRA, through which the Executive Office of the President monitors regulation.<sup>290</sup> A presidential order places OIRA in a hierarchical position over federal agencies to evaluate whether the benefits of agencies’ proposed rules exceed their costs.<sup>291</sup> And OIRA has the power not just to make suggestions for modifications but actually to block implementation of an agency regulation on this basis.<sup>292</sup> This “veto” power requires those agencies to take into account what they might consider a secondary goal—efficiency—when contemplating regulatory action.<sup>293</sup>

As with the requirement that the Attorney General or FBI Director consider input from particular entities, the impact and effectiveness of this model would be highly contingent on the degree to which Justice Department officials were obligated to take the PCLOB’s opinions into account.<sup>294</sup> An agency statutorily empowered to overrule DOJ proposals would have enormous practical effect. But such drastic (and implausible) measures are not required. Again, there are a range of possible roles for the PCLOB. For example, it could simply be given a seat at the table during the formulation of the Guidelines, allowing its representative to raise civil liberties concerns.<sup>295</sup> Or a stronger

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289. *Id.* at 2228.

290. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (describing the role of the OIRA).

291. *See id.* (requiring transmission of a regulatory plan to OIRA for review). *But see* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1756–64 (2013) (arguing that agencies can effectively insulate their decision making from presidential review).

292. *See* DeShazo & Freeman, *supra* note 239, at 2261 (explaining that third parties may “alert Congress so that it can intervene to correct agency misbehavior”).

293. *See* Biber, *supra* note 239, at 46–50 (explaining how OIRA developed and its role in reviewing the costs of federal agency rules prior to distribution); *id.* at 48 (“OMB monitors performance of agencies on a secondary goal—maximizing economic efficiency in the achievement of other goals . . . —and requires achievement of at least minimal performance on that goal before it would approve the issuance of a rule.”).

294. *See supra* Part III.B.2 (discussing the role of reasoned decision making through notice and comment requirements).

295. *See* Schlanger, *supra* note 249, at 32–33 (discussing how including representatives of a particular point of view in working groups can influence policy).

thumb on the scale of civil liberties might be to require a report to Congress about any instances in which the PCLOB and the Attorney General or FBI Director are unable to reach agreement on a particular issue.<sup>296</sup>

In sum, the procedural framework for the Guidelines should explicitly require that the Attorney General or FBI Director take into account the civil liberties costs when weighing policy options by preparing a “Civil Liberties Impact Statement” detailing the likely impact of the proposed changes on fundamental rights, and should empower the PCLOB to play an active role in formulating the Guidelines. These suggested procedures will not eliminate all concerns about civil liberties raised by the Guidelines and the DIOG. But in a context where preferred methods of rights protection break down, they offer a second-best option.<sup>297</sup>

#### *IV. Theoretical and Practical Objections*

Even if one concedes the potential value of the above reform suggestions, a couple of questions might arise. First, if the answer to the governance gap in intelligence collection is to import administrative law principles, why are existing proposals in that vein insufficient? And second, in the absence of judicial review and public scrutiny facilitated by transparency, how will the procedural requirements suggested here be enforced? This Part will address each of these questions in turn, arguing that the reforms suggested above provide a better means of addressing civil liberties concerns than existing reform proposals, and that there are available mechanisms that can enforce compliance with the recommended governance regime.

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296. *See id.* at 33–35 (detailing how giving an agency clearance authority and the power to conduct reviews are tools that can encourage cooperation with another agency).

297. *Cf. Katyal, supra* note 172, at 2316 (arguing that when the “first-best concept” of an executive checked by the legislature is unavailable, “checks and balances must be updated to contemplate second-best executive v. executive divisions”).

