

*The Reform of FBI Intelligence Operations.* JOHN T. ELLIFF.  
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In recent months, the United States has been engaged in an activity unique to the annals of government: influential members of Congress have been attempting to enact statutory “legislative charters” for the United States intelligence agencies. Senate Bill 1612,<sup>1</sup> which has become known as the “FBI charter,” involves the domestic activities of the FBI—investigations of groups or individuals whose activities are not related to the interests or influence of foreign governments or concerns. The bill is pending as this review goes to press, but because of complications of the immediate political situation, it seems unlikely that it will be enacted.

The original version of Senate Bill 2284,<sup>2</sup> which became labeled, rather inaccurately, as the “CIA charter,” concerned “foreign”-intelligence activities—investigations conducted by the CIA, FBI, and many other agencies directly involving the activities and interests of foreign political entities. It is no longer possible for the comprehensive CIA charter to be enacted this session, but there are significant indications that similar measures will be introduced in the future.<sup>3</sup> Indeed, the strength of the convictions held by many as to the need for a statutory foundation for these agencies’ operations ensures that the scope and nature of that foundation will be the subject of a continued and historic debate.

Until now, the rules that governments throughout the world have used to direct the operations of their intelligence agencies have been vaguely drawn and completely secret. By and large, these rules have given the agencies a free hand to gather information at the unchecked discretion of political leaders or even agency heads themselves. Among the chief targets of each agency’s intelligence gathering have been the very citizens of the state supporting the agency—citizens suspected of being political opponents of the

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<sup>1</sup> S. 1612, 96th Cong., 1st Sess. (1979) [hereinafter cited without cross-reference as S. 1612].

<sup>2</sup> S. 2284, 96th Cong., 2d Sess. (1980) [hereinafter cited without cross-reference as S. 2284].

<sup>3</sup> See, e.g., 126 CONG. REC. S6146 (daily ed. June 3, 1980) (statement of Sen. Bayh).

regime in power. In the United States, the recently proposed legislation would have replaced the present broadly drawn statutory authorizations for these agencies<sup>4</sup> with provisions narrowly defining the limits and regulating the conduct of their intelligence-gathering activity. Never before had any state sought to establish by legislation such detailed rules governing this type of surveillance.

John Elliff is in a unique position to offer the much needed background information that this book<sup>5</sup> provides. He served as a task force leader for an important Senate investigating committee<sup>6</sup> that conducted hearings in 1975 concerning abuses of the intelligence agencies (the Church Committee), and is now a key staff member of the Senate Select Committee on Intelligence, which drafted the new agency charters. Mr. Elliff's book was written and researched under the auspices of the Police Foundation as part of "a three-year analysis and evaluation of FBI internal security intelligence operations."<sup>7</sup> The work does not discuss either of the recent bills (although the preface seems to acknowledge their relevance<sup>8</sup>) because the narrow mandate of the Foundation's study precluded discussion of legislative proposals.<sup>9</sup> Nevertheless, the book's coverage of the history of the policy debates surrounding

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<sup>4</sup> The present version of chapter 33 of the Judiciary and Judicial Procedure Code allows the FBI much latitude in the scope and manner of its conduct. 28 U.S.C. §§ 531-537 (1976). Senate Bill 1612 would have replaced the entire chapter with a detailed set of specific authorizations and limitations discussed at text and notes at notes 30, 42-45, 55-58 *infra*.

The establishment and general enabling clauses for the CIA appear as parts of chapter 15 of the War and National Defense Code. 50 U.S.C. §§ 403-403j (1976). Certain sections of Title 4 of Senate Bill 2284 would have repealed these provisions, *e.g.*, S. 2284, § 442(c), and replaced them with more detailed lists of purposes, *id.*, § 401, functions, *id.* § 414, and authorizations, *id.* § 421. Other titles of the bill deal with other agencies performing national security functions, such as the National Security Agency and the Departments of Defense, Energy, and the Treasury, with a view toward unifying the administration of intelligence operations so as to eliminate duplication of activities. *See, e.g.*, S. 2284, §§ 101(2), 102(4).

