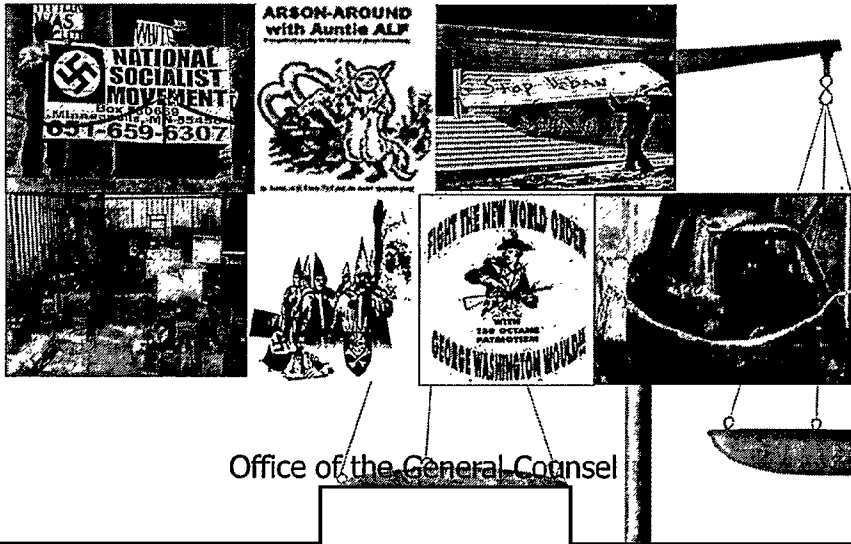


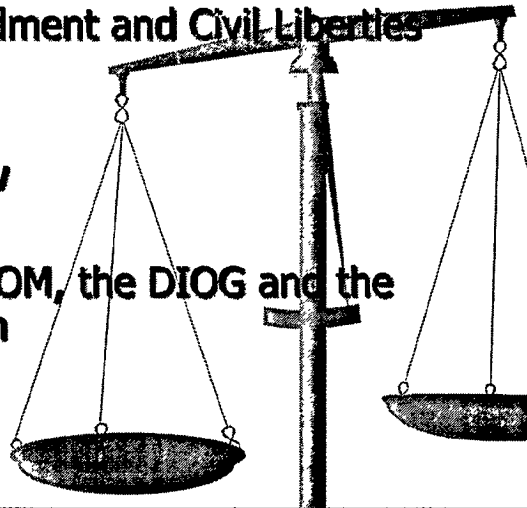
Domestic Terrorism Investigations: Legal Issues for DT Agents



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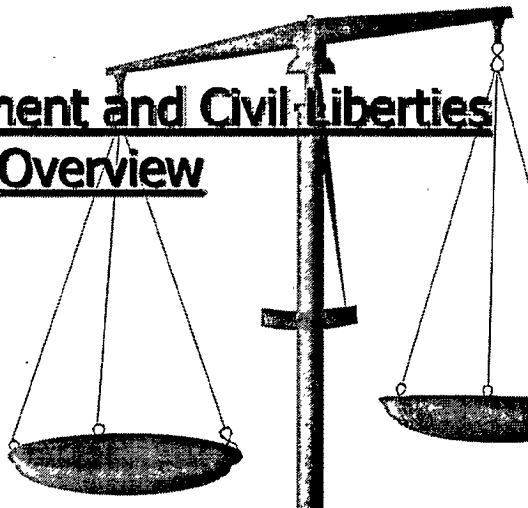
Agenda

- First Amendment and Civil Liberties Overview
- Federal Law
- The AGG-DOM, the DIOG and the DT program
- Case Study



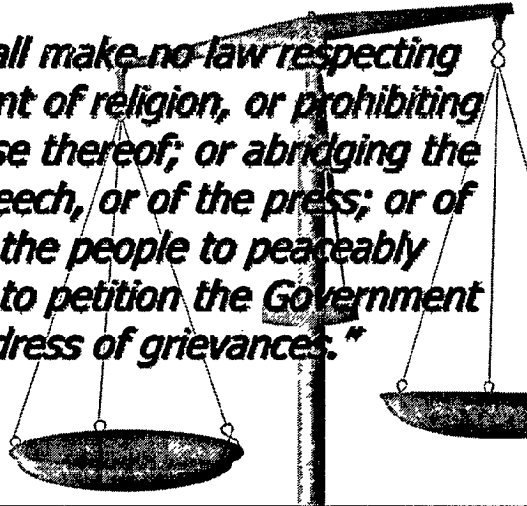
First Amendment and Civil Liberties

Overview



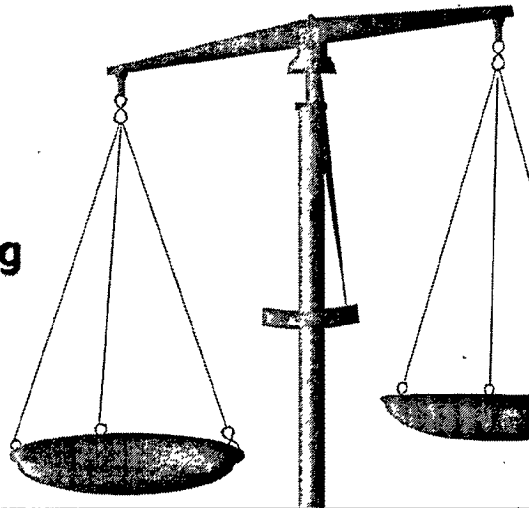
First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."



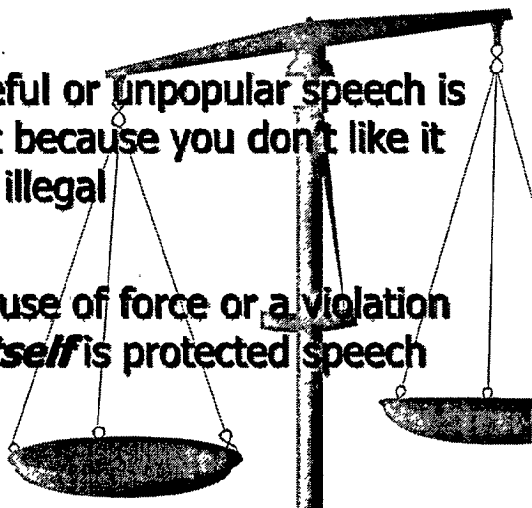
Unprotected Speech

- Fighting Words
- Obscenity
- Extortion
- Perjury
- False Advertising
- True Threats



- We're interested in true threats.
- Where is the line between protected expression and an unprotected true threat?

Protected Speech

- 
- Sometimes hateful or unpopular speech is protected – just because you don't like it doesn't make it illegal
 - Advocating the use of force or a violation of the law ***by itself*** is protected speech

- First Amendment issues become especially tricky when it comes to “threats.”
- The difficulty arises because we're not allowed to monitor solely First Amendment activity. So it's hands off UNTIL “the line” is crossed. THEN we can get involved.

