The FBI Charter
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On July 31, 1979, the Carter administration unveiled its proposed charter for the Federal Bureau of Investigation. The bill (S. 1612/H.R. 5030), which was drafted by the Bureau itself, has been the subject of considerable debate and controversy. The Senate Judiciary Committee and the House Judiciary Subcommittee on Civil and Constitutional Rights have held extensive hearings on the matter, and full congressional action is expected this spring. The proposed charter is for the most part the product of discon- tent, not with the Bureau's investigation of crimes generally but, rather, with its pervasive and long-standing surveillance of political dissidents. It must thus be assessed against the backdrop of these underlying concerns and in the light of the Bureau's own history.

The FBI had a less than auspicious beginning. Attorney General Charles Joseph Bonaparte first proposed the creation of a federal police force in 1907, but congressional authorization was withheld because of the widely held view that the establishment of such an agency would lead inevitably to "a general system of espionage" and would be "contradictory to the democratic principles of government." During a congressional recess in 1908, however, Attorney General Bonaparte quietly established the Bureau of Investigation within the Department of Justice. Despite vehement protest in Congress, the Bureau, with the active support of President Theodore Roosevelt, survived.

In its early years, the Bureau directed its energies primarily to enforcement of the Mann Act. Shortly after World War I, however, Attorney General A. Mitchell Palmer, frustrated by the Bureau's inability to solve a series of apparently anarchist-inspired bombings, created the General Intelligence Division (GID) of the FBI to investigate radical and subversive activities. The GID failed to discover the source of the bombings, but within six months it had compiled personal histories on 60,000 suspected "radicals." Before long, the index grew to include more than 200,000 names. During the Harding administration, the Bureau, under the direction of William J. Burns, accelerated its investigation of wobblies, anarchists, communists, and "subversives" generally. The Bureau wiretapped at random, broke into offices, and compiled information on personal lives. The targets were often critics of the Bureau or of the Justice Department and even included several senators who may have asked too many questions.

In 1924, Attorney General Harlan Fiske Stone, determined to refocus the Bureau's activities, ousted Burns and replaced him with J. Edgar Hoover. Hoover pledged that the Bureau would get out of the business of investigating political views and would henceforth limit itself to its intended function of investigating federal crimes. For the next twelve years, the Bureau exercised considerable restraint, but with the outbreak of World War II, it turned its attention once again to the investigation of political dissidents.

In a series of directives issued in the late 1930's, President Franklin Roosevelt, alarmed by reported attempts of foreign agents to influence domestic affairs, instructed Hoover to gather information concerning fascist and communist activities in the United States and to conduct investigations concerning possible espionage and sabotage. In 1938,* Professor of Law. Much of the historical discussion in this article is derived from Professor Stone's article, "Surveillance and Subversion," to be published in a forthcoming issue of Reviews in American History.
Roosevelt, Attorney General Homer S. Cummings, and Hoover decided not to seek legislative authority for this expanding domestic intelligence program. Although these directives did not expressly authorize the investigation of "subversive activities" generally, Hoover, apparently reasoning that persons opposed to the American form of government or to basic governmental policies might engage in espionage or sabotage, construed the directives as broadly mandating open-ended inquiries into "subversion." And by repeatedly misinforming a succession of careless or indifferent presidents and attorneys general as to the precise scope of the Roosevelt directives, Hoover managed for more than three decades to elicit tacit executive approval for continuing FBI investigations on an ever-expanding class of political dissidents. From 1957 to 1974, the Bureau opened investigative files on more than half a million "subversive" Americans. In the course of these investigations, the Bureau, in the name of "national security," engaged in widespread wiretapping, electronic monitoring, mail-openings, and break-ins. Even more insidious was the Bureau's extensive use of informers and undercover operatives to infiltrate and report on the activities and membership of "subversive" political associations ranging from the Socialist Workers Party to the NAACP to the Medical Committee for Human Rights to a Milwaukee Boy Scout troop.