*A. Distinguishing Alternative Proposals*

Recognizing the inadequacy of the current regime, some scholars have suggested that terrorism be treated as an administrative problem.<sup>298</sup> This is a profound insight. After all, the Justice Department and the FBI are agencies, and there is an entire body of law whose *raison d'être* is to improve agency governance regimes and ensure reasoned exercise of broad delegations of power. But existing reform proposals do not confront the Guidelines' governance challenges that implicate civil liberties concerns. Some call for the development of mechanisms to improve our ability to assess the actual risk posed by terrorism.<sup>299</sup> Others argue that responses to terrorism should take into account the unusually high psychological costs of terrorism.<sup>300</sup> Yet another approach looks for governance solutions through the structure of congressional oversight of intelligence operations.<sup>301</sup>

While some of these suggestions may prove beneficial to counterterrorism efforts more generally, none offers solutions to the civil liberties threats posed by the Guidelines and the DIOG. Indeed, they are not focused on meeting those challenges. Rather, they are concerned with broad-gauge adjustments to the government's general approach to counterterrorism. As a result, they do not purport to offer means of channeling agency discretion, enhancing the Guidelines' democratic bona fides, or

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298. See *supra* note 6 and accompanying text (listing scholars who advocate taking a regulatory approach to the threat of terrorism).

299. See Stern & Wiener, *supra* note 6, at 396–97 (arguing that decision makers developing counterterrorism measures “need mechanisms to ensure that sensible risk analysis precedes precautionary actions”).

300. See Posner, *supra* note 6, at 690–97 (describing how public fear can hinder government measures and recommending that agencies pay special attention to the “psychology of fear”); Sunstein, *supra* note 6, at 131–33 (describing some of the problems a government may face in attempting to address the panic that often results from terrorist attacks).

301. See Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1733–34 (2006) (describing a plan to reform congressional oversight of intelligence operations).

ensuring that concerns about fundamental rights are given the attention they deserve.

One scholar does consider in detail what a regulatory approach to intelligence collection might look like on the ground. Professor Sam Rascoff advocates importing into the intelligence-collection context several of the traditional means of constraining agency action, such as centralized cost-benefit review of agency rules to ensure that rules are “rational”—which he defines as efficient, effective, and sufficiently rights-respecting<sup>302</sup>—judicial review,<sup>303</sup> and increased public participation and transparency in intelligence agency decision making.<sup>304</sup> These mechanisms, he asserts, will create a “risk-management approach to counterterrorism” akin to other areas of regulatory endeavor.<sup>305</sup> Rascoff predicts that this approach will increase the accuracy, efficiency, and usefulness of the intelligence that is collected, and it may in fact do so.<sup>306</sup>

In addition to yielding gains in the quality and efficiency of intelligence collection, Rascoff expects his approach also to promote the protection of rights and check abuse or illegality;<sup>307</sup> it is here where his proposal, in my view, falls short. In fact, when it comes to addressing the civil liberties concerns inherent in the Guidelines regime, his approach contains two flaws. First, it is undertheorized. The traditional tools of administrative law—such as cost-benefit analysis, judicial review, and public

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302. See Rascoff, *supra* note 6, at 617–26 (arguing that centralized review would both increase accuracy and cost-effectiveness of intelligence and protect basic rights); Sunstein, *supra* note 6, at 131 (advocating cost-benefit analysis of counterterrorism regulations).

303. See Rascoff, *supra* note 6, at 628–29 (discussing the benefits of judicial review of agency action).

304. See *id.* at 629–33 (explaining that pluralism, and the related concept of transparency, are beneficial because they provide credibility and additional means through which oversight may occur).

305. *Id.* at 647.

306. See *id.* at 616 (“[R]egulatory governance implies a robust framework that simultaneously aims to produce more accurate, [more] cost-effective, and more rights-protecting intelligence.”).

307. See *id.* at 622–24 (arguing that empowering accountability mechanisms provides the public with a better avenue for protecting rights and restraining abuse).

participation—simply cannot function effectively in the intelligence-collection context. Their reliance on transparency, public scrutiny of agency action, and judicial review renders them largely inapplicable to intelligence collection.<sup>308</sup> To be sure, Rascoff recognizes the distinctiveness of the context and points to ways to modify these tools to operate more effectively in the intelligence-collection context. Judicial review, for example, would be performed by the secret Foreign Intelligence Surveillance Court (FISC), rather than traditional federal courts;<sup>309</sup> and cost-benefit analysis would be done by experts in the ODNI rather than OIRA.<sup>310</sup> But these adjustments do not go far enough. Instead, the obstacles to regulating intelligence collection require the formulation of new institutional designs custom-tailored to meet the challenges that intelligence-collection regulation presents. Second, and perhaps more importantly, embedded in Rascoff's proposal is an overly optimistic perspective on the premise—a premise belied by history—that the intelligence community can be relied upon to develop and enforce civil liberties protections on itself.