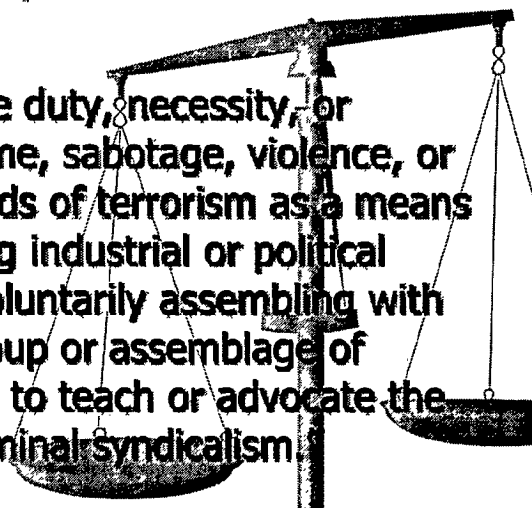
- Other courts applying Watts looked at (1) the context of the statement – was it made during a political speech, etc.; (2) the conditional nature of the threat – if ____, then ____; and (3) the reaction of the listeners.

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The Line (An Example)

Ohio statute (1969) at issue criminalized the following:

"advocating ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism"



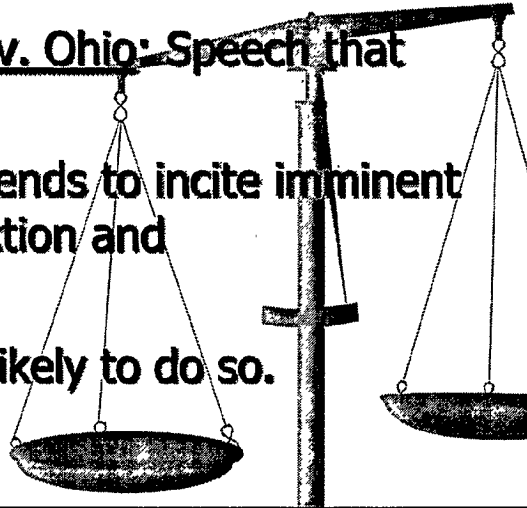
Constitutional or not?

The Line (An Example)

- Brandenburg v. Ohio: Speech that

(1) intends to incite imminent lawless action and

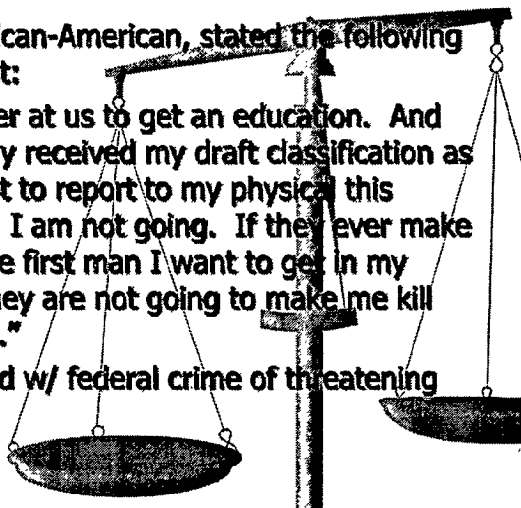
(2) is likely to do so.



The Supreme Court held that a State cannot “forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

The Line (Another Example)

- Robert Watts, an African-American, stated the following at an anti-war protest:
 - "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report to my physical this Monday morning. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers."
- Can Watts be charged w/ federal crime of threatening the president?

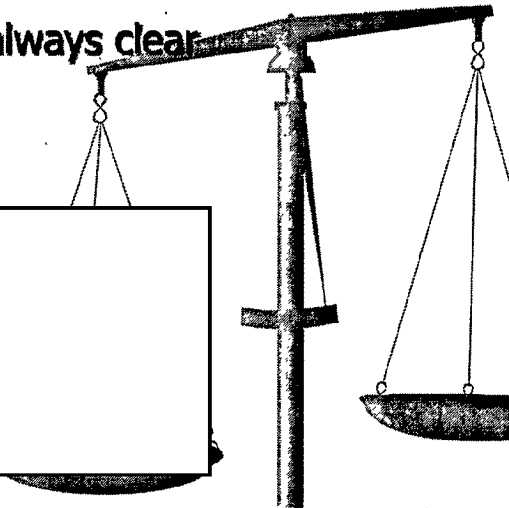
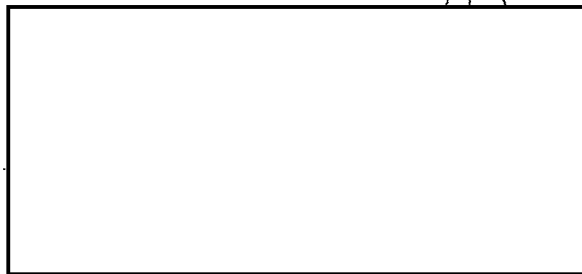


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The Line

- "The Line" isn't always clear

- Look at –



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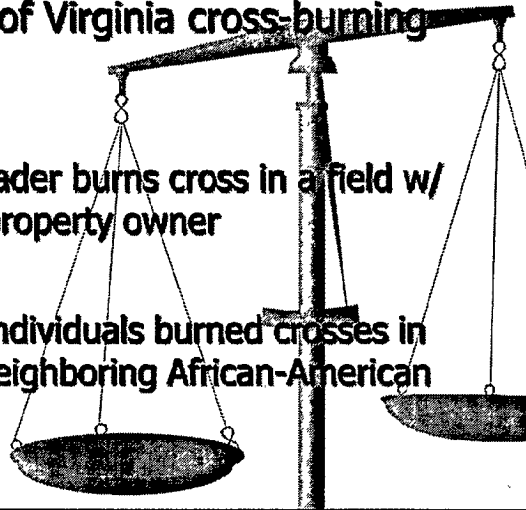
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The Line (Last Example)

- **Involves a pair of Virginia cross-burning cases (2003)**

- **CASE I: KKK leader burns cross in a field w/ permission of property owner**

- **CASE II: Two individuals burned crosses in the yard of a neighboring African-American family**



- Virginia v. Black (2003) (consolidated cases): In both cases, the accused appealed their convictions under a Virginia law that prohibited “any person or group of persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.

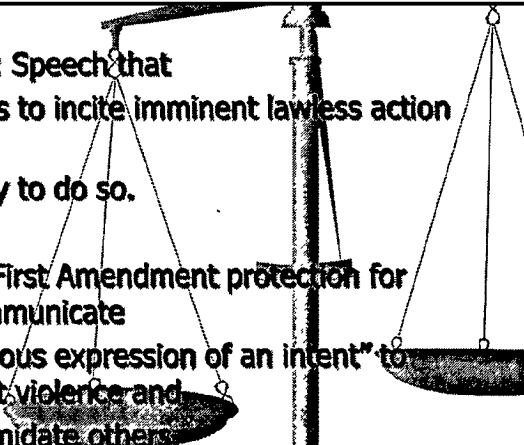
- Supreme Court struck down the part of the Virginia law that created a presumption that all cross-burnings were done with an intent to intimidate.

- Justice O’Connor formulated the “true threat” test: “True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects the individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.”

- So there appears to be an intent element in the analysis -- the speaker has to direct a threat to a person with the intent of placing the victim in fear of bodily harm or death.

Guideposts

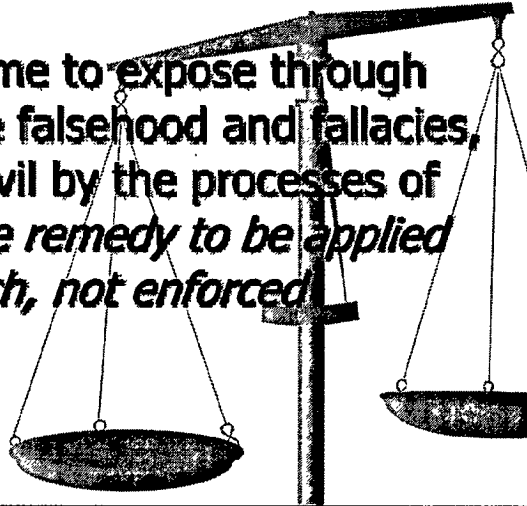
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- 
- Brandenburg v. Ohio: Speech that
 - (1) intends to incite imminent lawless action
 - and
 - (2) is likely to do so.
 - Virginia v. Black: no First Amendment protection for speech meant to communicate
 - (1) A "serious expression of an intent" to commit violence and
 - (2) to intimidate others.