Although some of these investigations were no doubt aimed at espionage, sabotage, or other federal crimes (such as violations of the Smith Act), they served other purposes as well. As early as 1939, the Bureau, without statutory authorization, initiated the compilation of a Custodial Detention List containing the names of those individuals who the Bureau determined should be "apprehended and interned immediately" in the event of war. The individuals' names were derived from subscription lists of German, Italian, and communist newspapers, membership in identified organizations, and informant and agent reports on meetings and demonstrations. Hoover counseled FBI field offices that the existence of this list and its "purpose should be entirely confidential." Although the Justice Department approved the compilation of such a list in 1940, Attorney General Francis Biddle determined three years later that the list was not legally justifiable and ordered that classifications as to the danger posed by individuals "not be used in the future." Hoover decided not to comply with this order. In a letter marked "strictly confidential," he announced a change in the Bureau's nomenclature and instructed his special agents in charge henceforth to refer to the Custodial Detention cards as Security Index cards and not to allude to their existence in communications outside the Bureau. In the late 1940's, the Justice Department once again approved the maintenance of a Security Index and in the Internal Security Act of 1950, the Congress, ignorant of the Bureau's program, enacted a statutory emergency detention program. The statutory program, however, was in many respects more restrictive than that of the Bureau, and for the next quarter-century, the Bureau, often with the knowledge and cooperation of the Justice Department, frequently disregarded the restrictions of the Act in order to utilize its own standard of "dangerousness."

COINTELPRO (counterintelligence program) was the most daring of the Bureau's activities. By the late 1950's, the Supreme Court had embraced restrictive interpretations of the Smith Act and the Internal Security Act of 1950, rendering them relatively ineffective in the fight against subversion. Frustrated by these decisions, and not content merely to compile extensive files on organizations and individuals viewed as threats to the nation's security, Hoover decided to take matters into his own hands. In 1956 he launched COINTELPRO, which was designed to "expose, disrupt and otherwise neutralize" dissident individuals, organizations, and movements. COINTELPRO involved the extensive use of extralegal measures to combat domestic subversion. The Bureau sent anonymous, scurrilous, and false letters to break up marriages, attempted to sow internal dissension within organizations, and informed public and private employers of the political activities and organization membership of "subversive" persons. Although directed initially against the Communist Party, the program expanded over the years to include Socialist, White Hate, Black Nationalist, and New Left targets as well. This extraordinary program was initiated without any prior executive or legislative authorization, and although Hoover occasionally informed various attorneys general of the existence of a counterintelligence program, his references were often too vague to make clear what actually was involved. The very existence of COINTELPRO was a closely guarded secret, shielded from public view by a carefully crafted system of multiple filings. As was so often the case in this period, the Bureau's foremost concern was not with legality, but with avoiding the embarrassment of exposure. And, as with its extensive political surveillance and emergency detention programs, the FBI's COINTELPRO was officially terminated only after
its existence and operation were finally revealed to the public through a series of exposes, lawsuits, and congressional investigations in the early 1970’s.

A confidential document stolen in 1971 from the FBI field office in Media, Pennsylvania, gave the public its first hint of the existence of COINTELPRO. Watergate, however, led to most of the initial revelations. Disclosure of the “Huston Plan” and other instances of White House misuse of the Bureau played a central role in the events leading to Richard Nixon’s resignation in 1974. The following year, Attorney General Edward H. Levi confirmed that Hoover had maintained secret files on various public figures, that the Bureau had on several occasions attempted surreptitiously to discredit its critics, and that it had gathered political intelligence for administrations of both parties. In reaction to these and other disclosures, Select Committees of the House and Senate embarked upon investigations of the Bureau’s internal security operations, and the House Judiciary Committee asked the General Accounting Office to review FBI domestic intelligence policies and procedures. At the same time, various lawsuits seeking information under the Freedom of Information Act or charging the Bureau with unconstitutional or otherwise unlawful conduct brought forth further revelations. Within the Justice Department, Attorney General Levi established a committee to draw up formal guidelines for FBI investigations. As early as 1976, Attorney General Levi and FBI Director Clarence Kelley voiced support for a legislative charter, and as revelations of Bureau abuse continued to pour forth, the notion of a charter designed to eliminate Bureau reliance on “inherent authority” and to guarantee external oversight of Bureau activities gained widespread legislative, executive, and public approval.