<sup>5</sup> J. ELLIFF, *THE REFORM OF FBI INTELLIGENCE OPERATIONS* (1979) [hereinafter cited without cross-reference as ELLIFF].

<sup>6</sup> *See id.* at ix. The committee, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, published a lengthy report of its findings, S. REP. NO. 94-755, 94th Cong., 2d Sess. (1976) [hereinafter cited as CHURCH COMMITTEE REPORT], in addition to its hearings, *Intelligence Activities: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Church Committee Hearings*].

<sup>7</sup> ELLIFF at ix.

<sup>8</sup> *Id.* at xi.

<sup>9</sup> The preface acknowledges that "the question whether policies and procedures of the FBI and the Justice Department should be embodied in legislation was outside the scope of the Police Foundation-supported inquiry." *Id.*

the FBI from its earliest years to the present, and its carefully considered suggestions for resolving some of the dilemmas currently presented by certain intelligence activities, make it an invaluable aid in understanding the recently proposed charters. Moreover, examination of Elliff's book in connection with those charters provides excellent background for the important debate that is sure to continue.

## I

Mr. Elliff begins with a rather dry and understated review of public perceptions of the FBI throughout the period of its existence and a discussion of various attempts in recent years to delineate the proper scope of its operation. He finds that from 1924, with the appointment of J. Edgar Hoover as director, until the late 1950s, the public regarded the FBI with uncritical admiration.<sup>10</sup> Elliff apparently suggests that, in this relatively early period, much of the Bureau's prestige was closely linked with its image as an essentially defensive organization. Its use of surveillance, for example, was thought to involve "only those few dissenting groups that used violence or served the interest of a hostile foreign power."<sup>11</sup>

Elliff believes that the Watergate "revolution"<sup>12</sup> of the mid-1970s shattered the public perceptions that had done so much to maintain that Bureau's high level of confidence and respect. First, it became clear the FBI intelligence operations were no longer focused only on dangerous extremists. The Bureau had applied its formidable intelligence-gathering apparatus to the activities of law-abiding citizens whose only threat to the domestic order or national security had been the peaceful exercise of their right of political dissent.<sup>13</sup> Second, investigations established that successive Presidents and Attorneys General "bore major responsibility"<sup>14</sup> for this shift of orientation. Thus, those broad segments of the American public involved in civil rights and antiwar activities had good reason to suspect they were the targets of FBI investigations—and

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.* at 20. Elliff considers the Watergate episode an event of "revolutionary dimensions," referring to Otto Kirchheimer's statement that he was "tempted to define a revolution by the willingness of a regime to open the archives of its predecessor's political police." *Id.* (quoting O. KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 204 (1961)).

<sup>13</sup> ELLIFF at 21.

<sup>14</sup> *Id.*

they had good reason to believe that their elected officials were responsible for making them so. Finally, the public learned that the White House had used the FBI for partisan political purposes on many occasions,<sup>15</sup> thus making the Bureau's activities seem corrupt as well as oppressive.

Many of the governmental and professional organizations instrumental in bringing these discoveries to light also suggested policies defining the proper scope and purposes of intelligence activities. The Church Committee "sought substantially to narrow, and to impose special restrictions on the conduct of, those investigations that involved the most flagrant abuses in the past,"<sup>16</sup> while still recommending that the FBI continue preventive intelligence investigations of terrorist and foreign-intelligence activities.<sup>17</sup> At roughly the same time that the Church Committee published its findings, the Comptroller General published a General Accounting Office report,<sup>18</sup> requested by the House Judiciary Committee,<sup>19</sup> on "the purpose and scope" of domestic-intelligence operations. Although the report indicated that domestic operations had produced few tangible results, it concluded that the FBI should continue its investigations of "groups involved in activities that have resulted, or are likely to result, in use of violence."<sup>20</sup> The Special American Bar Association Committee to Study Federal Law Enforcement Agencies criticized FBI surveillance of "legitimate activities of American citizens," while affirming the desirability of continued FBI investigations of "alleged subversives or extremists" and "in anticipation or prevention of a crime."<sup>21</sup> Each of these groups appears to have favored, to one degree or another, the restriction of FBI investigations so that they could not be abused as they had been previously. Yet each perceived the continued need for domestic security investigations as long as such investigations were limited to groups and organizations apt to engage in criminal or violent behavior and actual espionage.

