Proposal for a commission of inquiry into the effect of domestic intelligence activities on criminal trials in the United States of America

an amnesty international publication

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INTRODUCTION

Amnesty International has a threefold mandate defined by Article 1 of its Statute:

> CONSIDERING that every person has the right freely to hold and to express his or her convictions and the obligation to extend a like freedom to others, the object of AMNESTY INTERNATIONAL shall be to secure throughout the world the observance of the provisions of the Universal Declaration of Human Rights, by:
>
> a) irrespective of political considerations working towards the release of and providing assistance to persons who in violation of the aforesaid provisions are imprisoned, detained or otherwise physically restricted by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, colour or language, provided that they have not used or advocated violence (hereinafter referred to as "Prisoners of Conscience");
>
> b) opposing by all appropriate means the detention of any Prisoners of Conscience or any political prisoners without trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms;
>
> c) opposing by all appropriate means the imposition and infliction of death penalties and torture or other cruel, inhuman or degrading treatment or punishment of prisoners or other detained or restricted persons whether or not they have used or advocated violence.

Amnesty International works in support of these objects universally, as recorded annually in the Amnesty International Report. The organization's methods include research into allegations of human rights violations, the adoption of individual prisoners of conscience, the dispatch of missions to countries for talks with government authorities and the publication of reports.

Throughout its 20-year history, Amnesty International has concerned itself with various human rights questions in the United States of America. An early report, published in 1963, dealt with "Justice in the American South". In 1980 Amnesty International published recommendations, titled "Proposal for a Presidential Commission on the Death Penalty in the United States of America". It has considered allegations of the ill-treatment of migrant workers and of prison inmates, about whom it has directed inquiries and recommendations to state and federal authorities. At various times it has adopted individual prisoners or investigated their cases for possible adoption as prisoners of conscience.

This report has a precise focus. It considers cases in which United States citizens have suffered from irregular conduct by the Federal Bureau of Investigation (FBI) in the course of being prosecuted and have also been the object of FBI domestic intelligence activity. One case is of a member of the Black Panther Party; another is of a member of the American Indian Movement. Legal proceedings in both cases continued into 1981.

This report recommends that an inquiry be held and that, within it, specific consideration be given to the cases of these two men, Elmer Pratt and Richard Marshall, who were still in prison at the time of going to press. Solid grounds exist for the inquiry to determine whether official misconduct has led, as the defendants allege in their cases, to wrongful conviction of members of political groups. The defendants allege among other things that evidence was fabricated in order to convict them of murder. Amnesty International believes that such allegations should be carefully examined against the background of known instances of misconduct or harassment directed against members of the groups to which the defendants belonged.

Amnesty International does not assume that any findings of FBI misconduct in a case ought to lead automatically to an acquittal of the defendant. FBI misconduct and harassment of members of political groups have, however, created a context in which it becomes difficult to evaluate the merits of individual prosecutions. A thorough inquiry into the cases, their background and any evidence of pattern is necessary.

Amnesty International takes no position on domestic intelligence activities as such or on irregular government conduct, such as fabrication of evidence, unless these result in violation of human rights falling within the organization's mandate. Amnesty International is concerned that a combination of official misconduct and intelligence activity may have served to jeopardize the right to a fair trial while casting doubt on the bona fides of the FBI in its dealings with these defendants.

In publishing this report, Amnesty International has not sought to determine the guilt or innocence of the individuals whose cases are examined. It is concerned with the observance of internationally agreed standards for the promotion and protection of human rights.

The Final Act of the Conference on Security and Cooperation in Europe obliges the Government of the United States of America to "promote and encourage" the effective exercise of civil and political rights. Amnesty International recommends that the matters recorded in this report be thoroughly and impartially examined by an independent commission of inquiry.

CHAPTER I

A PROPOSAL FOR A COMMISSION OF INQUIRY

A. General

Amnesty International's work in the field of human rights is mainly on behalf of individuals imprisoned for overtly political offences. It is relatively easy in such cases to assess a claim that an individual is a prisoner of conscience (1) as the law under which he or she is charged often explicitly proscribes the expression of political views or the membership of a political organization. This is not so in the United States of America (USA) where cases brought to Amnesty International's attention involve convictions of ordinary criminal offences.

The cases dealt with in this report involve misconduct by the Federal Bureau of Investigation (FBI). The defendants were all politically active when legal proceedings were started, and have alleged that their prosecutions were due to state or federal policy to imprison them because of this. (2) There is evidence to suggest that the FBI has harassed and/or kept under surveillance the political groups to which the defendants belonged. (3)

Amnesty International has learned from experience that close examination of the details of an individual case may fail to reveal any demonstrable connection between a defendant's political ideology and the fact that she or he is being prosecuted. Defendants in criminal cases have the benefit of the constitutional safeguards of due process and equal protection of the laws, and there is a wide variety of legal procedures and arguments that can be adopted by the defence before, during and after conviction. Moreover, it is a jury and not Amnesty International which notes the demeanour of witnesses and is in the best position to pronounce upon questions of fact. Even though Amnesty International may undertake an exhaustive review of the evidence in each case, it can bring to this task neither the skill nor the experience of a court of law.

There is, however, another matter to consider. The cases described in this report are mainly ones where the FBI failed to act with due regard for individual human rights. But this is only half the story: the misconduct occurred at the same time as FBI domestic intelligence investigations or disruption programs aimed at individuals who have been arraigned on criminal charges. (4)

A former leader of the Black Panther Party (BPP) in California, Elmer "Geronimo" Pratt, and certain members of the American Indian Movement (AIM), claim that they have been "framed" and are therefore political prisoners. Chapters II and III of this report examine this

claim but do not comment on whether the jury acted reasonably in convicting on the evidence given at the trial. (5) The purpose of the research has been different; it has been to ascertain whether FBI misconduct may have undermined the fact-finding process. To quote from the dissenting judgment in the Elmer Pratt case:

> "Whether or not the evidence which was presented at the trial points unerringly to the defendant's guilt is not the fundamental issue, because in any trial if an effective defense is throttled there can be no conclusion other than one of guilt." (6)

Amnesty International's Statute does not permit the adoption as prisoners of conscience of those imprisoned because they have used or advocated violence. The matters of concern described in this report do not necessarily suggest that a particular individual should be considered a prisoner of conscience; only that there is reason to subject the circumstances of each case to further impartial scrutiny; nor does the report review all the evidence in the cases mentioned in it. (7)

B. Domestic Intelligence Operations by the FBI

Three aspects of FBI intelligence activities affecting American citizens are relevant to this report: the collection of intelligence about political groups and their penetration by informants;(8) the passing on of information thus collected to state law enforcement agencies, as well as supplying witnesses for the prosecution; (9) covert action "designed to disrupt and discredit the activities of groups and individuals deemed a threat to the social order." (10)

One function of the FBI is the prevention of unlawful violence, (11) but methods adopted to achieve this must be in accordance with both domestic law and the principles of international human rights law. This is especially important in domestic intelligence investigations whose criteria differ from those of ordinary criminal investigations and consequently may jeopardize political freedom: (12)

> "An integral part of domestic security investigations is the collection of information about the political beliefs, associations and activities of Americans with grievances against the government . . . A wide range of information about political beliefs and activities may appear relevant from the point of view of experienced investigators, who assume that somehow, some day, all the pieces will fall together to reveal a pattern of conspiratorial activity." (13)

The BPP was the subject of an FBI covert intelligence program known as COINTELPRO ("Counter Intelligence Program"):

"In COINTELPRO the Bureau secretly took the law into its own hands, going beyond the collection of intelligence and beyond its law enforcement function to act outside the legal process altogether and to covertly disrupt, discredit and harass groups and individuals . . . In COINTELPRO the Bureau imposed summary punishment, not only on the allegedly violent, but also on the non-violent advocates of change. (14)

". . . Under COINTELPRO, certain techniques the Bureau had used against hostile foreign agents were adopted for use against perceived domestic threats to the established political and social order. Some of the targets of COINTELPRO were law-abiding citizens merely advocating change in our society. Other targets were members of groups that had been involved in violence, such as the Ku Klux Klan or the Black Panther Party. Some victims did nothing more than associate with targets . . ." (15)