Consider first the idea of centralized review of intelligence policy in the ODNI to promote intelligence-collection rules that are “rational”—efficient, effective, and sufficiently rights respecting.<sup>311</sup> Just as OIRA subjects agency regulations to cost-benefit analysis, ODNI would review intelligence policies for rationality.<sup>312</sup> And because this rationality includes a mandate to

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308. See Edward Levi, Attorney Att’y Gen. of the U.S., Address to the Association of the Bar of the City of New York 1–2 (Apr. 28, 1975), <http://www.justice.gov/ag/aghistorical/levi/1975/04-28-1975.pdf> (discussing the need for confidentiality in national security matters: “The need for confidentiality is old, common to all governments, essential to ours since its foundation”).

309. See Rascoff, *supra* note 6, at 586 (“[T]he FISC ought to provide the sort of judicial review of agency action that I advocate . . .”).

310. See *id.* (“The rationality review that I endorse should be performed by an organization within the [ODNI], modeled on [OIRA] within [OMB].”).

311. See *supra* note 302 and accompanying text (defining and discussing what is meant by the term “rational”).

312. See Rascoff, *supra* note 6, at 586 (explaining Rascoff’s recommended use of the ODNI); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (stating that an assessment of potential costs and benefits of regulatory action shall be provided to OIRA).

seek the appropriate balance between security and liberty, the argument goes, it will ensure that privacy and liberty interests are not ignored.<sup>313</sup>

Looking to ODNI review as a means of rationalizing intelligence policy, however, is not a solution to civil liberties concerns. Unlike regulatory action whose economic impact can be measured, the liberty costs of various security policy options are often either speculative or a matter of subjective valuation. How would ODNI weigh the privacy harms caused by surveillance? How many unnecessary additions to a terrorist watchlist are justified by the detection of an incipient plot? Moreover, even if such considerations could be quantified, ODNI will be unable to know whether different, less intrusive, policies could produce the same positive security result. Merely instructing ODNI to take liberties costs into account may result in more liberty-solicitous policy. But because these costs cannot be objectively evaluated and intelligence community members are likely to assign lower value to them than the population at large, cost-benefit review is not a reliable mechanism for protecting individual rights.<sup>314</sup>

Moreover, ODNI itself is a member of the intelligence community. It may be the case that ODNI “enjoys sufficient distance from the various intelligence agencies” that it cannot be co-opted by any one element of the intelligence community.<sup>315</sup> But ODNI need not be “captured” by the FBI to fall prey to the same pro-security biases. ODNI’s website identifies its vision as, “A Nation *made more secure* because of a fully integrated Intelligence Community.”<sup>316</sup> Indeed, the staff of ODNI itself, at least initially, was drawn from other agencies within the

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313. See Rascoff, *supra* note 6, at 625, 634–39 (arguing that rationality review will ensure more effective intelligence collection and provide a secondary benefit to liberty concerns).

314. See Daniel J. Mitchell, *Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis*, 25 PACE L. REV. 219, 220 (2005) (discussing the difficulty of quantifying individual liberty and the benefits of cost-benefit analysis in a free society).

315. Rascoff, *supra* note 6, at 637.

316. *Mission, Vision & Goals*, OFF. OF THE DIRECTOR OF NAT’L INTELLIGENCE, <http://www.dni.gov/index.php/about/mission> (last visited Oct. 18, 2013) (emphasis added) (on file with the Washington and Lee Law Review).

intelligence community.<sup>317</sup> This vantage point inside the national security apparatus means that ODNI's assessment of the value of proposed intelligence-collection policy and the costs of resulting privacy and liberty sacrifices will not differ markedly from that of the FBI itself. Because ODNI officials share the FBI's primary mission of ensuring security, it is unclear why they would value civil liberties any differently than FBI officials or the Attorney General.<sup>318</sup> And because quantifying the value of civil liberties is an inherently subjective exercise, moving responsibility for doing so from one element of the intelligence community to another seems unlikely to generate significant rights-protection improvements.