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<sup>15</sup> *Id.*

<sup>16</sup> ELLIFF at 24 (quoting CHURCH COMMITTEE REPORT, *supra* note 6, at Book II, 318).

<sup>17</sup> ELLIFF at 24.

<sup>18</sup> COMPTROLLER GENERAL OF THE UNITED STATES, FBI DOMESTIC INTELLIGENCE OPERATIONS—THEIR PURPOSE AND SCOPE: ISSUES THAT NEED TO BE RESOLVED (1976) [hereinafter cited as COMPTROLLER'S REPORT].

<sup>19</sup> See ELLIFF at 14.

<sup>20</sup> *Id.* at 24 (quoting COMPTROLLER'S REPORT, *supra* note 18, at 158-61).

<sup>21</sup> ELLIFF at 25 (quoting SPECIAL COMMITTEE TO STUDY FEDERAL LAW ENFORCEMENT AGENCIES, AMERICAN BAR ASSOCIATION, PREVENTING IMPROPER INFLUENCE ON FEDERAL LAW ENFORCEMENT AGENCIES 21-22 (1976)).

By far the most distinguished and influential contribution to the reform efforts of the mid-1970s, however, was the set of Guidelines for FBI Domestic Security Investigations issued by then-Attorney General Edward H. Levi in March of 1976.<sup>22</sup> Attorney General Levi described the guidelines as tying "domestic security investigations closely to the violation of federal law,"<sup>23</sup> adding that their purpose "must be the detection of unlawful conduct and not merely the monitoring of disfavored or troublesome activities and surely not of unpopular views."<sup>24</sup> Elliff quotes Levi's testimony before the Church Committee regarding the proper conduct of domestic security investigations:

"[D]etection of crime in some areas requires preparation and at least some knowledge of what is likely to be going on. What is at issue, I think, is the proper scope, the means and methods used, the attention paid to conduct and not views, and the closeness of the relationship of the conduct and that which is forbidden by the laws of the United States."<sup>25</sup>

Elliff discerns in the Attorney General's guidelines and in the Church Committee and Comptroller's reports, a system of twin premises regarding the use of FBI domestic investigations: they are needed to anticipate the commission of certain violent crimes, and they should be so executed as to prevent the occurrence of those crimes, rather than merely to facilitate prosecution.<sup>26</sup> It would seem that this viewpoint, at least as Elliff describes it, is consonant with a return to the essentially defensive FBI that had gained the public's respect and confidence in the 1930s and 1940s.

## II

Mr. Elliff combines intimate familiarity with the contours of the various proposals for FBI reform with balanced and objective research and presentation; his many constructive suggestions and conclusions can be usefully borne in mind when examining the re-

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<sup>22</sup> Reprinted in ELLIFF at 196-202.

<sup>23</sup> *Id.* at 24 (quoting *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary* (Pt. 3), 94th Cong., 1st Sess. 258 (1976) [hereinafter cited as *House Oversight Hearings*] (testimony of the Hon. Edward H. Levi)).

<sup>24</sup> ELLIFF at 24.

<sup>25</sup> *Id.* (quoting *Church Committee Hearings, supra* note 6, at Book VI, 314 (testimony of the Hon. Edward H. Levi)).

<sup>26</sup> ELLIFF at 24.

cent legislative charters. Mr. Elliff's recommendations do diverge significantly from certain provisions of the FBI charter in ways that reflect his careful consideration of prior work in the field. Examination of a particular type of domestic security investigation, that concerning organizations suspected of terrorist activity, will amply demonstrate these contrasts.