Brandenburg → Rally leader spurred on followers in general terms, not directly out to do battle, and no planning. Protected b/c "mere advocacy" can't be punished.

Take Away from Justice
Brandeis

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, *the remedy to be applied is more speech, not enforced silence.*"



First Amendment and the Bureau

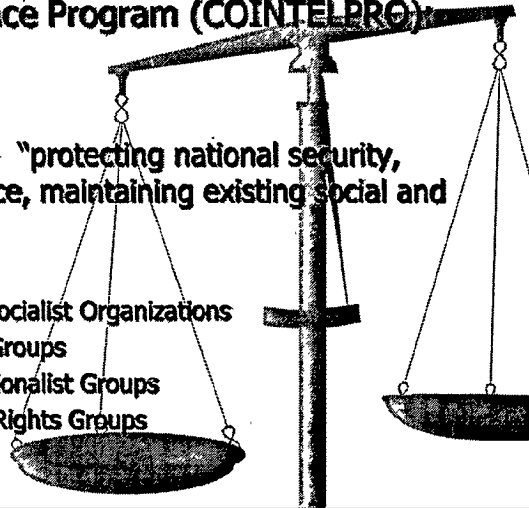
■ Counter Intelligence Program (COINTELPRO)

■ 1956 to 1971

■ Our stated goal -- "protecting national security, preventing violence, maintaining existing social and political order."

■ Our targets:

- Communist and Socialist Organizations**
- Women's Rights Groups**
- Militant Black Nationalist Groups**
- Non-Violent Civil Rights Groups**



• Director Mueller refers to the FBI's lack of an unblemished record.

• COINTELPRO:

• 1960s-1970s

• Little oversight or legal control to restrict Executive Branch discretion in conducting "national security" investigations.

• Directed at five groups: Communist Party, Socialist Workers Party (SWP), White Hate (Ku Klux Klan), Black Nationalist (Black Panthers), New Left (absorbed the SWP)

• Also targeted across the political spectrum: Martin Luther King, Jr., speakers, teachers, writers, reporters, and publications themselves.

• Used intrusive techniques to disrupt groups and neutralize individuals deemed to be threats to "national security":

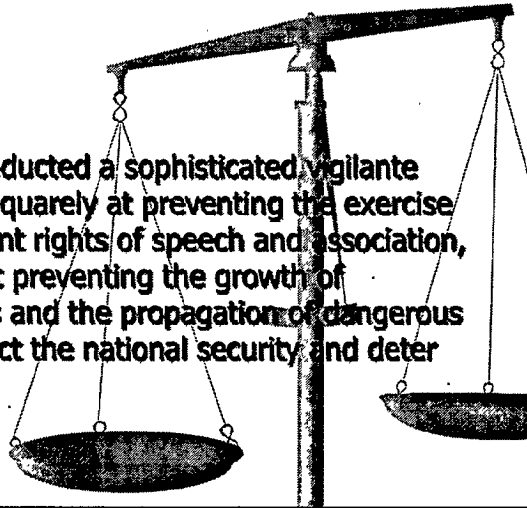
- Physical surveillance
- Recruiting sources
- Infiltrating operatives
- Electronic surveillance
- Collecting and disseminating information

• In other words, tactics that the FBI employs today!

The Church Committee Investigates

■ Final Report

- "...the Bureau conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence."



•1975: FBI and other IC agencies brought before Congress to testify in what became known as Church Committee hearings (led by Senator Church).

•Church Committee Findings:

- FBI had opened 65,000 domestic intelligence files in 1972 alone.
- At least 130,000 first class letters were opened and photographed by the FBI between 1940-1966 in eight U.S. cities.
- At least 26,000 individuals were at one point identified on an FBI List of persons to be rounded up in the event of a "national emergency."

•Church Committee condemned tactics, citing:

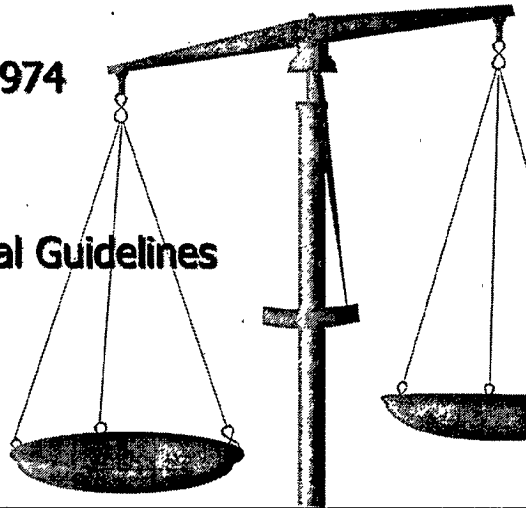
- Lack of any criminal predicate
- No established link to a foreign power or a foreign threat.
- No clear legal authority to use the tactics.
- Tactics used indiscriminately with little to no DOJ/HQ oversight.
- Groups targeted for political purposes (i.e., for exercising First Amendment rights).

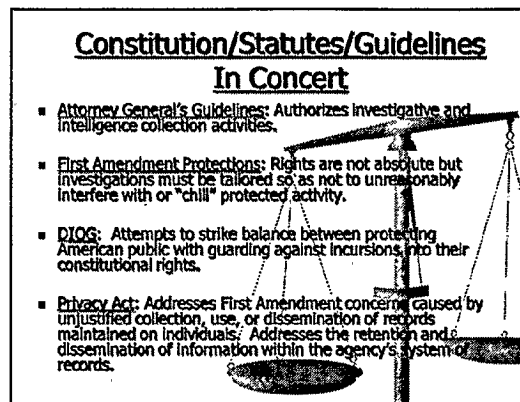
-Church Committee findings, along with Watergate scandal → led to reforms.

- ENDSTATE: We are not in the business of preventing the growth of dangerous groups or dangerous ideas – our job is to prevent dangerous actions.

The Fallout

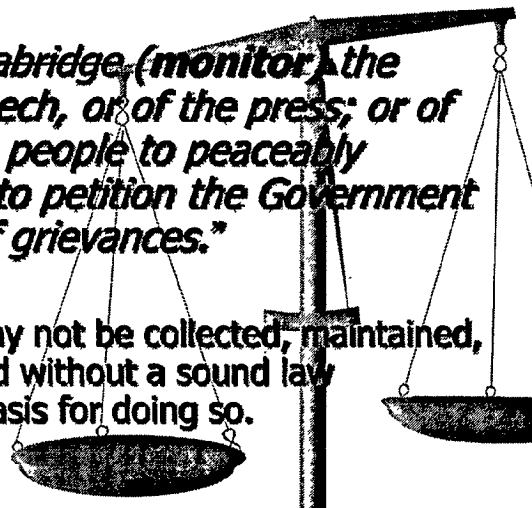
- Privacy Act of 1974
- Title III
- FISA
- Attorney General Guidelines
 - MIOG
 - DIOG