Even if the ODNI is able to set aside its security hat for the purpose of evaluating the civil liberties implications of particular policies, it will receive a distorted view of the policies in question. ODNI will not have the benefit of information provided by stakeholders outside the intelligence community. Intelligence community officials are likely—either consciously or unconsciously—to overvalue their own role and to present information in ways that support the intelligence-collection policies they favor. Without subjecting such information to scrutiny outside the intelligence community or considering outside views, any relevant flaws or biases in the information presented to the ODNI will remain uncontested. So while centralized review would impose an additional layer of bureaucratic scrutiny of the Guidelines, the additional review would not replicate the benefits that centralized review has produced in other parts of the administrative state, at least when it comes to civil liberties, because the ODNI cannot offer a neutral, dispassionate evaluation of the benefits and drawbacks of intelligence-collection policy.

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317. See GARRETT M. GRAFF, *THE THREAT MATRIX* 19 (2011) (describing the ODNI as “staffed with some of the top minds from the FBI, the CIA, Homeland Security, and the Pentagon”); Rascoff, *supra* note 6, at 637 (noting that the ODNI “possesses the core competences” to discharge its role effectively).

318. See *Quick Facts*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/quick-facts> (last visited Nov. 1, 2013) (“[T]he mission of the FBI is to protect and defend the United States against terrorist and foreign intelligence threats . . . .”) (on file with the Washington and Lee Law Review).



The suggestion that the FISC approximate the role of traditional judicial review of agency decision making to impose constraints on discretion will also fail to result in the preservation of civil liberties. As an initial matter, it is unclear what the extent of the FISC's review might be. Traditional judicial review of administrative rules asks whether an agency's action is consistent with the Constitution and its statutory mandate or whether it is arbitrary or capricious.<sup>319</sup> But when it comes to most intelligence-collection rules, there is no constitutional or statutory standard against which a court could measure agency compliance.<sup>320</sup> One proposed solution to this baseline problem is to have the FISC review policy for whether it is consistent with the intelligence agencies' own stated objectives.<sup>321</sup> Again, this proposal fails to account for the fact that when the intelligence community is left to determine the rules of its own conduct, concerns other than security will get short shrift. By asking intelligence agencies to identify their own objectives and then subjecting their efforts to meet those objectives to judicial review would replicate the current situation—where the constraints on agencies are limited to those that they agree to place on themselves—but with the added legitimating feature of judicial imprimatur.

Another barrier to enlisting the FISC in intelligence-collection governance is that the intelligence-collection activities governed by the Guidelines extend beyond the scope of the FISC's jurisdiction. The FISC oversees electronic foreign intelligence surveillance and physical searches of premises connected with foreign powers.<sup>322</sup> It has no role in overseeing purely domestic

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319. See 5 U.S.C. § 706(e) (2012) (detailing the scope of review for a reviewing court).

320. See Rascoff, *supra* note 6, at 591 (discussing the types of legal rules that apply to intelligence collection and noting the lack of governance for the conduct of human intelligence collection).

321. See *id* at 628 (proposing that at some regular interval a court should “review the agency’s program for fidelity to the agency’s own stated (and previously approved) objectives”); *cf.* Bressman, *supra* note 190, at 529–33 (arguing that agency articulations of the limits on their own power would address concerns about excessive delegations of discretion).

322. See 50 U.S.C. §§ 1801–1829 (2012) (defining the scope of legal foreign intelligence searches and surveillance).

surveillance of Americans absent probable cause that those Americans are agents of a foreign power.<sup>323</sup> The content of the Guidelines and the activities they regulate—such as physical surveillance of Americans, infiltration of religious or political groups, the use of informants, requests for internet history—rarely fall within the FISC’s jurisdiction. Individuals who wish to challenge FBI activity—if they can establish standing—do not have access to the FISC.<sup>324</sup> Thus, it is unclear what role the FISC could play in reviewing many activities in which the FBI engages.