It may be interesting, however, to point out initially that the structure of Elliff's book, shaped by his assignment from the Police Foundation,<sup>27</sup> has been somewhat overtaken by events. His volume deals exclusively with the activities of the FBI, and thus addresses Bureau investigations of domestic criminal activities related to foreign espionage as well as those that are not.<sup>28</sup> The recently proposed legislation, on the other hand, reflected an analytical division along different lines. The CIA charter attempted to unify under one statute certain authorization and regulatory provisions for the foreign-intelligence activities of virtually all the entities of the intelligence community, including the FBI.<sup>29</sup> Senate Bill 1612, on the other hand, described as its chief purpose the creation of a charter for the FBI, and expressly excludes FBI foreign-intelligence and counterintelligence activities from its coverage.<sup>30</sup> Whereas Elliff's book discusses foreign-counterintelligence activities as one of the issues addressing the FBI as an institution, the recent legislative proposals addressed foreign-counterintelligence activities across institutional lines, and treated FBI operations as only one aspect of the larger issues involved.

Senate Bill 1612 surpassed the Elliff analysis in terms of the depth and detail of its coverage. Both the bill and the Elliff book, however, devote substantial attention to intelligence investigations related to terrorist organizations. Perhaps as a result of the current topicality of the subject, much of the controversy over the FBI charter has concerned its treatment of such investigations. These provisions are of interest, not solely for the controversies they engender, but also for the comparisons they invite with Elliff's recommendations. Elliff deals directly with three of the critical issues

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<sup>27</sup> See text and note at note 7 *supra*.

<sup>28</sup> Elliff addresses issues concerning foreign-counterintelligence investigations in a separate chapter. ELLIFF at 133-59. See text and notes at notes 65-72 *infra*.

<sup>29</sup> Section 111(a) of the bill authorizes the "entities of the intelligence community" to conduct "intelligence activities" under the direction of the National Security Council, but only in accordance with the provisions of the bill itself. Section 103(12) lists the many organizations to be considered "entities of the intelligence community," including the FBI.

<sup>30</sup> S. 1612, § 531a(a).

to be resolved regarding this feature of the FBI charter.

## A

The first such issue is whether, and to what extent, the FBI should even engage in "intelligence-type" investigations of suspected terrorist organizations. Elliff reminds us that a criminal investigation begins only when the Bureau learns that a crime has been or is about to be committed and that the investigation terminates when a decision has been made whether to prosecute.<sup>31</sup> The purpose of an intelligence investigation, by contrast, is the gathering of general information, rather than the obtaining of evidence relating to a particular crime; the decision to begin or terminate such investigations does not necessarily depend on prosecutorial factors.<sup>32</sup> Because crucial decisions during these investigations may not be based on objective evaluations of the worth of the gathered information in terms of some explicit criterion, some feel that the investigations present a threat to the privacy of citizens that is virtually unrestrained.<sup>33</sup> Elliff points out that the elimination of intelligence activities would not block all sources of information to the FBI, because regular criminal investigations can also provide significant warning of impending violence.<sup>34</sup> Thus it is arguable that domestic-intelligence investigations, even with respect to terrorist groups, are not desirable at all.

Elliff concludes that the Bureau needs the authority to conduct this type of investigation, but arrives at the conclusion by a circuitous route. He suggests that the Church Committee and the Comptroller's Report adopted two standards for evaluating the effectiveness of FBI intelligence investigations—the degree to which such investigations assist future investigations of specific criminal acts and the degree to which they aid in preventing terrorist crimes.<sup>35</sup> By both standards, Elliff concludes that FBI intelligence investigations are relatively ineffective,<sup>36</sup> but he insists that intelligence investigations are still necessary to "calm public fears in time of terrorist activity";<sup>37</sup> without the authority to conduct intel-

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<sup>31</sup> ELLIFF at 105.

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* at 104.

<sup>34</sup> *Id.* at 108.

<sup>35</sup> *Id.* at 106.

<sup>36</sup> *Id.* at 107.