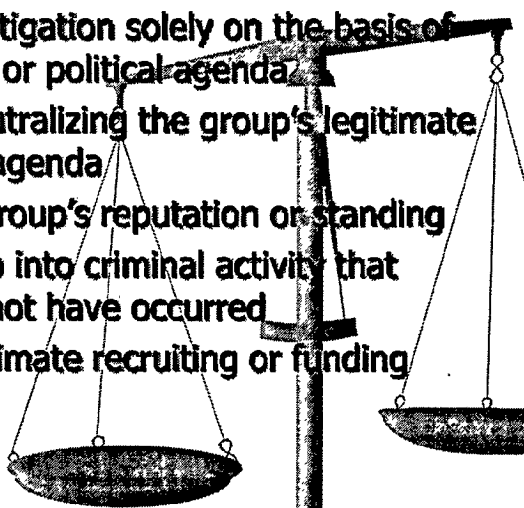
- Prior to mid-1970s:
 - FBI discretion based on executive orders and blanket authority granted by the Attorney General.
- Replaced by statutory restrictions and detailed DOJ guidelines.
- Today:
 - FBI's protection of privacy and civil liberties not limited to observance of constitutional standards.
 - Number of other guideposts in place – some of which go even farther than constitutional requirements.
- AG Guidelines:
 - First issued by AG Levi in 1976
 - Revised several times, most recently by AG Mukasey in 2008.
 - General Principles:
 - Guidelines must be flexible enough to permit FBI to proactively address potential threats by acting well in advance of the commission of a federal crime or an act that threatens national security.
 - Investigations may not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States.
 - Employ least intrusive means needed to achieve objective under the circumstances.
 - Limit:
 - Interference with protected speech and association,
 - Damage to reputation,
 - Intrusion on privacy.

FBI has rewritten the Constitution

- 
- ***FBI shall not...abridge ~~(monitor)~~ the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."***
 - **Information may not be collected, maintained, or disseminated without a sound law enforcement basis for doing so.**

- Underscores a central tenant of the AG Guidelines and the DIOG: An "authorized purpose" is ALWAYS required no matter what type of investigation you might be conducting: assessment, preliminary investigation, or full investigation.

Legally Objectionable Investigative Activities

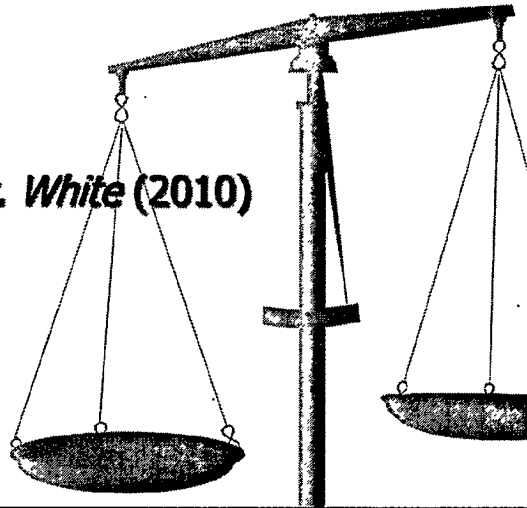
- Initiating an investigation solely on the basis of the groups' social or political agenda
 - Sabotaging or neutralizing the group's legitimate social or political agenda
 - Disparaging the group's reputation or standing
 - Leading the group into criminal activity that otherwise would not have occurred
 - Undermining legitimate recruiting or funding efforts
- 

• Be particularly mindful of some of the less obvious activities – “neutralizing the group’s legitimate social or political goals.” What if the “social or political goals” are abhorrent? Doesn’t matter.

• Also be careful about having too many sources effectively “run” a group? Is the group conducting the criminal activity on its own or was it led to the water by the source or undercover? Entrapment issues.

Case Study

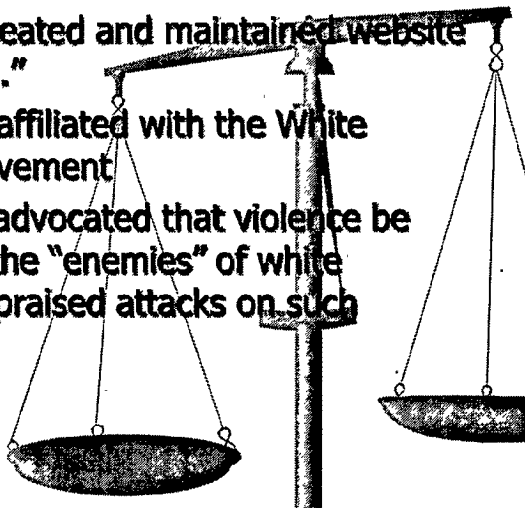
■ *United States v. White* (2010)



- This case out of the Seventh Circuit illustrates the difficulty that courts have in assessing “true threats.”

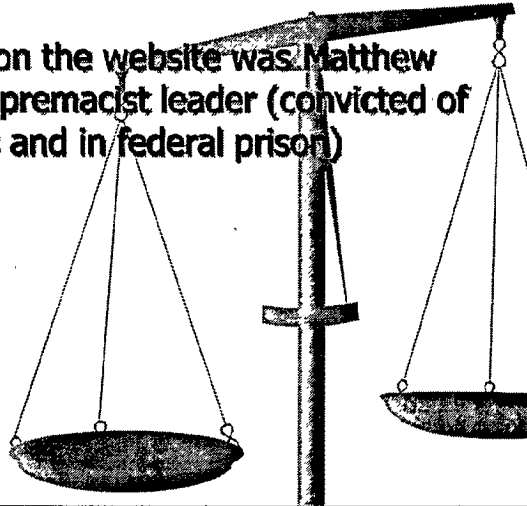
Facts of the Case

- William White created and maintained website "Overthrow.com."
- Overthrow.com affiliated with the White Supremacist movement
- White routinely advocated that violence be perpetrated on the "enemies" of white supremacy and praised attacks on such enemies



Facts of the Case

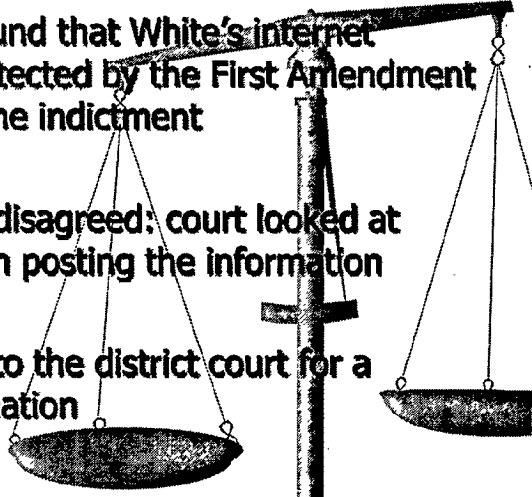
- Repeated topic on the website was Matthew Hale, a white supremacist leader (convicted of several offenses and in federal prison)
- First posting
- Second posting



• First posting (2005): “everyone associated with the Matt Hale trial has deserved assassination for a long time.” He also wrote a posting naming individuals involved or related in some way to Hale’s conviction, such as federal agents and prosecutors and other citizen’s advocating for Hale’s arrest, stating that any of them may be the next targets of an “unknown nationalist assassin.” No personal info published.

• Second posting (2008): posted personal information about the foreperson of the Hale trial: Name, address, date of birth, home phone number, cell phone number, and office number.