The FISC, too, is likely to share the FBI and ODNI’s bias toward the security mission. Unless a recipient of a FISC order challenges the legitimacy of that order, proceedings in the FISC are not subject to an adversarial process.<sup>325</sup> Instead, like magistrate judges considering whether to issue traditional search warrants, FISC judges review unopposed government applications for surveillance orders.<sup>326</sup> The FISC thus receives

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323. See *id.* § 1801(b) (defining the term “agent of a foreign power”).

324. See *id.* § 1806(e)–(h) (discussing the means by which a person may challenge the use of electronic surveillance in a trial or hearing).

325. See Rascoff, *supra* note 6, at 642–44 (explaining that judicial review before the FISC and traditional judicial review differ because FISC review lacks a meaningful adversarial process). Third parties generally lack “incentives . . . to challenge government requests for information.” *Id.* at 644.

326. See *id.* at 639 (discussing the application process for surveillance to the FISC); 50 U.S.C. § 1804 (detailing the requirements of an application for court order to the FISC). In the wake of the NSA surveillance revelations in 2013, some proposals have emerged to inject an adversarial element into FISC proceedings. See, e.g., Matt Sledge, *Adam Schiff Prepares FISA Court Bill To Create Special Privacy Advocate*, HUFFINGTON POST (July 25, 2013, 3:42 PM), [http://www.huffingtonpost.com/2013/07/25/adam-schiff-fisa-court\\_n\\_3653946.html](http://www.huffingtonpost.com/2013/07/25/adam-schiff-fisa-court_n_3653946.html) (last visited Oct. 19, 2013) (describing one Congressman’s plans to introduce legislation creating a special privacy advocate who would appear before the FISC to represent the public interest) (on file with the Washington and Lee Law Review); James G. Carr, *A Better Secret Court*, N.Y. TIMES (July 22, 2013), <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html> (last visited Oct. 19, 2013) (advocating that FISC judges appoint a lawyer to represent the public interest when novel questions come before it) (on file with the Washington and Lee Law Review). The likely success of such proposals is uncertain; United Kingdom and Canadian efforts in this vein have been roundly criticized. See JOINT COMM. ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2006–2007, H.L. 157, H.C. 394, at 49–55 (U.K.) (describing the functions of and concerns with the use of Special Advocates to represent the interest of excluded parties in closed hearings).

only the Justice Department's perspective—heavily informed by the FBI's perspective—about any given rule. This concern is compounded by the fact that even the judges themselves largely hail from the law enforcement community—twelve of the fourteen judges who have served this year are former prosecutors and one is a former state police director.<sup>327</sup> Moreover, once selected by the Chief Justice of the Supreme Court for FISC service, these judges are exposed to a constant stream of government applications to engage in foreign intelligence collection detailing just how dangerous the world can be and the important role that intelligence collection plays in combating those dangers.<sup>328</sup> FISC involvement thus serves only to reinforce the pro-security perspective already embedded in the development of domestic-intelligence-collection policies.

Finally, Justice Department briefings to congressional committees and to interested nongovernmental organizations shortly before the current Guidelines were officially issued can be interpreted as evidence of “the possible emergence in the domestic intelligence arena of a new ethic of interest group representation.”<sup>329</sup> This form of participation, however, left many interested parties unsatisfied<sup>330</sup> and bore only “a passing resemblance” to traditional notice-and-comment rulemaking.<sup>331</sup> These meetings permitted stakeholders to see (but not to copy or retain) a near-final draft of the document weeks before its implementation. But the Guidelines were entirely subject to the

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327. John Shiffman & Kristina Cooke, *The Judges Who Preside Over America's Secret Court* (June 21, 2013 1:11 AM), <http://www.reuters.com/article/2013/06/21/us-usa-security-fisa-judges-idUSBRE95K06H20130621> (last visited Oct. 19, 2013) (describing the professional background of the FISC judges) (on file with the Washington and Lee Law Review).

328. See Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney Gen., to the Honorable Harry Reid, Majority Leader, U.S. Senate (Apr. 30, 2013), [http://www.justice.gov/nsd/foia/foia\\_library/2012fisa-ltr.pdf](http://www.justice.gov/nsd/foia/foia_library/2012fisa-ltr.pdf) (reporting on the 1,856 applications made to the FISC in 2012).