<sup>37</sup> *Id.* at 108.

ligence activities, public confidence in federal law enforcement would be undermined and the public would perceive the Justice Department as failing in its duty to "insure domestic tranquility."<sup>38</sup>

Elliff's point at first seems fatuous, since the conduct of such investigations in recent years has done little to improve the public image of the Bureau. But he distinguishes the continued intelligence operations he advocates from those in the recent past by noting that, instead of concentrating on groups or individuals that "had a record of violence or were likely to use violence in the near future," the FBI has been investigating persons or groups "because of their adherence to revolutionary or extremist ideologies."<sup>39</sup> Thus Elliff endorses FBI antiterrorist intelligence investigations of only those groups with a "track record" of violence.<sup>40</sup> Of course, the FBI would not be completely precluded from investigating groups without a track record. Elliff's point is merely that without such a record, investigations must be oriented toward a particular anticipated terrorist act, and their conduct would thus be governed by the standards of a regular criminal investigation:

Where members of a group have a record of federal crimes involving violence, the group deserves wider investigation to determine what it will do next and who may be involved. This requires collecting intelligence information beyond evidence of a crime. But if a group is suspected only of preparing to commit crimes in the future, there is much less justification for broad intelligence gathering. The sole purpose of the investigation should be to find out if, in fact, someone is planning a specific terrorist act.

. . . .

These limits on the scope and purpose of purely preventive investigations would confine intelligence gathering to groups such as the Symbionese Liberation Army or the Weather Underground, whose potential for future terrorist acts is clearly established by their track record.<sup>41</sup>

The authors of Senate Bill 1612 do not appear to have been quite so restrictive as Elliff in delineating the circumstances in

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<sup>38</sup> *Id.* at 109.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 119.

<sup>41</sup> *Id.*



which an antiterrorist intelligence investigation would be authorized. The bill contained an explicit authorization for the investigation of suspected terrorist groups,<sup>42</sup> and provided a detailed description of the type of group that could be considered as coming within its purview. A group would have been subject to an investigation if “facts or circumstances . . . reasonably indicate[d]”<sup>43</sup> that the group operates for one of several enumerated purposes (such as “intimidating or coercing the civil population”<sup>44</sup>), and that “such purpose is to be accomplished wholly or in part”<sup>45</sup> through enumerated varieties of terrorist activities. These provisions—phrased in terms of reasonable indications of circumstances and purposes to be accomplished—do not appear to have required the past commission of a single terrorist act for a group to be subject to a domestic-intelligence investigation.

## B

The second issue that Elliff focuses on is the use of informers and infiltrators. His book indicates,<sup>46</sup> and the Church Committee Report documented in some detail,<sup>47</sup> the FBI’s extensive reliance on informants for the conduct of antiterrorist intelligence investigations as well as general criminal investigations. In situations involving suspected terrorist groups, such informants would report not only on the likelihood of illegal violent activities, but would also of necessity report the wholly peaceful activity of the groups they infiltrate. Elliff indicates that such widespread infiltration of groups engaged in entirely lawful political activities might exert a chilling effect on such activities, and observes that for this reason the concept of an “investigative warrant” has “become more attractive.”<sup>48</sup> Such a warrant might be issued on probable cause that the informant would gain information about violent criminal activity.

Attorney General Levi apparently believed that the investigative warrant would have undesirable institutional effects, seeing it as “a step toward the inquisitorial system in which judges, and not

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<sup>42</sup> S. 1612, § 533(b)(3).

<sup>43</sup> *Id.* § 533(b)(3)(a).

<sup>44</sup> *Id.* § 533(b)(3)(A)(i).

<sup>45</sup> *Id.* § 533(b)(3)(B).

<sup>46</sup> See ELLIFF at 120-21.

<sup>47</sup> See CHURCH COMMITTEE REPORT, *supra* note 6, at (Book II), 184.