Court's Decision

- 
- District court found that White's internet posting was protected by the First Amendment and dismissed the indictment
 - Seventh Circuit disagreed: court looked at White's intent on posting the information
 - Case sent back to the district court for a factual determination

- Ninth Circuit focused on White's intent – if White intended that one of his readers harm the juror, then there is a crime. Doesn't matter whether the juror was actually harmed. If White intended only make a political point, then there is no crime.
- Note that two federal courts disagreed on the outcome of the "true threat" analysis.
- Ultimately, it will be very factually driven: As the Circuit court noted, one has to look at the meaning and inferences that can be drawn from the facts. One has to look at the website's readership, audience, and the relationship between White and his followers (are they willing and capable of acting on his statement?).
- Note that the district court found White guilty on remand.

Federal Law

Domestic Terrorism



18 U.S.C. § 2331(5)

Definition of Domestic Terrorism

Activities that:

- Involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- Appear to be intended to
 - intimidate or coerce a civilian population;
 - influence the policy of a government by intimidation or coercion; or
 - affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- Occur primarily within the territorial jurisdiction of the United States.

Violent Criminal Act + Special Intent

18 U.S.C. § 2331(5)

The term "domestic terrorism means activities that-

(A) involve acts dangerous to human life that are a violation of the criminal laws of the US or of any State.

(B) Appear to be intended-

(i) to intimidate or coerce a civilian population;

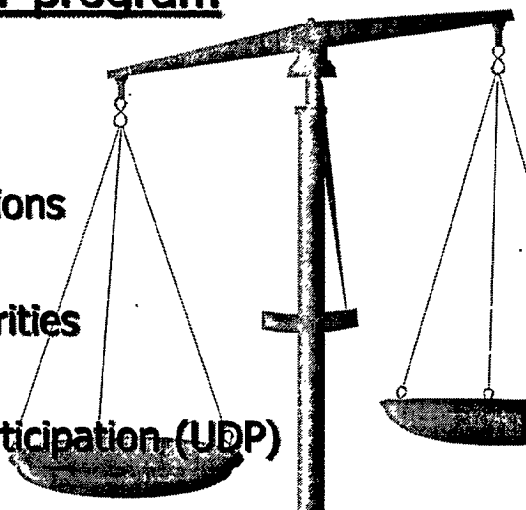
(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of the government by mass destruction; assassination or kidnappings; and

(C) Occur primarily w/I the territorial jurisdiction of the US

The AGG-DOM, the DIOG and the DT program

- The Guidelines
- Case Classifications
- Approval Authorities
- Undisclosed Participation (UDP)



THREE PRONGS OF AN FBI DT CASE

- Advancement of political and/or social goals;
- Wholly or in part through activities that involve the use of force or violence;
- In Violation of Federal Law.

Violent Federal Criminal Act + Special Intent

- According to the AG Guidelines and the DIOG, DT investigations require these three prongs.
- We'll discuss the classifications in a second, but in the DT world, the vast majority of our investigations will require these three prongs.
- There's a complicated way of showing this – next slide.

Attorney General Guidelines (Terrorism) Enterprise Investigation

Group or Organization engaged in an enterprise for the purpose of:

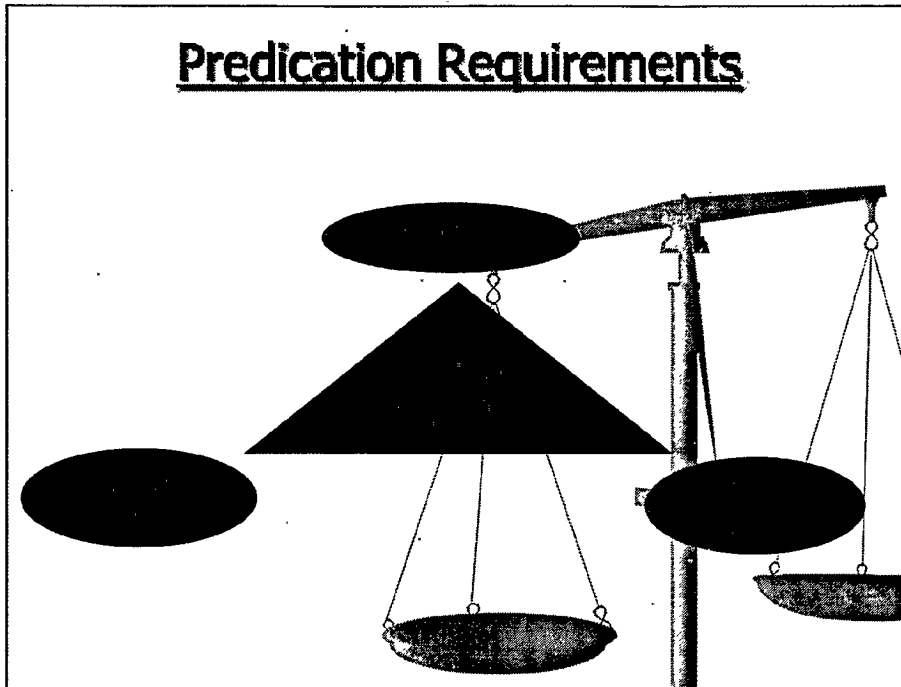
- furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law,
- An offense described as **Domestic Terrorism - 18 U.S.C. 2331(5)** involving a violation of federal criminal law, or
- Committing any offense listed under **Federal Crime of Terrorism - 18 U.S.C. 2332b(g)(5)(B)** or 18 U.S.C. 43 (Force, Violence or Threats involving animal enterprise).

Violent Federal Criminal Act • Special Intent

Here you see the three prongs tucked under the first bullet.

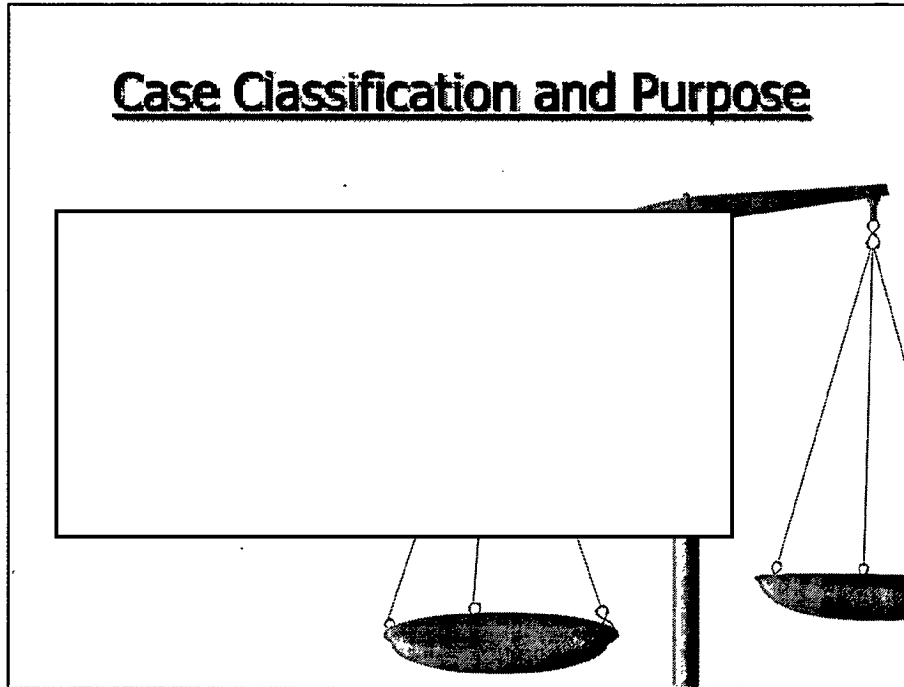
- But there's an easier way to visualize this "three prong" requirement – next slide.