Detailed reports of FBI misconduct towards the BPP are contained in the report of the Senate Committee set up to study "governmental operations with respect to intelligence activities and the extent, if any, [of] . . . illegal, improper or unethical activities by . . . the federal government" (Church Committee). (15A) Senator Church has said, however, that "we did not pursue the Indian matter . . . . It may not have been raised because it seemed to fall within the ordinary law enforcement side of the FBI duties whereas we were concerned with the counter-intelligence side." (16) In Amnesty International's opinion this distinction is in practice sometimes difficult to draw. (17)

On 17 March 1976 the Director of the FBI wrote that "a search of our central records reveals no information concerning the establishment of counter-intelligence disruption programs" (18) directed at AIM; but on 21 March 1979 the FBI Special Agent-in-Charge in Minneapolis, Minnesota, wrote that "the FBI does investigate AIM". (19) Judicial opinion suggests that "AIM now operates within the system". (20)

Amnesty International does not take any position on the necessity or otherwise of any domestic intelligence investigation; (21) but it notes with concern that while engaged on its intelligence work in relation to AIM the FBI has appeared willing to fabricate evidence against one of AIM's members. (22) It earlier withheld information from defendants which should have been disclosed (23) and infiltrated the defence team of individuals indicted on a serious charge. (24)

Domestic intelligence investigations are intended to ensure domestic security; (25) but when the agency carrying out the program also jeopardizes the practical application of the right to a fair trial the issues raised are fundamental. It is against this background that allegations of an FBI pattern of intimidation of AIM must be considered. (26)

C. Misconduct in Criminal Cases

Misconduct by law enforcement agencies must be viewed in context, which requires study of more than the evidence given in court and the applicable constitutional and legal protections. (27) Any deviation from the rules by law enforcement agencies is cause for concern, but a determination of motive (or identification of any de facto policy) requires consideration of all the circumstances.

A difficulty arises when the defence seeks to prove that law enforcement agencies have harassed minority groups, and the government replies that this is irrelevant to the merits of the case being tried. (28) The court must exercise its discretion as to whether the evidence should be presented to the jury. (29) The political effect of such an evidentiary ruling in the government's favour may be considerable; it can result in accusations that the defence is being prevented from presenting its case in full. (30)

The defence may try to prove that harassment and surveillance by the FBI of a group strongly indicates that the prosecution of a member is a case of selective enforcement or a frame-up. It may say that evidence of harassment and surveillance should be presented to the jury in order to show that the government will go to any lengths to secure a conviction. (31) The government may state that there is no proof that the evidence is actually relevant to the facts at issue in the trial (for instance, how a homicide was committed and by whom). (32) They may assert that the defence is arguing in bad faith and trying to divert the court from the pertinent issues. A court might justifiably decide that the evidence of harassment and surveillance was collateral; but it could also reasonably come to the opposite conclusion. (33)

One case is apt to differ from another; so does the attitude of the courts. The majority of the Court of Appeal in Pratt said the following:

"Defendant Pratt's petition in the instant case is hollow. It follows the too often typical pattern in today's upside-down system of criminal justice where a defendant himself charged with or convicted of such 'illegal acts', such as murder, attempted murder and robbery in the instant case, seeks to focus attention on the alleged 'illegal acts' of law enforcement officers." (34)

It is difficult for a defendant to prove that he or she is the object of improper FBI attention, (35) as this court appears to have noted:

"Our conclusions and holdings herein are based on the information and documentation supplied this court by defense counsel, the California Attorney General's office and the FBI as of the date of filing this opinion. Should additional evidence be uncovered in the future from the above sources which adequately and legally support defendant's contentions, our determinations herein do not, of course, preclude the filing of a new petition seeking appropriate relief." (36)

The same applied to AIM. The United States District Court in a case arising out of the occupation of Wounded Knee stated: (37)

> "The defendants have expressed profound mistrust towards the FBI . . . This expression of mistrust is understandable, although I cannot bring myself to the conclusion that the FBI has purposefully suppressed evidence. The behaviour of the FBI in this case is negligent at best. Although the FBI has had the well deserved reputation of being the world's most effective crime fighting organization, it must be remembered, if our system of freedom is to be preserved, that the FBI must be servile to our system of justice.
>
> "The FBI in this case failed as a servant of the law. The many revelations of Bureau negligence or Bureau dilatoriness have brought this court to the brink of dismissing this case. I must conclude, however, that although they may have been careless, the FBI failures . . . were not purposeful. What is more, they have not acted towards the irremedial prejudice of the defendant's case." (38)

But the court changed its mind when a pattern became apparent:

> "The principle reason for denying [the earlier dismissal motion] was that in my opinion, the alleged misconduct up to that time was the result of negligence rather than bad faith on the part of the prosecution. Whether the misconduct is the result of negligence or of bad faith must be determined by analysing the totality of the surrounding circumstances and past conduct . . . [When] a pattern of negligent conduct becomes apparent it becomes a permissible, and possibly compelling inference to say that bad faith is present . . .
>
> "Because of a series of incidents of government misconduct, which, I feel, form a pattern throughout the trial, I am forced to conclude that the prosecution acted in bad faith at various times throughout the course of the trial and was seeking convictions at the expense of justice." (39)

This report is concerned with the question of pattern.

D. The Nature of Amnesty International's Concern

Amnesty International conducted the research on which this report is based in order to discover whether the defendants in question received fair trials. (40) The issues discussed in the report have been the subject of vigorous legal argument in both state and federal courts. Amnesty International stresses that those who suffer from the excesses of law enforcement agencies have remedies available to them in the US courts provided they can establish the facts. (41)

The report does not enter into legal argument. (42) Its intention is to present evidence of misconduct, try to put it in context and draw conclusions. The subject matter includes evidence that domestic intelligence programs have in the past involved the arrest of political activists without there being any genuine suspicion that an offence had been committed, (43) and that the initiation of legal proceedings has been considered by the FBI without taking into account the legal merits of the case. (44) One prisoner whose case is discussed in the report was indicted on state charges at the time when such programs were actual federal policy. (45)

It is not the number of cases discussed in this report that is important but the apparent relationship between domestic intelligence activity and the criminal justice system. (46) Since misconduct by a law enforcement agency may at first sight seem to be an isolated incident it is important to decide whether or not it is, in fact, part of a pattern. (47)

Two cases serve as examples. In the first, the trial was in 1972; (48) in the second in 1976. (49) Both men were still in prison in June 1981. The first is Elmer "Geronimo" Pratt; the second, Richard Marshall. The former was a BPP leader; the latter, a member of AIM.

The two cases have the following in common:

(i) they were state prosecutions;

(ii) the FBI were directly or indirectly concerned in each case;

(iii) both organizations have been kept under surveillance by the FBI;

(iv) both cases involve prisoners who were investigated by the FBI before new rules became applicable in 1976;

(v) both prisoners are serving life sentences after conviction on murder charges;

(vi) both prisoners' lawyers argue that their clients were framed.

The main difference between the two cases is that Elmer Pratt was "targeted for neutralization" before his arrest while Richard Marshall was "targeted for investigation" the day after. (50) Two days after the latter's arrest an FBI document, "Predication for Investigation of Members and Supporters of AIM", (51) appears to have informed agents that AIM members might have broken federal laws against rebellion, insurrection or seditious conspiracy. (52)

The Pratt and Marshall cases reveal the following: (53)

(i) an individual was "targeted" under a domestic intelligence program (54) before or after being charged with a criminal offence, (55) but in any event before trial;

(ii) there were signs of misconduct by the FBI in their handling of the case. The defence claimed that this arose directly from a policy of harassment and intimidation; (56)

(iii) representations were made to Amnesty International on behalf of the defendant stating that he had been framed and that the motive for the imprisonment was political. (57)

A defendant may not be able to demonstrate the relevance of FBI conduct which appears at first sight collateral to the case in question. (58) The feelings of those who have been harassed and kept under surveillance should not be underestimated when discretion to exclude evidence as collateral is used to their disadvantage. (59) Resentment is aroused in such cases -- the resentment of a minority group which believes, rightly or wrongly, that such a decision is conducive to a course of events which cannot give them any opportunity to influence the rest of the trial. Justice, they argue, is at the very least not being seen to be done. And, more important perhaps, the court may not be in a position to review evidence of pattern.