<sup>48</sup> ELLIFF at 125.

members of the executive, actually control the investigation of crimes.”<sup>49</sup> Elliff rejects the warrant mechanism for a similar reason: he fears that use of a warrant would “diffuse responsibility in a field where precise accountability is essential.”<sup>50</sup> He considers it important that the responsibility for enforcing intelligence-investigation rules rest on FBI headquarters and the Attorney General’s office, and that neither be able to “pass the buck” to a judge or magistrate.

Instead of a warrant, Elliff proposes a system of dual approval by the Attorney General’s office. First, he asserts that his limited “track record” standard for investigatory decisions<sup>51</sup> would involve a determination by the Attorney General’s office of what direction further activities would take, and that it would make sense to incorporate an “informant-approving duty” into the decision whether an investigation should be of the intelligence or regular criminal variety.<sup>52</sup> Second, the Attorney General’s office would review the activities of informants at yearly intervals to ensure that their continued deployment was justified.<sup>53</sup> He acknowledges that when the Attorney General’s office could not impose sufficiently rigorous review, judicial warrant procedures would be justified.<sup>54</sup>

Senate Bill 1612 contained a subsection especially devoted to the use of informants,<sup>55</sup> but it required the Attorney General’s office to approve specifically the use of an informant only when a person requested to become an informant was under the obligation of a privilege of confidentiality, such as a physician, attorney, clergyman, or journalist.<sup>56</sup> In other types of cases, the bill did not seem to require any restraints external to the FBI. The finding of a supervisory FBI official that an informant “appears suitable . . . and that the information likely to be obtained is pertinent to and within the scope of investigative activity” otherwise authorized, was sufficient ground for the use of an informant to collect information about an identifiable person.<sup>57</sup> When the informant would

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<sup>49</sup> *House Oversight Hearings*, *supra* note 23, at 255 (testimony of the Hon. Edward H. Levi). See ELLIFF at 126.

<sup>50</sup> ELLIFF at 127.

<sup>51</sup> See text and notes at notes 40-41 *supra*.

<sup>52</sup> ELLIFF at 124.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 127.

<sup>55</sup> S. 1612, § 533b(b).

<sup>56</sup> *Id.* § 533b(b)(3)(B).

<sup>57</sup> *Id.* § 533(b)(1).

be used to "infiltrate a group under investigation," a similar finding would have had to be made by "a senior official of the FBI,"<sup>58</sup> but still no outside authority would have been required.

### C

A third important issue addressed by Elliff is the proper role of FBI preventive action. "Preventive action" refers to tactics used by the Bureau, not to obtain information, but to obstruct the activities of the groups under its surveillance. A notorious example of such preventive action was the FBI operation known as COINTELPRO (a loose acronym for "counterintelligence program"). Elliff notes that the program consisted largely of a campaign of poison pen letters designed to inconvenience and discredit those whom the FBI considered dangerous,<sup>59</sup> and Attorney General Levi denounced its activities as variously "foolish" or "outrageous."<sup>60</sup> Some aspects of COINTELPRO seemed to have rather sinister aims, such as the disruption of lawful political activity and the encouragement of violence against those under investigation.

Elliff views the alternative to preventive-action programs as exclusive reliance on arrests and warnings, and argues that these measures are inadequate.<sup>61</sup> First, such overt measures could "blow the cover" of informants or sources; and second, arrests at an early stage of investigation would often have to be based on a conspiracy charge. Such charges, Elliff maintains, are often difficult to prosecute and raise substantial civil-liberties questions, especially when the course of action that is the object of the alleged conspiracy is still in its early stages.<sup>62</sup>

Thus Elliff endorses limited preventive action, but insists that all measures be lawful and that appropriate safeguards be employed to avoid the abuses of the past.<sup>63</sup> He recognizes the obvious necessity of preventing access to, or rendering inoperative, explosives or other weapons,<sup>64</sup> but urges that standards be developed

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<sup>58</sup> *Id.* § 533(b)(6).

<sup>59</sup> ELLIFF at 21. As an example, it appears that FBI personnel at one point had suggested the anonymous mailings of an article criticizing student demonstrators to a university official. *Id.* at 48.