Predication Requirements



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Case Classification and Purpose



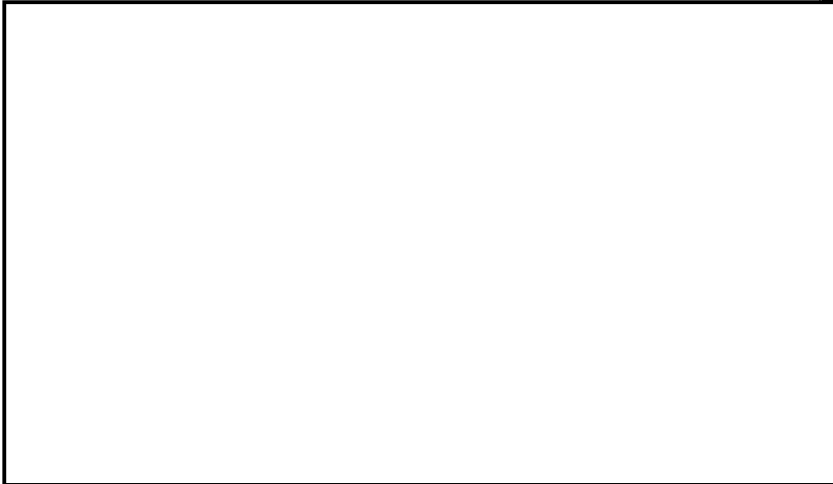
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Enterprise Investigation
Classification (100)

b7E

Note: The group's activities and statements of its members may be considered in combination to comprise the [REDACTED] even if the statements alone or activities alone would not warrant such a determination.

336 AOT-DT Classification



b7E



266 AOT-DT Classification

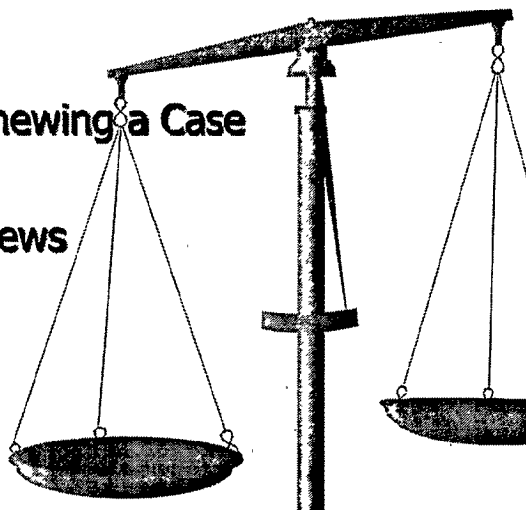
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- Why to these different investigation classifications matter?
- Because the investigative methods that can be brought to bear hinge on the case classification. You can do a whole lot more with a [redacted]

[redacted]

Approval Authorities

- Initiating or Renewing a Case
- Mandatory Reviews



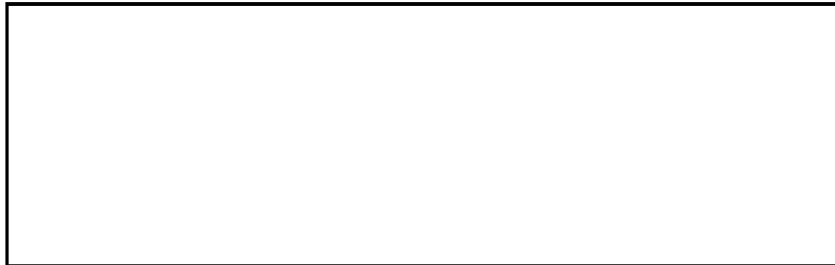
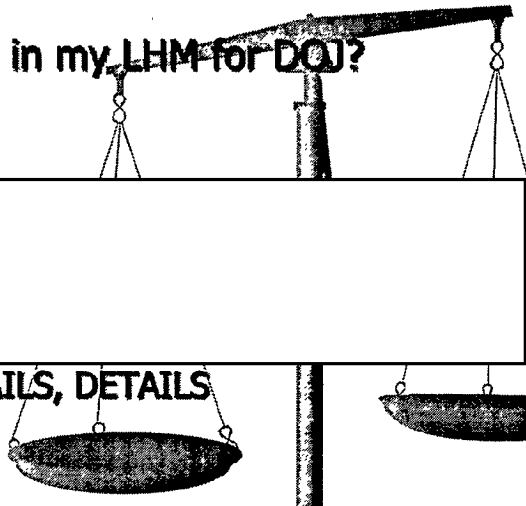
Initiating or Renewing an Enterprise Case

- What do I need in my LHM for DOJ?

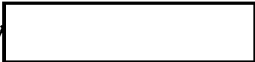
- Predication:



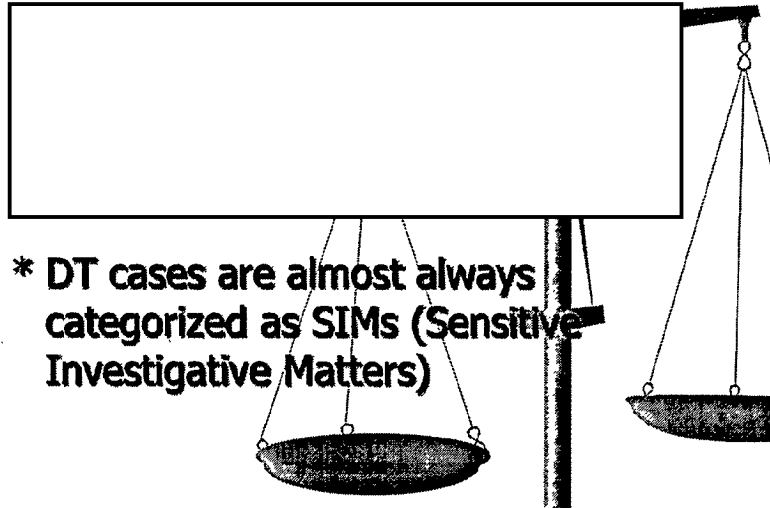
- DETAILS, DETAILS, DETAILS



b7E

- Internet: Threats on the internet? / Consider context / consider audience / consider past threats and/or acts of violence (near term)
- Legal will take a hard look at whether there is any  *within the reported time period.*

Mandatory Reviews



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•Currently: 266 policy mandates CDC review and concurrence prior to the initiation of ANY new 266 matter.

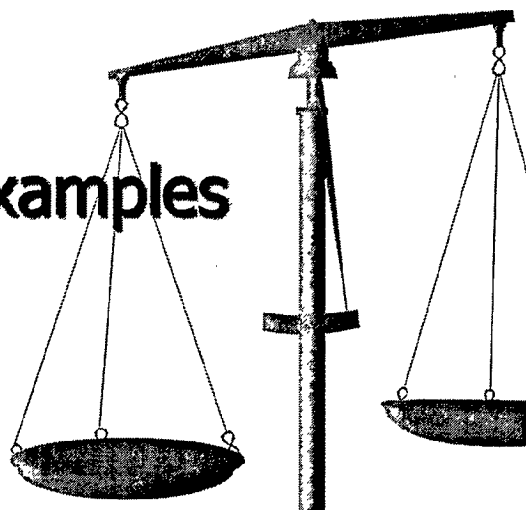
At least semi-annual review thereafter

See 6/12/2007 EC 266D-HQ-1448552, serial 1028

"Opening communication must document CDC review & concurrence..."