But even FBI misconduct considered collateral to the legal merits of a given case highlights the government's overriding obligation to ensure that equality and fairness in the enjoyment of rights is not prevented or distorted by any counteracting measures by its agencies. (60)

Amnesty International does not assume that any FBI misconduct ought to lead automatically to an acquittal. (61) But there comes a point when the number or type of measures taken against members of a political group suggests that it may be impossible to decide whether a particular case has been affected by law enforcement misconduct without the conducting of a comprehensive inquiry into whether or not the individual measures form part of a pattern. (62)

Interpreting law enforcement misconduct is difficult, as an example from Elmer Pratt's case shows. The FBI have said there is no evidence that any of the COINTELPROs in relation to Elmer Pratt were intended to influence his trial. In effect, they have said that all they intended to do was to disrupt the BPP. (62a)

One COINTELPRO was designed to discourage Kathleen Cleaver, then in Algeria, from returning to the USA at a time when she might have been able to heal a rift within the BPP. The FBI sent a letter to Algeria under another name saying that Elmer Pratt was "really uptight"

and that "in view of the violence it might be dangerous for [her] to return." (62b) She did return to the USA, and was an alibi witness at the trial. Elmer Pratt's lawyers regard the letter as "a plan to discourage a vital witness from testifying at Elmer Pratt's trial by warning her that her life might be in danger if she went to Los Angeles." (62c) The FBI's letter was sent approximately two and a half months after Elmer Pratt was indicted. Amnesty International does not know whether, at that time, they knew Kathleen Cleaver was a potential witness. However, since the FBI now admits it had informants in both the defence camp and the BPP, it is reasonable to assume that they might well have known. (62d)

Amnesty International has no means of discovering the FBI's actual motive for sending the letter, so does not state that they were trying to stop a potential witness testifying. But the episode is part of a pattern and gives cause for concern when viewed in that light.

This report quotes extensively from official documents and relies on them for its conclusions. One recurring question is whether "exculpatory" evidence in the possession of a prosecutor before trial was made available to the defence, and whether, if it was not, a re-trial should be ordered. (62e)

"Exculpatory" evidence demonstrates the innocence of the accused; various technical rules regulate its handing over to the defence before trial. The law is clear. The US Supreme Court has said that in exercising the discretion whether or not to disclose information "the prudent prosecutor will resolve doubtful questions in favour of disclosure [as] the significance of an item of evidence can seldom be predicted accurately until the entire record is complete." (62f)

It is of significance to Amnesty International if the FBI acts improperly in developing its case. The question arises: what is the FBI trying to achieve? (62g) Elmer Pratt's lawyers argued that the government has recently attempted to suppress and misrepresent evidence. Two examples illustrate this. Firstly, on 12 July 1979, the FBI said that "Elmer Pratt was never a target" of COINTELPRO. (62h) By 16 January 1981, 10 COINTELPRO proposals concerning him had come to light. (62i) Secondly, Elmer Pratt's lawyers were told that "the FBI possesses no information on its files pertaining to Pratt prior to January 1969." (62j) Yet the FBI later said that their records included information about him dated 20 December 1968. FBI records did not, the lawyers were told, establish an alibi for him on the date of the murder of which he was convicted -- 18 December 1968. (62k)

When relying on official documentation which has been released over a period, caution is needed in evaluating the significance of each revelation. (621) Some documents may indicate that the misconduct is local; some, that it stems from a policy formulated in Washington DC; some, that a given intelligence program may have caused an unfair trial;

and some, that the misconduct is not part of a defined policy. (62m) Each document is a piece of a jigsaw puzzle.

E. International Human Rights Standards and the USA (63)

After publication of the report of The Commission on Security and Cooperation in Europe (CSCE), Fulfilling Our Promises: The United States and the Helsinki Final Act , (64) Amnesty International wrote to the US Attorney-General in April 1980 welcoming the commission's recommendations that: ". . . the Justice Department should establish a more effective mechanism to review cases brought to its attention by the CSCE Commission, the State Department, Amnesty International, reputable private groups or other CSCE signatory states." Amnesty International noted the commission's statement that "We cannot say conclusively that there have not been varying degrees of racial discrimination or localised political motivation in accusing, arresting and prosecuting certain of these [named] individuals or in meting out unusually harsh sentences." (65)

For this reason, and because of the evidence presented in this report, Amnesty International proposes that there be a federal inquiry into the practices described in the report. It considers such an inquiry necessary in order to determine whether or not the USA is abiding by Principle VII of the Helsinki Final Act of August 1975, which runs as follows:

"VII Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief:

"The participating states will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

"They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

"Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

"The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

"The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and cooperation among themselves as among all States.

"They will constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in cooperation with the United Nations, to promote universal and effective respect for them.

"They confirm the right of the individual to know and act upon his rights and duties in this field.

"In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia, the International Covenants on Civil and Political Rights, by which they may be bound."

The practices referred to in this report are capable of preventing fair trials. (66) Moreover, the "effective exercise of civil and political rights", and the guarantees of due process and equal protection of the laws, may have been jeopardized in that courts may not have had all the information that would have helped them to adjudicate fairly in the criminal cases concerned. If so, this has been because of government misconduct.

Amnesty International believes that the provisions in the Helsinki Declaration for "the right of the individual to know and act upon his rights and duties" and to "promote and encourage the effective exercise of civil and political rights and freedoms" justify the call for an independent, impartial inquiry into the cases described in this report.

F. Main Findings of Fact

1. Amnesty International notes that COINTELPRO involved abuses of the criminal justice system. (67)

2. Amnesty International notes that "COINTELPRO involve[d] specific violations of law, and the law and the constitution were 'not given a thought' under the FBI's policies." (68)

3. Elmer Pratt and Richard Marshall were "targeted" by the FBI (a federal agency) for intelligence investigation; (69) and Elmer Pratt was in addition "targeted for neutralization" under the

FBI's former COINTELPRO directed at the BPP. The State of California and the State of South Dakota respectively indicted these men on criminal charges.

4. The FBI gave information to the Los Angeles Police Department (LAPD) that appears directly relevant to Elmer Pratt's defence. (70) The information was not passed on by the LAPD to the defendant before trial. (71)

5. One of the witnesses against Richard Marshall was supplied to the South Dakota authorities by the FBI. This witness, who was pressurized by the FBI, was legally "incompetent" and has given highly prejudicial evidence in cases against two members of AIM. (72) She later retracted her evidence in both cases, saying that she had been coerced by the FBI into testifying against the defendants. (73)

6. The State of California has argued that there is no evidence that the FBI and the LAPD conspired to frame Elmer Pratt. (74) They say that federal misconduct is not relevant to a state case, (75) and that as COINTELPRO was a secret program state prosecutors knew nothing about it, therefore had no information to hand over to Elmer Pratt under applicable rules of criminal procedure. (76)

7. The State of South Dakota argued that Richard Marhsall's lawyers did not demonstrate that the state prosecutors had information about the relationship between the witness and the FBI (other than the evidence she gave). They said that "the facts indicate that the FBI simply turned the witness over to the State . . . and that . . . she then gave [her] statement to the local sheriff." (77)

G. Conclusion

1. The United States Government is obliged to "confirm the right of the individual to . . . act upon his rights". (78) and to "promote and encourage the effective exercise of civil and political rights". (79)

2. The cases discussed in this report show that the proper administration of justice appears to have been hindered in the following, among other, ways:

   (a) by the production of false evidence; (80)

   (b) by the non-disclosure of matters relevant to the defence; (81)

   (c) by the failure to disclose evidence that might help the defence. (82)

3. The consequent obstacles to the conducting of the defence case are a cause of serious concern. The combination of domestic intelligence activity and irregular FBI conduct in prosecuting these men casts doubt upon the bona fides of the FBI in its dealings with them. (83)

H. Recommendations

1. Amnesty International recommends that the United States Government establish an independent commission of inquiry to examine thoroughly and impartially the matters raised in this report.