<sup>60</sup> *Id.* at 131 (quoting *House Oversight Hearings, supra* note 23, at 260 (testimony of the Hon. Edward H. Levi)).

<sup>61</sup> ELLIFF at 129.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 129-30.

that would specify exactly which types of activities would be permissible. By contrast, the proposed FBI charter does not contain a detailed delineation of permissible preventive action techniques.

### III

The restricted scope of Elliff's assignment concentrated his discussion of foreign counter-intelligence investigations on the activities of the FBI. Foreign-counterintelligence investigations concern suspected espionage and other activities by or on behalf of foreign governments; thus they involve not only certain of the FBI's operations in this country, but also activities of many other agencies abroad, such as the CIA and National Security Agency. The original version of Senate Bill 2284, although it has been popularly termed "the CIA charter," recognized this diversity of interest in its broad application to virtually all entities in the American intelligence community.<sup>65</sup>

The narrowness of Elliff's focus does not mean, however, that his observations on foreign-counterintelligence investigations have no bearing on the concerns of Senate Bill 2284. His recommendations concerning the foreign-counterintelligence activities of the FBI differ from those concerning its other intelligence activities. These differences suggest similar distinctions that might be appropriate in comparing domestic-intelligence investigations with foreign-intelligence operations generally, regardless of the particular agencies involved.

In the first place, Elliff suggests that the standards governing foreign-counterintelligence investigations in the United States should reflect the various national interests to be protected; they should "incorporate policy judgments about the desired purpose of counterintelligence investigations."<sup>66</sup> Elliff acknowledges that these standards may often require investigations that "go beyond the conventional investigation of specific crimes for purposes of prosecution."<sup>67</sup> Thus Elliff appears to be more willing to abandon the criminal-investigation standard for foreign-counterintelligence in-

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<sup>65</sup> See S. 2284, § 103(12)(A)-(L). The Senate ultimately passed Senate Bill 2284 on June 3, 1980, but the provisions of the bill as passed merely strengthened congressional oversight of certain intelligence activities. 126 CONG. REC. S6171 (daily ed. June 3, 1980). Thus, although the Senate passed Senate Bill 2284, it did not pass the so-called "CIA charter."

<sup>66</sup> ELLIFF at 137.

<sup>67</sup> *Id.*

vestigations than for domestic-intelligence investigations. This might also be useful in contrasting the proper nature of investigations conducted under a measure such as the CIA charter with those domestic investigations conducted under provisions similar to Senate Bill 1612.

Second, Elliff divides foreign-counterintelligence activities into two stages: a "preliminary" investigation<sup>68</sup> and a "full" investigation.<sup>69</sup> A full investigation, the more thorough and more potentially obtrusive of the two, would be authorized "only when there is reasonable suspicion that a person is a conscious member of a hostile foreign intelligence network."<sup>70</sup> It might be inferred that a less restrictive approach, comparable to the one Elliff advocates for foreign-counterintelligence FBI activities, should be advanced by analogy for foreign-intelligence investigations by other agencies. Even if such an analogy were correct, one might still expect a sharply defined standard for the commencement of large-scale CIA foreign-intelligence operations similar to the "conscious member" standard that Elliff proposes for his FBI "full" investigations. It is worth noting, however, that the authority sought by the foreign-intelligence agencies in the CIA charter was much broader. The bill seemed to authorize the agencies to use the full range of their powers to investigate anyone engaged in "clandestine intelligence activity,"<sup>71</sup> a term that appears to have been broadly defined.<sup>72</sup>

As Congress and the public continue to debate the desirability of legislative charters for our intelligence agencies, it will be of great value to have as a benchmark these carefully drawn recommendations of an individual who had access to the details of prior FBI investigations, yet who was able to write as an independent scholar.

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<sup>68</sup> *Id.* at 139.

<sup>69</sup> *Id.* at 142.

<sup>70</sup> *Id.* at 158.

<sup>71</sup> S. 2284, § 214(a).

<sup>72</sup> *See id.* § 103(11).