It is against this background that the proposed charter was framed. It attempts for the first time to spell out legislatively the precise duties, responsibilities, and limitations of the Bureau, and it is without question a serious effort to accommodate society’s interest in effective law enforcement with its often competing interest in the preservation of civil liberties. There are, however, several significant aspects of the bill that should cause concern. Although limitations of space preclude an exhaustive analysis of these concerns, at least a brief comment on those which seem most important may be of interest.

1. A central purpose of the proposed charter is to prevent a recurrence of the pervasive political surveillance that has marked so much of the Bureau’s past. The bill thus explicitly declares that, in the exercise of its criminal investigation authority, the Bureau “shall be concerned only with . . . such conduct as is forbidden by a criminal law” and, further, that the Bureau “shall not conduct an investigation solely on the basis of . . . the lawful exercise of any . . . right secured by the Constitution or laws of the United States.” Such straightforward, seemingly unambiguous declarations of principle can have significant symbolic and even practical impact. Standing alone, however, they cannot satisfactorily guard against the inevitable temptation to investigate political beliefs. As history amply demonstrates, the line between investigating political beliefs and investigating potential criminal activity by persons and associations holding certain political beliefs is fuzzy at best. The Bureau in 1919 was certainly justified in investigating bombings. It no doubt thought that it was doing precisely that when it compiled dossiers on all the anarchists and radicals it could find. In the late 1930’s, the Bureau was cer-
ciently justified in investigating potential espionage and sabotage. It no doubt thought that it was doing precisely that when it gathered information on anyone even remotely suspected of having fascist or communist sympathies. Particularly in times of national crisis, even the most well meaning of government officials may too readily make the not wholly illogical leap from investigating crime to investigating belief. In at least some circumstances it is, in the end, merely a matter of degree.

In an effort to lessen the likelihood of such investigatory leaps, the proposed charter provides that the Bureau may conduct full-scale “investigations,” as opposed to less intrusive and more limited “preliminary inquiries,” only “on the basis of facts or circumstances that reasonably indicate that a person has engaged, is engaged, or will engage in” criminal activity. Although a step in the right direction, this requirement is inadequate, at least with respect to full-scale investigations of associations engaged in protected first amendment activity. The phrase “facts or circumstances that reasonably indicate” is vague in the extreme. Is an association’s mere abstract advocacy of unlawful conduct in itself sufficient to satisfy this standard? If so, we have learned little from the past. For as history teaches, it is not uncommon for dissident organizations to employ abstract advocacy as a tenet, dogma, or slogan without in fact posing any bona fide danger to society. If abstract advocacy is not in itself sufficient, however, what additional information must be present before the Bureau may launch a full-scale investigation? Although the commentary accompanying the bill adds some substance to this phrase, it remains disconcertingly ambiguous. This problem is heightened by the bill’s express authorization of investigations of politically-oriented associations for possible future crimes without regard to whether the suspected criminal activity is to take place imminently or at some uncertain time in the indefinite future. Such an open-ended authorization will enable the Bureau to embark upon investigations of virtually unlimited duration despite the absence of even the suspicion of present danger. It is precisely these sorts of free-wheeling investigations that are most likely once again to lead the Bureau into mischief. To mitigate this danger, the proposed charter should be amended so as to permit full-scale investigations only when, on the basis of clear and objective evidence, there is reason to believe that the association will engage in criminal activity in the “immediate future.” Although such a standard is obviously not devoid of ambiguity, it at least focuses attention upon what should be an important limiting consideration. And although its use would doubtless forestall early investigation of at least some potentially dangerous organizations, this is a necessary and unavoidable trade-off if we mean seriously to avoid a repetition of the past.