2. The commission of inquiry should examine the effect of the FBI's domestic intelligence program "COINTELPRO" on criminal prosecutions of persons who were "targeted" under it. (84) Amnesty International considers that the case of Elmer Pratt, including the role and conduct of the FBI, should form part of the material studied by the commission of inquiry.

3. The commission of inquiry should consider the conjunction of FBI domestic intelligence investigation of members of the American Indian Movement with the irregular and inappropriate FBI conduct in prosecutions against them. Amnesty International considers that the case of Richard Marshall, including the role and conduct of the FBI, should form part of the material studied by the commission of inquiry.

4. The commission of inquiry should consider whether the political views of any citizens, or the FBI's attitude toward those views, have been a factor in prosecutions or the preparation of cases against them and, if so, seek ways of preventing this from occurring in future.

CHAPTER II

The Effect of the FBI COINTELPRO on the Criminal Justice System

Part One: COINTELPRO: Aims and Techniques

A. Introduction

When preparing this report Amnesty International considered material about FBI domestic intelligence activity against US citizens. In COINTELPRO "the arsenal of techniques used against foreign espionage agents was transferred to domestic enemies". (1) The targets were individuals and groups considered potential or actual threats to the security of the USA. (2)

The result was that the right of US citizens to engage in free and open discussion and to associate with anyone they choose, was jeopardized or "chilled". (3) The Church Committee put it succintly: "Domestic intelligence activity has threated and undermined constitutional rights of Americans to free speech, association and privacy. It has done so primarily because the constitutional system for checking abuse of power has not been applied." (4)

Undoubtedly there is a clear distinction between the "chilling" of constitutional rights and the imprisonment of individuals on political grounds. One object of this inquiry is to ascertain whether COINTELPRO, which certainly did the former, also resulted in the latter.

This inquiry is not merely of historical interest as it is about the case of a US citizen still in prison. Elmer Pratt was sentenced to life imprisonment in 1972 following his conviction on California state charges of murder, assault and robbery. His offences were alleged to have been committed in 1968. Elmer Pratt was the leader of the BPP's Southern California Chapter and a member of its Central Committee. His lawyers have known since 1975 that the federal government, in the form of the FBI, was, before his conviction, engaged in illegal secret action to "neutralize" him. In June 1981 Elmer Pratt was in prison in the California Men's Colony in San Luis Obispo.

B. The FBI COINTELPRO against "Black Nationalist Hate Groups", including the BPP

COINTELPRO was aimed at domestic groups from 1956 to 1971. (5) In August 1967 the FBI started a COINTELPRO to disrupt and neutralize organizations that it called "Black Nationalist Hate Groups". (6) The program, which did not originally include the BPP among its targets, was designed to:

"1. Prevent a coalition of militant black nationalist groups . . .

"2. Prevent the rise of a messiah who could unify and electrify the militant nationalist movement . . . Martin Luther King, Stokley Carmichael and Elijah Muhammad all aspire to this position . . .

"3. Prevent violence on the part of the black nationalist groups . . .

"4. Prevent militant black nationalist groups and leaders from gaining respectability by discrediting them . . .

"5. . . . prevent the long-range growth of militant black nationalist organizations, especially among youth." (7)

The BPP soon became a target. In September 1968 J. Edgar Hoover, Director of the FBI, referred to it as:

". . . the greatest threat to the internal security of the country . . . schooled in the Marxist-Leninist ideology and the teaching of Chinese Communist leader Mao Tse-Tung, its members have perpetrated numerous assaults on police officers and have engaged in violent confrontations with police throughout the country. Leaders and representatives of the Black Panther Party travel extensively all over the United States preaching their gospel of hate and violence not only to ghetto residents but to students in colleges, universities and high schools as well." (8)

By July 1969, BPP had become "the primary focus" of COINTELPRO. (9)

* * * *

This report will not discuss the details of COINTELPRO except inasmuch as it appears to have led to abuses of the criminal justice system. But the tactics of violence adopted by the FBI should be explained. The Church Committee reported that:

"Although the claimed purpose of the Bureau's COINTELPRO tactics was to prevent violence, some of the FBI's tactics against the BPP were clearly intended to foster violence, and many others could reasonably have been expected to cause violence. For example, the FBI's efforts to 'intensify the degree of animosity' between the BPP and the Blackstone Rangers, a Chicago street gang, included sending an anonymous letter to the gang's leader falsely informing him that the Chicago Panthers had 'a hit out' on him. The stated intent of the letter was to induce the Ranger leader to 'take reprisals against' the Panther leadership. (10)

"Similarly, in Southern California, the FBI launched a covert effort to 'create further dissension in the ranks of the BPP.' (10A) This effort included mailing anonymous letters and caricatures to BPP members, ridiculing the local and national BPP leadership for the express purpose of exacerbating an existing 'gang war' between

the BPP and an organization called the United Slaves (US). This 'gang war' resulted in the killing of four BPP members by members of US and in numerous beatings and shootings. Although individual incidents in this dispute cannot be directly traced to efforts by the FBI, FBI officials were clearly aware of the violent nature of the dispute, engaged in actions which they hoped would prolong and intensify the dispute, and proudly claimed credit for violent clashes between the rival factions which, in the words of one FBI official, resulted in 'shootings, beatings, and a high degree of unrest . . . in the area of southeast San Diego.'" (11)

The Committee's conclusion on this was clear:

"The chief investigative branch of the Federal Government, which was charged by law with investigating crimes and preventing criminal conduct, itself engaged in lawless tactics and responded to deep-seated social problems by fomenting violence and unrest." (12)

C. COINTELPRO and Elmer Pratt

Elmer Pratt was a COINTELPRO target. (13) On 28 October 1969 the San Francisco field office of the FBI sent a memorandum to the Director of the FBI. (14) According to page 3 of it (referring to Elmer Pratt and two other Black Panther leaders):

"San Francisco will follow appropriate sources closely for additional information pertaining to above and will keep the Bureau and appropriate offices advised.

"All offices should be alert for any information or situations pertaining to these active members of the BPP mentioned above which would lend itself to counter-intelligence measures." (15)

A memorandum of January 1970 from the FBI office in Los Angeles to the Director in Washington (16) stated that:

"Operation Number One is designed to challenge the legitimacy of the authority exercised by Elmer Gerard Pratt, BPP Deputy Minister of Defence from Southern California." (17)

On 26 June 1970 the Los Angeles office of the FBI issued a report covering the period from 6 May 1969 to 21 June 1970. (18) This stated among other things:

"It is noted . . . that constant consideration is given to the possibility of utilization of counter-intelligence measures with efforts being directed towards neutralizing Pratt as an effective BPP functionary." (18)

On 4 December 1970 the Grand Jury for the County of Los Angeles indicted Elmer Pratt on five counts, including murder, assault and robbery. (19) The charges were brought by the state under the provisions of the California Penal Code. (20) Elmer Pratt was convicted and sentenced to life imprisonment. (21)

D. Covert Domestic Intelligence Activity and Abuse of the Criminal Justice System (22)

In September 1968 a series of bombings occurred which the FBI described as a "shift of violence in the new left movement". (23) Part of the FBI response can be seen from the text of a memorandum dated 24 October 1968 sent from FBI headquarters to all its Special Agents. (24) It stated:

"Successful prosecution is the best deterrent to such unlawful activity. Intensive investigations of key activists . . . are logically expected to result in prosecutions under substantive violations within the Bureau's investigative jurisdiction." (25)

The Church report put the matter differently:

"While the FBI considered Federal prosecution a 'logical' result, it should be noted that key activists were not chosen because they were suspected of having committed or planning to commit any specific federal crime." (26)

A number of FBI documents, some of them quoted in the Church report, indicate that there was a link between domestic intelligence programs and misconduct by the FBI within the criminal justice system. (27) The following passages, numbered (i) - (x), suggest this. Although this material does not refer specifically to Elmer Pratt, it is important because it reveals the tendency of the FBI during the period in question. (28)