329. Rascoff, *supra* note 6, at 644–66.

330. See *id.* at 646 (quoting Senator Russ Feingold asking FBI Director Robert Mueller: “Why can’t you at least solicit . . . suggestions in a meaningful process that involves more than a single meeting where the participants aren’t even allowed . . . to keep a copy [of the draft guidelines]?”).

331. *Id.* at 645.

Attorney General's discretion with respect to whether to respond to or to take any views expressed at these meetings into consideration. This superficial involvement of interested parties does not provide sufficiently broad, meaningful participation outside the Justice Department and the FBI to alleviate the accountability and democracy deficit with the Guidelines and DIOG.

### *B. Oversight of Procedural Requirements*

One possible objection to this Article's proposals is that, in eschewing judicial review and conceding the secret nature of the Guidelines regime, they relinquish all means of enforcing their requirements. As with the proposed procedural rules themselves, however, the principles behind the administrative state's compliance mechanisms offer a (partial) solution.<sup>332</sup>

Notice-and-comment rulemaking employs the transparency of the rulemaking process followed by public and judicial review to enforce the regulatory regime to which agency decision making is subjected.<sup>333</sup> The public's role in that regime is to play watchdog. Because rulemaking and its results are conducted in a transparent fashion, interested stakeholders can be relied upon to object if they believe that an agency has not acted appropriately.<sup>334</sup> The public will scrutinize not only proposed rules to ensure that they do not suffer from procedural, logical, or evidentiary deficiencies, but also any information that is made public as part of the process. If, for example, an Environmental Impact Statement predicts dire environmental consequences from a proposed agency action, environmental activists will use that

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332. See *supra* Part III.D.2 (explaining how the procedural rule changes discussed offer a second-best option).

333. See Aftergood, *supra* note 234, at 399 (“[T]he free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability to hold elected officials accountable.”).

334. See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 59 (1995) (naming a number of benefits that informal rulemaking confers on society, including the fact that “rulemaking enhances fairness by allowing all potentially affected members of the public to participate in the decision-making process”).

Statement to lobby not only the agency but also Congress and the President to prevent the agency from taking the proposed action.<sup>335</sup> Another important compliance-related element of public scrutiny is the fact that it can lead to legal challenges to agency rules. If a regulated entity believes that a regulation applied to it was adopted through flawed procedures, it can bring suit, thereby subjecting the regulation to judicial review.<sup>336</sup> Through this review, courts serve to confirm that agency decisions are not unjustified exercises of discretion and that they followed the mandated procedures.<sup>337</sup> Consequently, courts engage in a “searching and careful” review of the record an agency makes of its decision-making process<sup>338</sup> and will invalidate the results of proceedings that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>339</sup> These standards are not necessarily particularly stringent, but like public scrutiny,

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335. See, e.g., *Sierra Club Continues the Fight Against the Keystone XL Tar Sands Pipeline: Case Updates*, SIERRA CLUB, <http://www.sierraclub.org/environmentallaw/lawsuits/0476.aspx> (last visited Nov. 1, 2013) (detailing the Sierra Club’s lobbying efforts against the Keystone XL Tar Sands Pipeline) (on file with the Washington and Lee Law Review).

336. See *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court.”).

337. See Sunstein, *supra* note 192, at 63 (“A principal concern is that without the procedural and substantive requirements of [judicial review], the governing values may be subverted . . .”); *id.* at 68 (“[P]rocedural rights are created because of a perception that the existing processes of representation are an inadequate guaranty that the outcome will be something other than the result of private whim.”).

338. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (noting that an agency must consider the “whole record” in making a rule, and courts are entitled to review the full administrative record to evaluate the challenged action).

339. 5 U.S.C. § 706(2)(A) (2012); see also *Motor Vehicles Mfrs. Ass’n. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (noting that courts will reject reasoning “so implausible that it could not be ascribed to a difference in view or the product of agency expertise”); *Overton Park*, 401 U.S. at 416 (explaining that agency decisions reflecting a “clear error of judgment” are unacceptable). Agency decisions are also struck down because the agency “relied on factors” that Congress did not authorize, *State Farm*, 463 U.S. at 43; the agency failed to consider “relevant factors,” *Overton Park*, 401 U.S. at 416; or the agency failed to “consider obvious alternatives,” *City of Brookings Mun. Tel. Co. v. F.C.C.*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

they do ensure that agency decisions have been reached through the proper procedures and therefore that they are reasoned rather than arbitrary or irrational.