2. The proposed charter delineates the circumstances in which the Bureau may employ “sensitive investigative techniques” in the course of its criminal investigations. In so doing, however, it seeks in practical effect to place Congress’ formal imprimatur upon a class of investigative practices long thought questionable. The proposed charter approves the use of trash covers, pen registers, warrantless arrests, “floaters” informants, consensual electronic monitoring, and electronic location detectors essentially without restraint. It permits the use of informants and undercover agents to collect information about “an identifiable person on a continuing basis” whenever “the information likely to be obtained is pertinent to” an investigation. And it empowers the Bureau to issue investigative demands to obtain confidential financial, credit, toll, and insurance information from an individual’s bank, insurance agent, telephone company, or credit institution whenever “there is reason to believe that the records sought are relevant to an investigation.”

Admittedly, the Bureau’s utilization of these techniques is not demonstrably unconstitutional. To the contrary, some of these practices, such as consensual electronic monitoring, warrantless arrest, pen registers, and investigative demands, have been held by the Supreme Court not to violate the fourth amendment. Others, such as trash covers and electronic location detectors, have generated considerable division among the lower courts but have not yet been ruled upon by the Supreme Court. What is particularly striking about the proposed charter, however, is that it, for the most part, authorizes the use of “sensitive investigative techniques” right up to the constitutional limit. Apart from the minimal restraints imposed upon the use of investigative demands and informers, the overriding assumption seems to be that “if it’s not unconstitutional it’s not undesirable.” The privacy and dignitary interests of the individual are not exhausted by the Constitution, however, and for Congress to embrace such an assumption would be an abdication of its responsibility to ensure that the Bureau operates within proper bounds. The bill does direct the Attorney General to promulgate guidelines to assure that “investigations are conducted with minimal intrusion consistent with the need to collect information or evi-
dence in a timely, effective manner.” But Congress should not pass the buck so quickly. In light of the Bureau’s history, Congress has an obligation independently to scrutinize each of these “sensitive investigative techniques” to determine whether specific restraints should be imposed in the charter itself.

One aspect of the “sensitive investigative technique” issue merits special attention. As already indicated, the proposed charter ordinarily permits the use of informants and undercover agents whenever “the information likely to be obtained is pertinent to” an investigation. When the Bureau attempts to infiltrate an organization suspected of “terrorist activity,” however, the proposed charter requires additionally that the infiltration be “necessary.” The commentary explains that this additional requirement is imposed because “infiltration of groups whose motivation may be political raises unique First Amendment considerations.” Although this bow to constitutional “considerations” is to be commended, it does not go far enough. The applicability of the “necessity” standard only in investigations of so-called “terrorist” organizations is simply inexplicable. This standard should logically be employed whenever the Bureau contemplates infiltration of a politically-oriented association, whether or not the suspected crime is “terrorist” in nature. More fundamentally, infiltration of a politically-oriented association should be permitted only when authorized by a judicial warrant premised upon a finding of “probable cause.” Like a wiretap, which is of course subject to such restraints, an infiltrator poses a severe threat to associational privacy. The suspicion that an infiltrator might be present can cast a demoralizing cloud of uncertainty and mutual mistrust over the members of the association and can seriously chill their willingness to speak freely even within the confines of the organization. Moreover, infiltrators not only report on first amendment activity, they participate in it. An infiltrator can vote, make policy suggestions, and even serve in influential administrative and leadership positions. In light of the Bureau’s past inclination to employ this technique indiscriminately, the refusal to adopt a judicial warrant/probable cause requirement is unfortunate indeed.