The quotations below appear to show that under its domestic intelligence program the FBI harassed individuals because of the group to which they belonged rather than the likelihood that they would commit, or had committed, criminal offences. (29) Certain individuals were arrested on "every possible charge until they could no longer make bail". (30)

The prosecution of people with the ulterior aim of "exhausting and demoralising" the BPP, (31) and the arrest of individuals in order to intimidate them, thereby cutailing legitimate First Amendment activities, reveals a willingness on the part of the FBI to abuse the investigative process. (32) Amnesty International considers Elmer Pratt's conviction should be viewed in this light. The details of his case are examined below. (33)

Purpose of the Prosecution (34)

(i) "The FBI's counter-intelligence program may bring about results which could lead to prosecution of these violence-prone leaders and active members, thereby thwarting their efforts to perpetrate violence in the United States". (35)

Federal-State Cooperation

(ii) "The FBI frequently worked with the San Diego Police Department, supplying it with informant reports to encourage raids on the homes of BPP members often with little or no apparent evidence of violations of state or federal law." (36)

(iii) "The Los Angeles office of the FBI is furnishing on a daily basis information to the Los Angeles County Sheriff's Office Intelligence Division and the Los Angeles Police Department Intelligence and Criminal Conspiracy Divisions concerning the activities of the black nationalist groups in the anticipation that such information might lead to the arrest of these militants." (37)

(iv) "It is also felt that the racial briefing sessions being given by the San Diego Division [of the FBI] are affording tangible results for the counter-intelligence program. Through these briefings, the command levels of virtually all of the police departments in the San Diego Division are being apprised of the identities of the leaders of the various militant groups. It is felt that, although specific instances cannot be attributed directly to the racial briefing program, police officers are much more alert for these black militant individuals and as such as contributing to the over-all counter-intelligence program directed against these groups." (38)

Selective Enforcement of the Laws

(v) "The Revolutionary Action Movement, RAM, a pro-Chinese Communist group, was active in Philadelphia, Pa, in the summer of 1967. The Philadelphia office [of the FBI] alerted local police who then put RAM leaders under close scrutiny. They were arrested on every possible charge until they could no longer make bail. As a result, RAM leaders spent most of the summer in jail and no violence traceable to RAM took place." (39)

(vi) ". . . Any excuse for arrest was promptly implemented by arrest. Any possibility of neutralizing a RAM activist was exercised . . . [name deleted] was arrested for defacing private property when he painted 'Black Guard' on a private building. His companion was also arrested. A charge of carrying a concealed deadly weapon, a switch-blade knife, was pushed against the companion. His probation officer was contacted, his parole revoked and he was returned to prison for several years." (40)

(vii) "When surveillance reflected the arrival of a new group in town, they were brought in for investigation and their residence searched." (41)

Arrests for the Purpose of Intimidating Activists and Curtailing their Activities

(viii) ". . . Legal searches of the home of [deleted] and other RAM members produced a volume of literature of such a nature that the District Attorney authorised the arrest of [deleted] and five other RAM members. They are still in prison. Other RAM people were arrested and released on bail but were re-arrested several times until they could no longer make bail . . . [These] local actions appear for the present to have curtailed the activities of this group. It was apparently a highly frustrating experience for the persons involved . . . [Deleted] was advised that he was again under arrest and that his wife and sister were also under arrest, he lay down on the floor of his residence and beat the floor with his fists and cried." (42)

Bringing Prosecutions for the Apparently Ulterior Purpose of "Exhausting and Demoralising" the Black Panther Party

(ix) "The plan being formulated is, once a prosecutable case is developed, to conduct simultaneous raids on BPP headquarters in San Diego, San Francisco and Los Angeles. The raids would result in the arrests of as many BPP members as possible along with the seizure of all available weapons in the possession of BPP members. In view of the fact that the Bureau has by far the greatest amount of information concerning the BPP it is felt that the Bureau could be of vital assistance in effecting a prosecutable case in conjunction with the local authorities. Therefore, Bureau permission is requested to furnish all of the non-confidential and public source information in possession of the San Diego office [deleted] on a confidential basis. (43)

"Permission is also requested to furnish [deleted] with selective confidential information which could be utilized by [deleted] as lead material to develop his own witnesses and evidence . . . (44)

"In view of the fact that the Black Panther Party has held firearms practice . . . [and] has . . . an army, it would appear that it would come within the purview of [section 11460 of the California Penal Code proscribing, inter alia, training for guerrilla warfare and sabotage] . . . It is felt that, even if actual prosecution is not successful as far as convictions are concerned, that the raids in and of themselves will exhaust and demoralise the BPP on a statewide level." (45)

The Purpose of "Counter-Intelligence Action" other than Prosecution (46)

(x) "The purpose of counter-intelligence action is to disrupt the BPP and it is immaterial whether facts exist to substantiate the charge. If facts are present it aids in the success of the proposal . . ." (47)

* * * *

Part Two: The Case of Elmer "Geronimo" Pratt

A. Introduction

Various aspects of this case pose important questions for Amnesty International:

(i) Elmer Pratt was a target of COINTELPRO, under which the FBI considered "neutralizing" him. (48) The question arises what effect, if any, this may have had on the outcome of the case. The defence was not aware of COINTELPRO during the trial and was therefore unable to cross-examine on the issue.

(ii) The chief prosection witness, Julius Butler, gave information to the FBI at the time of the trial. (49) His evidence was that Elmer Pratt had confessed the murder to him. (50) It has yet to be determined whether Julius Butler, although apparently not employed by the FBI, had any relevant connection with the COINTELPRO designed to "neutralize" Elmer Pratt.

(iii) The FBI had planted informers inside the defence camp, and received material relating to the testimony of at least two witnesses. (51) It remains to be determined whether this was a relevant part of the COINTELPRO designed to "neutralize" Elmer Pratt.

(iv) Approximately 14 months before the trial the FBI gave the LAPD the name of a person whom the former apparently believed was a second suspect in the case. (52) The only eye-witness to the murder said there were two assailants. The defence were never told about a possible second suspect and it is not known whether the LAPD followed up this information. Had the defence known of the second suspect it might have helped their case. (53) It remains to be determined whether this incident has any relevant connection with the COINTELPRO designed to "neutralize" Elmer Pratt.

(v) The FBI, evidently with the knowledge of the LAPD, had surveillance information which Elmer Pratt claimed might have confirmed or refuted his alibi. (54) This material was not made available at trial. (55) It remains to be determined whether this withholding of evidence has any relevant connection with the COINTELPRO designed to "neutralize" Elmer Pratt.

(vi) Elmer Pratt's counsel did not cross-examine an eye-witness to the murder about a definite identification that the latter had allegedly made of somebody else as one of the assailants. (56)

Amnesty International is certainly not in a position to reach a definite conclusion about the facts in this case. (57) It is concerned, however, that there may have been an abuse of the investigative and trial processes (perhaps as a result of COINTELPRO) which denied Elmer Pratt a fair chance to establish his innocence.