Perhaps just as importantly, the roles that the public and the courts play impose an important “prior restraint” on agencies. Knowing that their rules and the justifications that they offer for them will be public and potentially subject to judicial scrutiny, agencies will be more likely to be conscientious, hoping to ensure that their decision-making processes pass judicial muster.<sup>340</sup> In other words, they will take any procedural requirements seriously from the outset knowing that, if they do not, any resulting rule could ultimately be invalidated.

Fashioning equally effective means of supervising Justice Department or FBI compliance with any relevant rules is a challenge, because the transparency that facilitates both public scrutiny and judicial review is concededly difficult to replicate. Any proceedings regarding the Guidelines that take place outside of public view are shielded from the public-as-watchdog. If the relevant rules were legislatively mandated, challenges to any failure to abide by them theoretically could be reviewed by the courts.<sup>341</sup> But even in the unlikely event that Congress imposes procedural requirements akin to those suggested here, such suits will fall prey to the same barriers that currently exist to challenging the FBI’s intelligence-collection activities—any individual or entity seeking to challenge the Guidelines or the DIOG on the grounds that they did not follow the required procedures would struggle to establish standing and to overcome the state secrets privilege.<sup>342</sup>

As with the reforms suggested to channel the Justice Department’s discretion and to improve the participatory nature of the Guidelines’ development process, ensuring compliance with procedural requirements would necessitate a means of approximating the traditionally public and judicial roles. One

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340. See Pierce, *supra* note 334, at 68 (noting that judicial review can be beneficial to the extent that “it induces agencies to consider issues and values agencies otherwise would be tempted to ignore”).

341. See *supra* note 337–39 and accompanying text (discussing the standard of review imposed on agency actions by the APA).

342. See *supra* Part II.B.2.

option in this regard would be to enlist proxies within the executive branch to engage in scrutiny of the decision-making process, to inquire whether the process complied with any required procedures, and to consider whether the required statement(s) of justification are adequate. A government watchdog could be assigned to take the place of the public and judicial watchdogs that normally play this role.<sup>343</sup> The Justice Department's Inspector General (IG)—who is statutorily empowered to conduct audits, investigations, inspections, and reviews of Justice Department programs and to issue reports to Congress regarding the results of any investigations that it does conduct—might play a constructive role in holding the Attorney General and FBI Director accountable for following any applicable procedural rules. The IG investigates not only alleged violations of the law by DOJ employees, but also audits and inspects DOJ programs regularly.<sup>344</sup> That office could perform reviews of the process employed each time the Guidelines or the DIOG are amended. Audits conducted by the IG would be especially effective in replicating the effects of traditional transparency if the results of those audits could be released publicly. Indeed, IGs have, at times, played quite important roles in uncovering violations of law and policy in pursuit of security.<sup>345</sup> Perhaps more than any other oversight mechanism (with the exception of unlawful leaks of classified information), audit reports from the Justice Department's Inspector General have shed light on the FBI's investigative activities in the wake of 9/11. These reports, some of which revealed violations of law or

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343. See *supra* note 334 and accompanying text (describing the role of the citizen as “watchdog” over agency actions).

344. See *About the Office*, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., <http://www.justice.gov/oig/about/> (last visited Oct. 19, 2013) (detailing the structure and duties of the Inspector General's office) (on file with the Washington and Lee Law Review).