3. The proposed charter makes no reference to COINTELPRO or COINTELPRO-type techniques. It is unclear whether this omission signifies an endorsement of such techniques, a rejection, or merely an unwillingness to take a position. The failure to confront this issue is inexcusable. At the very least, the charter, tracking the Levi guidelines, should explicitly prohibit the Bureau from “disseminating in-

formation for the purpose of holding an individual or group up to scorn, ridicule, or disgrace; disseminating information anonymously or under a false identity; and inciting violence.” At the other extreme, there may be circumstances in which preventive action short of arrest and prosecution is warranted. For example, it may at times be justifiable for practical or investigative reasons for agents to prevent access to or render inoperative explosives, firearms, or similar devices when there is probable cause to believe that the organization intends to employ them unlawfully in the immediate future. Similarly, there may be limited circumstances in which the Bureau, in order to prevent imminent crime, may appropriately inform members of an association planning imminently to engage in unlawful conduct that they are presently under surveillance. Beyond these extremes, there is a vast gray area in which careful legislative guidance is essential. COINTELPRO was too central an abuse simply to be ignored.

4. The proposed charter announces in no uncertain terms that its provisions may not be enforced in any way, shape, or form by the judiciary. It expressly rejects a civil cause of action even for knowing, intentional, and substantial violations, and it prohibits any court to quash a subpoena, suppress evidence, dismiss an indictment, or take any other action designed to redress violations of its terms. In defense of this refusal to permit judicial enforcement, Attorney General Civiletti has argued that there already “exists a full range of suits which can be brought against government officials who act illegally or without authority.” The point seems to be that the creation of a civil remedy would be superfluous. This is erroneous. Even in present form, the proposed charter imposes several important restraints which go beyond the requirements of the Constitution. Existing law, however, recognizes a civil cause of action only for unconstitutional government action, and even that cause of action rests on a rather shaky foundation. Moreover, litigation of constitutional claims against the federal government or its agents, even when permitted, is presently quite burdensome. A statutory civil remedy, patterned, for example, after the remedy embodied in the Right to Financial Privacy Act of 1978, 12 U.S.C. 3417, might, by eliminating the jurisdictional amount requirement, establishing a minimum liquidated damage provision, and authorizing the shifting of attorneys’ fees, greatly facilitate such litigation.

Supporters of the bill maintain further, however, that a civil remedy is in any event unnecessary given the existing provisions for internal enforcement and
congressional oversight. The proposed charter in-
structs the Director of the Bureau to “establish an
effective system for imposing administrative san-
tions for” violations, and it mandates systematic re-
view of Bureau activities by the Attorney General
and regular reporting of such activities to specified
congressional committees. This is all to the good.
But it is not enough. If history teaches anything,
it is that the danger lies not only in the Bureau, but
in the Congress and the Executive as well. Although
some attorneys general have been careful, respon-
sible, and thoughtful in their supervision of the Bu-
reau, others have been careless and have allowed
themselves to be deceived and manipulated. Still
others have expressly authorized and encouraged
Bureau activities that, even at the time, were ques-
tionable at best. In some instances, the Bureau vio-
lated its own standards under pressure from the
Executive, and in others, Congress provided the im-
petus or looked the other way. The plain fact is that
with swings in the political pendulum, and particu-
larly in times of real or perceived crisis, the Execu-
tive and Congress may once again lose that sense of
perspective that is so essential to the preservation of
our liberties. Even in times of relative calm, how-
ever, a civil remedy would serve as an important
supplement to these other forms of regulation. It
would enable the judiciary to play a central role in
the interpretation of the charter; it would expose
Bureau activities to public scrutiny; it would gen-
erate additional pressure on the Director to keep his
house in order; and it would compensate victims of
Bureau illegality for violations of their political and
civil rights. In the end, of course, no written docu-
ment or legal charter can by itself “reform” the
Bureau. But it can set us off in the right direction.