B. Recent Case History

On 20 November 1979 Elmer Pratt's lawyers filed a petition for a writ of habeas corpus in Los Angeles Superior Court. (58) The case was heard by the Honourable Kathleen Parker, the judge who had presided over the trial in 1972. (59) Elmer Pratt claimed that he had been framed by the FBI and state agencies as part of COINTELPRO, and used the Church Committee Report and FBI documents which had been obtained under the Freedom of Information Act in his attempt to prove that this was so. (60)

On 18 January 1980 the petition was refused, so was the request for an evidentiary hearing. (61) The judge said she did not think that the defendant "by wishful thinking . . . [could] step from one point to another by speculation", and that "an evidentiary hearing at this time would [not] serve any useful purpose". (62) She did not "see sufficient evidence that Mr Pratt was framed and that he did not have a fair trial". (63)

On 10 April 1980 a writ of habeas corpus was filed in the Court of Appeal. (64) It was turned down on 3 December 1980 by a two to one majority. (65) The judge who dissented stated that he did so "respectfully but vigorously" but thought his colleagues had "misperceived the essential issue". (66)

The majority replied that a decision to hold an evidentiary hearing, on the grounds that Elmer Pratt was not afforded due process of law in 1972, was "not supported by the record and is predicated on a selective reading of the record and misconstruction and misapplication of controlling law". (67) They continued:

> "The dissenting opinion has bought hook line and sinker defendant's arguments in his petition which when dissected and analysed have as little substance as a handful of fog. Reliance on some nebulous concept that a fair trial was

denied defendant based solely on allegations which are wholly speculative and conjectural and admittedly unproven, not only defies logic but ignores the standards set by the Supreme Court . . ." (68)

On 1 April 1981 the California Supreme Court found against Elmer Pratt, the Chief Justice dissenting. (68A)

C. The Issues

1. COINTELPRO

It has been established that COINTELPRO was designed, among other things, to harass black militants. (69) Elmer Pratt, who became the Southern California Black Panther leader in January 1969, was one of its targets. (70) It has been established also that the Los Angeles office of the FBI was giving information daily between 1969 and 1971 to the LAPD "in the anticipation that such information might lead to the arrest of [black] militants". (71)

The majority decision in the Court of Appeals was unequivocal as regards COINTELPRO:

> "The Church Committee Report is based on a staff study of more than 20,000 pages of Bureau documents, depositions of many Bureau agents involved in the programs, and interviews of several COINTELPRO targets . . . Nowhere in the report is listed as a technique the 'framing' of a target of a criminal offence in order to 'neutralise' an individual perceived as a threat. Nor does the report suggest that state governments were involved with COINTELPRO and its techniques, except for the mutual dissemination of information, which is highly desirable between law enforcement agencies at all levels of government. Nor does our independent analysis of the FBI documents supplied this court to date in conjunction with a review of the entire court record support a finding that such a technique was employed by COINTELPRO agents to falsely procure defendant Pratt's conviction. (72)
>
> "Accordingly, we conclude that defendant Pratt's contention that FBI's COINTELPRO agents conspired with local law enforcement authorities and the prosecuting attorney to 'frame' him by illegally manufacturing, manipulating and withholding evidence in order to insure his conviction is based on rank speculation and sheer conjecture which does not justify the relief sought. Nor does the mere existence of COINTELPRO and its activities as it related to the BPP or to defendant Pratt in and of itself in any way constitute exculpatory evidence. In short, defendant Pratt has not proven the facts on which he relies in support of his claim for relief." (73)

Although the Church report did not list "framing" as a COINTELPRO method, Amnesty International has noted that COINTELPRO did involve "attempts to interfere with the judicial process". (74)

Even though the items from Church quoted below are based on facts which are very different from those in Elmer Pratt's case, they appear to provide the basis for believing the allegations were about matters not wholly unlike COINTELPRO methods already known about. Clearly there is a distinction between a "frame-up" and selective enforcement but both are the result of willingness to abuse the criminal justice system, and this appears to be a relevant consideration in Elmer Pratt's case. (75)

The Church report included the following passages in its discussion of COINTELPRO methods:

(i) "Use and Abuse of Government Processes

> This category, which comprises 9 per cent of all approved proposals includes selective law enforcement (using Federal, state, or local authorities to arrest, audit, raid, inspect, deport, etc.); interference with judicial proceedings, including targeting lawyers who represent 'subversives'; interference with candidates or political appointees; and using politicians and investigating committees, sometimes without their knowledge, to take action against targets." (76)

(ii) "Selective Law Enforcement

> Bureau documents often state that notifying law enforcement agencies of violations committed by COINTELPRO targets is not counter-intelligence, but part of normal bureau responsibility. Other documents, however, make it clear that 'counter-intelligence' was precisely the purpose. 'Be alert to have them arrested', reads a New Left COINTELPRO directive to all participating field offices. Further, there is clearly a difference between notifying other agencies of information that the Bureau happened across in an investigation - in plain view, so to speak - and instructing field offices to find evidence of violations - any violations - to 'get' a target." (77)

(iii) "State and local agencies were frequently informed of alleged statutory violations which would come within their jurisdiction. As noted above, this was not always normal Bureau procedure." (78)

(iv) "Interference with Judicial Process

> The Bureau's attempts to interfere with judicial processes affecting targets are particularly disturbing because they

> violate a fundamental principle of our system of government. Justice is supposed to be blind. Nevertheless, when a target appeared before a judge, a jury, or a probation board, he sometimes carried an unknown burden; the Bureau had gotten there first." (79)

Amnesty International believes that the above quotations constitute weighty evidence of FBI bad faith in some of its dealings with the criminal justice system. One purpose of an inquiry would be to examine the extent to which this disrespect for due process of law can legitimately be considered in relation to FBI counter-intelligence action. Amnesty International is aware of the FBI's position concerning the latter: the "purpose of counter-intelligence action is to disrupt the BPP and it is immaterial whether facts exist to substantiate the charge". (80)

2. FBI informants had infiltrated the defence camp and were collecting information about defence strategy

On 18 December 1979, eight years after Elmer Pratt's trial, the California Attorney-General's office filed a declaration in court that his defence camp had been infiltrated by one FBI informant. (81) The Deputy Attorney-General wrote to the court and defence counsel on 28 July 1980, enclosing a copy of a letter of the same date from the Executive Assistant Director of the FBI. This letter revealed that two informants had been in a position to obtain information about Elmer Pratt's defence strategy. (82) It included an offer to hand over relevant documents to the Court of Appeals for in camera ex parte inspection. (83) The court accepted the FBI offer and the inspection was carried out on 21 August 1980. (84) The majority held that:

> "Our in camera inspection confirmed that the two informants did not testify at the trial and the FBI analysis of the documents inspected was essentially accurate in all respects." (85)

Part of the FBI account of meetings between Elmer Pratt and his defence team was as follows:

> "On a few occasions an FBI informant(s) may have been present at meetings in which the following subjects were discussed:
>
> "Pratt's unhappiness with one of his [former] lawyers;
>
> "alleged problems with the FBI's arrest of Pratt in Texas;
>
> "Pratt's interest in finding witnesses who would testify that Butler had a grudge against him;
>
> "possible approaches to the defense summation in the Pratt trial, and possible strategies in an appeal if Pratt were convicted; and
>
> "the effectiveness of the testimony of certain trial witnesses. (86)

> "The significance of this discovery must be placed in perspective. First, the [FBI review] was unable to determine whether the FBI informant(s) was actually present at these meetings or merely heard about the discussions later. Second, the records indicate that attorneys were actually present at these meetings on only a few occasions. Third, and most important, while a number of reports refer to meetings at which strategy was discussed, the reports do not - with one exception - elaborate on the nature of the strategy. The reports merely state that the topic of defense strategy was discussed. The one exception is the report that Pratt wanted witnesses to testify that Butler had a grudge against him, and in that case, there is no reason to believe that the report was based on a meeting involving an attorney." (87)

The majority stated:

> "There is no dispute that FBI informants (as distinguished from local law enforcement informants) were in the defense camp . . . [but] . . . while the FBI informants may have had access to defense strategy the information obtained was of such a general nature as to be of no aid to the prosecution and was not detrimental to the defense; in any event, it was not transmitted to the local prosecuting attorney for use during the trial. (88)
>
> "Moreover . . . the FBI review did not uncover any indication that any defense strategy information, or that any information that could possibly have been construed as Pratt defense strategy was ever disseminated outside the FBI until December 12 and 13, 1979. (89)
>
> "In the instant case the knowledge obtained by the FBI informants in the defense camp did not impact on the 'reliability of the fact-finding process at [the] trial' in California's court or assist the prosecution or prejudice the defense because the information was not transmitted by the FBI to the local prosecuting attorney. Insofar as the case at bench is concerned, the record indicates that the presence of COINTELPRO informants in the defense camp has as much effect on whether or not defendant Pratt was afforded a fair trial conducted in California's superior court as did the furniture in the areas where the discussions were conducted." (90)

The dissenting judgment in the Court of Appeals took a somewhat different view of the matter:

> "The information before the court reveals that these informants were present at several conferences between Petitioner and his attorney during the trial. The existence of one such informant was revealed to the Petitioner for the first time in December 1979. (91) . . .