345. See Sinnar, *Protecting Rights from Within*, *supra* note 7, at 1047–48 (discussing the Inspector General's review of coercive interrogation techniques used by the CIA). *But see id.* at 1048–49 (pointing out risks to Inspectors-General independence given their location within an agency and noting that agencies are often reluctant to provide full information to an Inspector General conducting investigations).

policy, drew both public and congressional attention, and consequently prompted changes to internal FBI policy.<sup>346</sup>

To be sure, even publicly released IG conclusions would lack some of the other compliance-enhancing characteristics of public and judicial scrutiny. The IG does not have the power to invalidate rules that are adopted through flawed procedures or lack sufficient justification. It can point out flaws and insufficiencies, but ultimately any findings or recommendations would be nonbinding. This absence of compulsory power sacrifices some of the sword-of-Damocles threat inherent in the promise of judicial review. If, however, the findings and recommendations can be made public, the threat of reputational costs to the FBI still imposes some *ex ante* incentive to comply with required procedures. And IGs have been particularly successful in generating public reports for reviews of even the most sensitive programs.<sup>347</sup>

An alternative, though less promising, option would be to rely upon Congress to monitor compliance through either the General Accounting Office, which regularly audits and reviews agency programs on behalf of Congress, or the congressional oversight committees themselves. This option is less promising than the IG, however, because Congress already has the power to insist on these types of procedures but has chosen not to intervene when it comes to the Guidelines and the DIOG. Indeed,

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346. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS 124 (2007) (discussing the Inspector General's findings with regard to the FBI's improper use of national security letters); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE FBI'S USE OF NSLS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006, 8–12 (2008) (detailing the FBI's efforts to reduce the improper use of NSLs and noting further measures to ensure elimination of the NSL problems identified); *see also* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE FBI'S USE OF EXIGENT LETTERS AND OTHER INFORMATION REQUESTS FOR TELEPHONE RECORDS 64–78 (2010) (detailing several additional FBI practices that were found to be inappropriate and improper).

347. *See, e.g.*, OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUST., CENT. INTELLIGENCE AGENCY, NAT'L SEC. AGENCY, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (2009) (detailing a review of the President's classified terrorist surveillance program to detect and prevent further attacks on the United States organized after Sept. 11, 2001).



in 2008, several members of the Senate Judiciary Committee voiced concerns about imminent changes in the Guidelines.<sup>348</sup> The Attorney General was under no obligation to take those concerns into account, however, and he did not respond to the Senators' correspondence.<sup>349</sup>

### V. Conclusion

Domestic intelligence collection presents a challenge in a democracy. While it can play a crucial role in keeping our nation secure, it also poses threats to the very freedoms that make that nation worth defending. When the prevention of terrorism is viewed as a regulatory problem—one to be managed rather than defeated—the challenge becomes more manageable. Examining regulatory strategies developed over the past half-century in the administrative state provides a roadmap for the development of structural and procedural mechanisms to channel executive discretion into reasoned, evidence-based decisions; to include viewpoints from outside the intelligence community in the process; and to ensure that the Justice Department explicitly takes into account the civil liberties perspective.<sup>350</sup> The need to substitute alternative mechanisms for tools that are often effective in governing agency action, such as judicial review and public scrutiny, means that they may be less directly effective in achieving their goals.<sup>351</sup> But developing such a framework is a

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348. See Letter from Patrick Leahy, Chairman of the Senate Judiciary Committee, Russell D. Feingold, U.S. Senator, Edward M. Kennedy, U.S. Senator, Richard J. Durbin, U.S. Senator, to The Honorable Michael Mukasey, Attorney Gen. (Nov. 25, 2008), <http://www.judiciary.senate.gov/resources/documents/upload/110thCongress-2008Documents.pdf> (notifying the Attorney General of substantial concerns about the new Guidelines).

349. See 28 U.S.C. §§ 509, 510, 533, 534 (2012) (outlining the role of the Attorney General and the foundation for the Attorney General's power to craft the Guidelines); Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981) (detailing the goals and certain requirements of United States intelligence activity).

350. See *supra* Part III (discussing the framework for governance of the administrative state and proposing a governance framework for the rules governing FBI's intelligence collection programs).

351. See *supra* Part IV (noting that traditional tools for agency governance

viable second-best option in a context where the traditional means of government oversight break down.<sup>352</sup> It will contribute to generating the appropriate FBI for the twenty-first century, one that takes into account not only the nature of the disease, but also the potential costs of the cure.

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are not available in the intelligence-collection context and alternative tools may need to be substituted).

352. *See supra* Part IV.