Case Classifications and Approvals

Examples

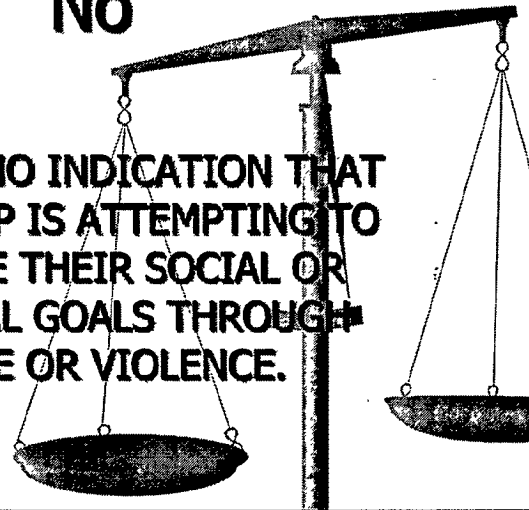


Example 1

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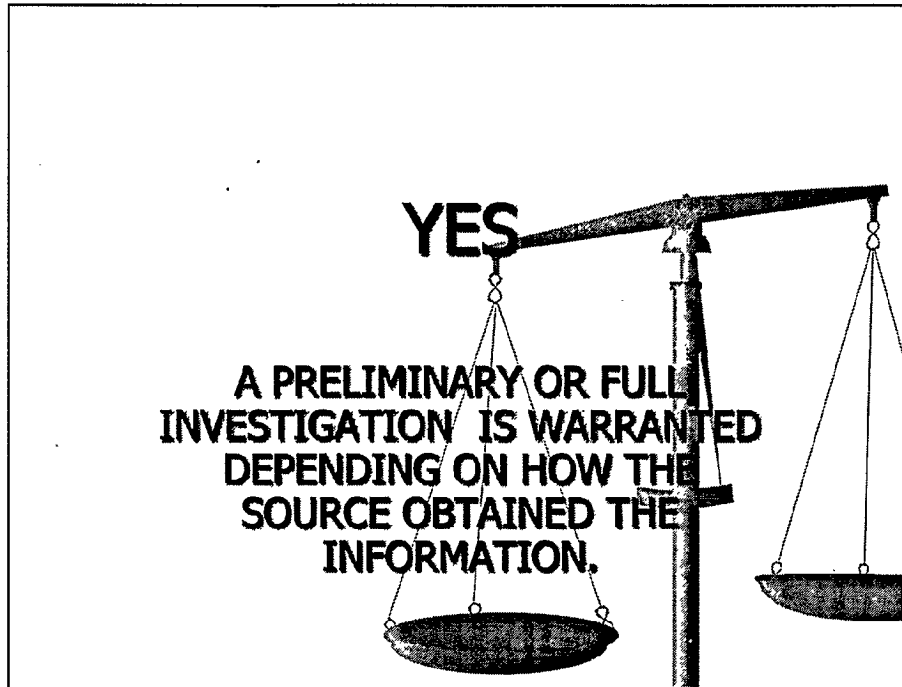
No

**THERE IS NO INDICATION THAT
THE GROUP IS ATTEMPTING TO
ADVANCE THEIR SOCIAL OR
POLITICAL GOALS THROUGH
FORCE OR VIOLENCE.**



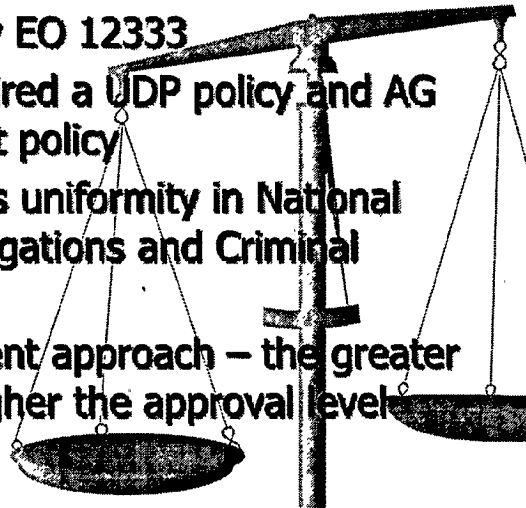
Example 2

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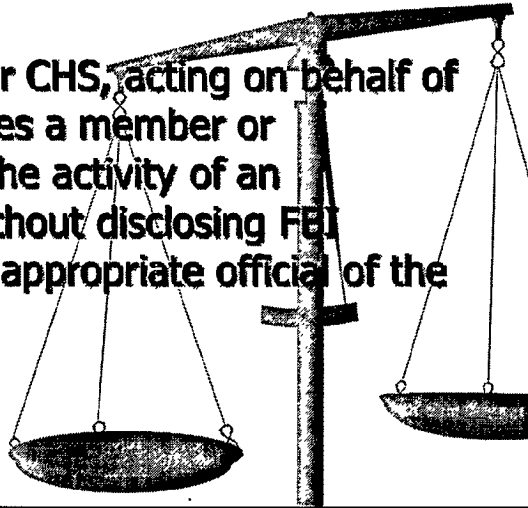
Undisclosed Participation (UDP)

- Policy driven by EO 12333
- AGG-Dom required a UDP policy and AG approval of that policy
- FBI Policy seeks uniformity in National Security Investigations and Criminal investigations
- A risk assessment approach – the greater the risk, the higher the approval level



What is UDP?

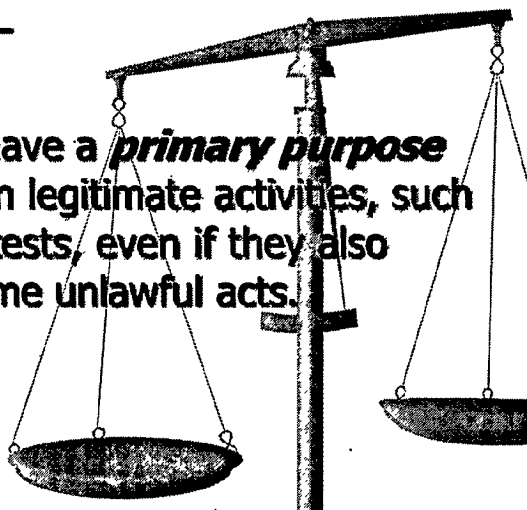
- FBI employee or CHS, acting on behalf of the FBI, becomes a member or participates in the activity of an organization without disclosing FBI affiliation to an appropriate official of the organization



UDP

■ "Organization" –

Groups that have a ***primary purpose*** of engaging in legitimate activities, such as lawful protests, even if they also engage in some unlawful acts.



- Includes organizations that meet and communicate primarily on the internet
- Does not include a loose group of friends, social contacts, or business associates who share common interests but have no formal structure, such as a weekly poker gathering of friends
- Important to remember that groups that engage in mostly unlawful activities ARE NOT organizations for UDP purposes. NO requirement to get UDP approval for these groups.