"The majority apparently find no due process flaw in this revelation . . .

"It is now well established that a defendant has an absolute right to effective counsel which includes the absolute right to communicate with his counsel in private. The intrusion of an informant into the attorney-client relationship when a defendant is preparing for trial or is in trial is a violation of the constitutional guarantees contained in the United States Constitution and in the California Constitution." (92)

Amnesty International is concerned because informants were put in in the defence camp by the FBI at a time when a domestic intelligence operation aimed at "neutralizing" the defendant was being conducted. Even supposing the information was neither "detrimental" to the defence, nor "transmitted" to local prosecutors, the question why it was being collected at all is still relevant. (93) Unless the FBI's motives, as well as the means it has adopted to achieve its aims, are known it will be difficult to appraise this case objectively. (94)

3. The evidence of Julius Butler

FBI records shown to Elmer Pratt's lawyers reveal that in August 1969 the FBI had the first of a number of meetings with BPP member Julius Butler, soon to be regarded by the FBI as a "probationary racial informant". (95) The question posed for Amnesty International is whether Julius Butler's giving of information to the FBI, taken in conjunction with the existence of COINTELPRO, is grounds for concern. (96)

During the trial in 1972 the prosecutor said:

"At this point one thing seems to me to be clear; that is, that Julio Butler has testified in this court under oath and to the jury to a confession that Mr Pratt made to him that admits all the elements of the offense. Except for the fact that it wasn't to a police officer, it bears all the earmarks of a confession.

"Elmer Pratt has denied every saying those things to Julio Butler, or for that matter having confided in Julio Butler at any time. He has said that Julio Butler was not a confidant of his; he always suspected him, Julio Butler's credibility.

"Whether or not the jury believes that confession is a key issue in the case. If the jury believes Julio Butler, regardless of whether they believe or disbelieve the identification witnesses, Mr Pratt is guilty, the case is over. If they believe that.

"The jury must have every fact at its disposal which bears upon the worthiness of that confession, every fact which tends to show whether or not the confession is true." (97)

This prompts two questions:

(i) What is the nature of evidence "which tends to show whether or not the confession is true"? (98)

(ii) Was anything concealed from the defence at the trial? (99)

The majority in the Court of Appeals said that Elmer Pratt had not done the following:

(i) "he has not shown that perjured testimony was in fact adduced at his trial;

(ii) he has not demonstrated that if witness Butler did lie that it was known to a representative of the state; and

(iii) he has not [demonstrated that] the perjured testimony, if any, was of such significance as to have affected the outcome of the trial in respect to guilt or innocence. (100)

"In any event, considering all the evidence and circumstances in this case, we further conclude that failure to disclose to the jury the extent and nature of the FBI contacts with witness Butler as hereinbefore described was nonprejudicial and harmless beyond a reasonable doubt . . .

"In fact to disclose what witness Butler told the FBI contacts as hereinbefore discussed would not be exculpatory. That information is consistent with and corroborative of Butler's testimony in court and it would, therefore, have been detrimental to Pratt's defense." (101)

The dissenting opinion took a different view:

"In my view, Butler's status as an informant was a material fact which could have affected his credibility at the Pratt trial. [And Mr Pratt] has, in my view, made a sufficient prima facie showing of possible perjury on the part of Butler to warrant further inquiry." (102)

Amnesty International suggests that the nature of the COINTELPRO directed at Elmer Pratt was such that the evidence of anyone working within it, or giving it information, should be very carefully scrutinized to check if it is reliable. And although Julius Butler's evidence was significant, the extent of his relationship with the FBI was not fully revealed to the jury. (103)

Amnesty International cannot comment on whether Julius Butler perjured himself; it does not know if he did or not. Nor does it claim that the convictions of those "targeted" by COINTELPRO were necessarily wrong. But one important matter still needs to be considered: was Julius Butler's evidence affected by COINTELPRO? (104)

The majority in the Court of Appeals thought one possibility was that "the perjured testimony, if any, was [not demonstrated to be] of such significance as to have affected the outcome of the trial in respect of guilt or innocence". (104A) This poses the question: was any evidence, even if of no practical significance, perjured? If so, was it due to COINTELPRO? And if it was, what was COINTELPRO hoping to achieve?

4. Evidence possibly supporting (or discrediting) Elmer Pratt's alibi defence (105)

Elmer Pratt was the subject of close FBI surveillance: Amnesty International understands that material obtained under the Freedom of Information Act (FOIA) amounted to over 7,000 pages of FBI surveillance records dated after 2 January 1969. (106) Elmer Pratt claimed that earlier records would reveal that he was at a meeting in Oakland at the time of the murder on 18 December 1968 but the FBI's initial response to this was that there had been no surveillance before 1969. This was later shown to be untrue. (107)

Elmer Pratt contends that the FBI has concealed and withheld evidence that would help to corroborate his alibi. But the majority in the Court of Appeals disagreed and held that "the defendant points to only two reports gleaned from the thousands of documents recently furnished by the FBI to the Attorney General and defense counsel (108) . . . Neither of the above documents warrants relief on the ground of newly discovered evidence because separately or in combination it cannot be said that they 'completely undermine the entire structure of the case upon which the prosecution is based', are 'conclusive' and 'point unerringly to innocence'." (109)

This opinion was based on a finding that neither of the documents supported Elmer Pratt's alibi that he was in Oakland on 18 December 1968. (110) It was in this context that the court referred to the prosecution's identification evidence and spoke of the "sharp conflict" between it and the alleged alibi. The jury "in resolving the credibility issue found against the defendant", they added. (111)

The dissenting judge viewed the matter differently. He made the point that the two documents indicating there was radio and telephone surveillance of BPP headquarters from 15 November till 20 December 1968, (112) were accompanied by two other pages of memoranda indicating that the FBI showed an interest in the activities of Black Panthers in

Oakland, California, in December 1968. (113) He said:

> "If, however, telephones were tapped, it is conceivable that the records will either confirm or refute the petitioner's contention that he was in northern California at the time of the murder. Certainly in my view, this potentially exculpatory or inculpatory evidence should have been provided to the petitioner's defense counsel. The FBI has indicated (not by affidavit) that the transcripts of the conversations recorded by these telephone taps have been lost or destroyed. An evidentiary hearing will provide an opportunity to determine if they are inextricably lost or if they can be produced or reconstructed. It seems most apparent that such information is relevant and material." (114)

The majority, however, were more concerned about the lack of hard evidence:

> "In no event is an evidentiary hearing warranted when based on sheer speculation and pure conjecture that there may be some evidence out there some place in the hands of federal authorities that may allegedly corroborate an 'alibi' defense. In the instant case in order to justify relief, defendant Pratt must be able to point to something in the record amounting to 'a demonstrable reality and not a speculative matter'." (115)

This matter will be taken up again at the end of the chapter.

5. Was evidence withheld that the only eye-witness to the killing positively identified someone else as the assailant? (116)

Information was allegedly withheld from the defence at the trial that an eye-witness to the murder had positively identified another individual as the assailant. (117)

Kenneth Olsen, who was wounded in the attack and whose wife was killed, admitted at the trial that earlier he had picked someone at an identification parade who, he had then believed, "could be" the assailant. But he emphasized in his evidence that he had been uncertain at the time. (118) Amnesty International understands that the evidence apparently withheld contradicts this statement. (119)

Elmer Pratt has claimed that Kenneth Olsen positively identified another man before the trial. This assertion is based on a declaration by a Los Angeles County Deputy Public Defender who was representing the man identified at that time. (120)

The evidence allegedly withheld was a card, known as a "witness slip", signed by Kenneth Olsen at the time of the identification parade stating that another man was the assailant. (121) What now matters to Amnesty International is not whether Kenneth Olsen actually identified someone else, but that the card may not have been handed over to the defence and that they may therefore have been hindered from following this line in cross-examination. (122)

The dissenting judgment in the Court of Appeals put the matter thus:

> "An evidentiary hearing is required to make a factual determination regarding the event. Since the jury of necessity had to evaluate the credibility of Olsen's identification, such information regarding a prior identification would have been material." (123)

And it put it in the following context:

> "[This] raises an issue not previously litigated that the state, through the police department and, or the district attorney's office, suppressed material evidence; to wit, the witness slip." (124)

This matter too will be taken up again at the end of the chapter.