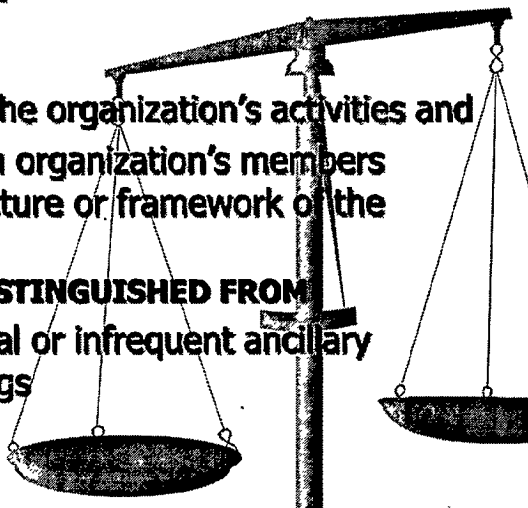
UDP

■ "Participation" –

- Taking part in the organization's activities and
- Interacting with organization's members within the structure or framework of the organization

DISTINGUISHED FROM

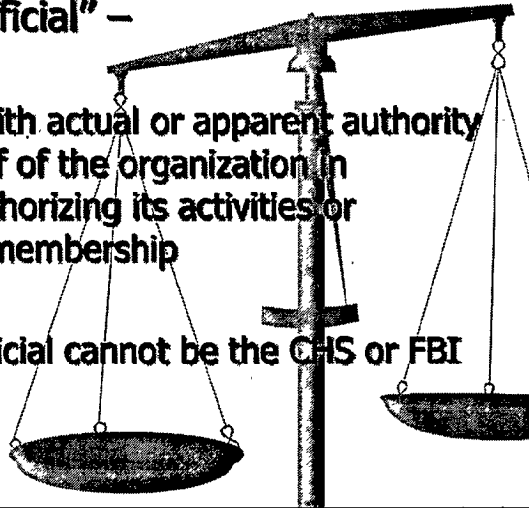
- Occasional social or infrequent ancillary business dealings



UDP

■ "Appropriate Official" –

- An individual with actual or apparent authority to act on behalf of the organization in directing or authorizing its activities or monitoring its membership
- Appropriate official cannot be the CHS or FBI employee



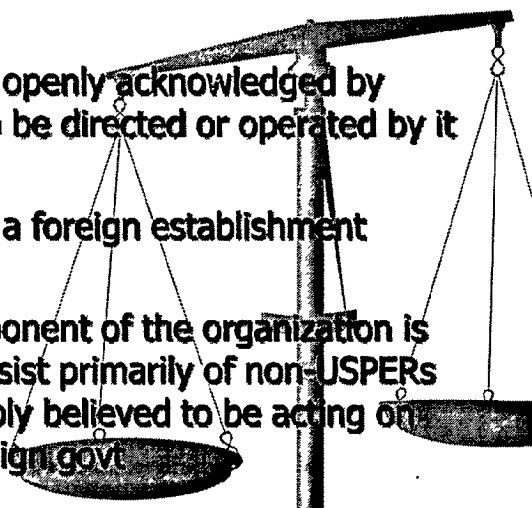
UDP

- UDP approval is NOT required when –

- Information voluntarily provided by a CHS *who is already a member* of an organization or joins on his/her own behalf
- Information is derived from attending events/activities that are open to the general public, and obtained on the same terms and conditions as members of the general public

UDP

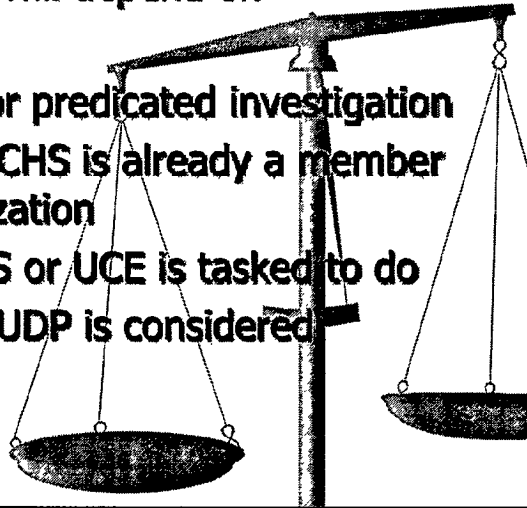
■ UDP approval is NOT required when –

- Organization is openly acknowledged by foreign govt. to be directed or operated by it**
 - Organization is a foreign establishment**
 - US based component of the organization is believed to consist primarily of non-USPERS and is reasonably believed to be acting on behalf of a foreign govt**
- 

UDP

- Approval levels will depend on –

- Assessment or predicated investigation
- Whether the CHS is already a member of the organization
- What the CHS or UCE is tasked to do
- Whether the UDP is considered "Sensitive"



- When dealing with UDP issues, especially in the realm of the internet, it can't hurt to consult your CDC or HQ OGC.

Scenario 1

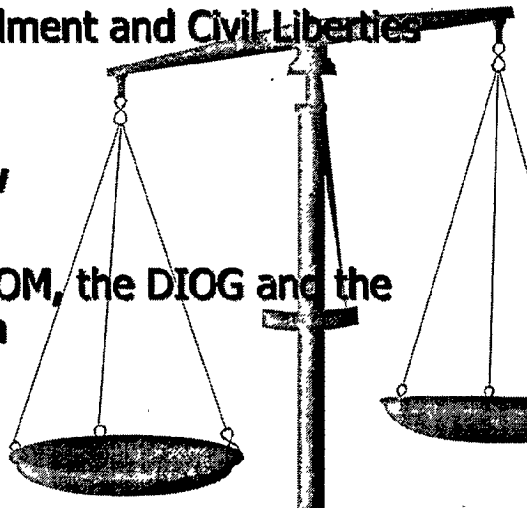
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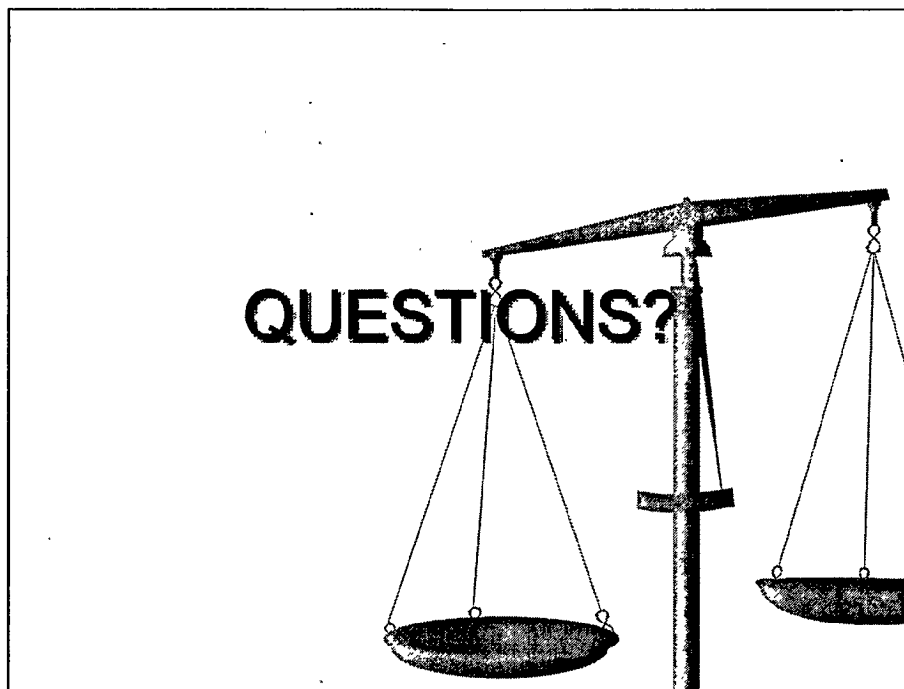
Scenario 1

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Recap

- First Amendment and Civil Liberties Overview
- Federal Law
- The AGG-DOM, the DIOG and the DT program
- Case Study





Additional Legal Questions

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