6. The second suspect

On 30 June 1980 the FBI released documentation under the FOIA (125) running to 1,239 pages. It included a heavily deleted single page indicating that on or about 29 March 1971, after Elmer Pratt had been indicted and while he was awaiting trial, the FBI had forwarded information to the LAPD about an alleged second suspect in the case. (126) This revelation suggests that:

(i) the FBI discovered information pertaining to the identity of a second murder suspect; (127)

(ii) the FBI kept this information on file; (128)

(iii) the FBI passed this information on to the LAPD on 29 March 1971, some 14 months before Elmer Pratt's trial; (129)

(iv) defendant Pratt was never informed about it. (130)

According to Elmer Pratt's lawyers there would seem to be only two possible explanations for the failure to hand over this material earlier. (131)

> "The first is that the LAPD conducted an investigation as to the second suspect, but for some reason suppressed the investigative reports. The second is that the LAPD never conducted an investigation as to the second suspect at all and thus no investigative reports ever existed." (132)

The implications of either possibility may be of some importance to Elmer Pratt's case. If an investigation had been made without reports being handed over, the state might not have been fulfilling its obligation to pass on material potentially helpful to the defence. Elmer Pratt's lawyers argue that the state could hardly maintain that the reports were immaterial as the police reports that were handed over to the defence were filled with "various investigative blind alleys". (133) They continue:

> "There is certainly no obvious reason why the police report dealing with the investigation of the second suspect should not also have been turned over to the defense, whether the investigation was fruitful or not.
>
> "If no investigation of the second suspect was ever undertaken by the LAPD in spite of the fact that it received specific information as to his possible identity from the FBI on 29 March 1971 the implications go well beyond suppression of evidence, and suggest an overtly bad faith prosecution. It is difficult to imagine any reason for the LAPD to be so indifferent to the apprehension of the murder suspect as to not even bother to conduct an investigation when supplied with information specifically by the FBI - unless, of course, Mr Pratt is correct in his contention that his conviction was contrived by one or more police agencies that were involved in helping to prepare his prosecution." (134)

Amnesty International does not claim that the failure to hand over the information concerning a second suspect was necessarily improper; the organization is not in a position to assert that such information definitely indicates that Elmer Pratt was innocent. However, in view of other aspects of this case, this omission can be considered a further cause for concern and a further reason why there should be a full inquiry into the case.

Part Three: Conclusion

Evidence presented in this chapter shows that Elmer Pratt was "targeted for neutralization" under the domestic intelligence program known as COINTELPRO. He states that he is innocent of the crimes of which he was convicted in 1972 and alleges that he was "framed". The Church report does not list "framing" as a COINTELPRO method, but Amnesty International notes that the program did include such attempts to interfere with the judicial process as selective enforcement of the law.

Undoubtedly there is a clear distinction between framing an individual and selective enforcement of the law; but both measures stem from an official willingness to abuse the criminal justice system. This is relevant to the consideration of Elmer Pratt's case.

Amnesty International does not claim that the convictions of people "targeted" under COINTELPRO are invariably suspect. It believes that any separate evidence of prejudicial conduct by law enforcement agencies raises a presumption that both the misconduct and the COINTELPRO may share the same aim - in this case "neutralization".

The following facts, at least, were not known by Elmer Pratt when he was on trial:

(i) that there was a COINTELPRO directed at the BPP;

(ii) that he was a "target for neutralization";

(iii) that a crucial prosecution witness had extensive contacts with the FBI;

(iv) that the defence camp had been invaded by informants who were passing on information to the FBI;

(v) that the FBI had told the LAPD about a possible second suspect;

(vi) that the FBI was in possession of surveillance records which might serve to confirm or refute his alibi defence;

(vii) that the eye-witness to the murder might have signed a document stating that he had identified another individual as one of the murderers.

Since the above events took place at a time when there was close cooperation between the FBI and the LAPD, and Elmer Pratt was "targeted for neutralization", this case needs to be very carefully scrutinized.

The effect of COINTELPRO has been to destroy confidence in the bona fides of the FBI in all its dealings with Elmer Pratt. The information about the second suspect may have the same effect with regard to the LAPD. For this reason alone the case includes issues of fact which the state and federal government should look into.

CHAPTER III

The FBI and the American Indian Movement

A. Investigation and Surveillance by the FBI

In 1972 the FBI considered that its domestic security jurisdiction empowered it to investigate any individual who "is affiliated with, or who adheres to, the principles of [an organization] which has as an objective" the violent overthrow of the government or "other criminal activity detrimental to the national defence". (1) Church points out that the purpose of the investigations was more than obtaining "evidence for a prosecution". (2) The FBI's position was that "subversive activity . . . often does not clearly involve violation of a specific section of a specific statute." (3)

An examination of general FBI practice in investigating groups and compiling dossiers on individuals and their political activities is not being made in this report except insofar as this seems relevant to particular cases of imprisonment. It is pertinent as background information however that, in the name of internal security, the FBI had kept dossiers on those it regarded as "agitators of all types". (4) And as far as some secret action was concerned. Church reported that "the FBI resorted to counter-intelligence tactics in part because its chief officials believed that the existing law could not control the activities of certain dissident groups, and that court decisions had tied the hands of the intelligence community." (5)

The criteria for FBI investigations had officially excluded "mere dissent and opposition to governmental policies in a legal constitutional manner". (6) But practice seems to have been ambiguous. (7) Although agents in the field were instructed to "show the potential threat; not [just] anti-Vietnam or peace group sentiments [that do not reveal] advocacy of violence or unlawful action", (8) the dividing line between political expression (however militant) and overt incitement to violence appears to have been blurred. The former is protected by the First Amendment to the United States Constitution. In 1972 the FBI admitted that individuals were investigated even though they did not "realistically pose a threat to the national security". (9) Shortening the list to those "who were an actual danger now" (10) is said to have reduced it by two thirds. (11)

The question raised at the end of this chapter is straightforward -- what conclusions can properly be drawn when it is shown that the FBI, while conducting a domestic intelligence investigation of a "targeted" political group, has acted improperly and apparently attempted to prejudice the right to a fair trial of individual members of the group charged with serious offences? Cases referred to in this chapter are of prosecutions of AIM members.

* * * *

AIM has been kept under surveillance by the FBI; but on 17 March 1976 the FBI Director wrote that a "search of our central records reveals no information concerning the establishment of counter-intelligence disruption programs against the American Indian Movement." (12)

The FBI has investigated AIM. In March 1979 David A. Brumble, the FBI Special Agent in charge in Minneapolis, wrote to the Minneapolis Tribune as follows:

> "The FBI does in fact investigate the American Indian Movement under the authorisation and guidelines issued by the Attorney-General of the United States. Although this does not mean that each and every individual member of associate is subject to any investigation it should be clearly understood that the FBI would be remiss in performing its job if it did not investigate the activities of the American Indian Movement." (13)

Practice in this area can perhaps be best understood with 1973 as the starting point. In May 1973 FBI field offices were told that the "chief statutes" on which domestic security investigations should be based were those covering rebellion or insurrection (18 US Code 2383), (14) seditious conspiracy (18 US Code 2384), (15) and advocating overthrow of the government (18 US Code 2385). (16) These standards brought the following within the ambit of FBI investigations:

(i) any group or movement known to engage in or advocate activities aimed at overthrowing, destroying or undermining the Government of the United States, or any of its sub-divisions, by means prohibited under the above statutes; (17)

(ii) any person "reported to be engaged in activities" which might result in a violation of the above statutes; (18)

(iii) any "current active member" of an organization or movement under investigation; (19)

(iv) anyone who was "actively supporting the goals" of such a movement which had no formal membership. (20)

At that time a 90-day preliminary investigation was allowed, based on evidence that the person concerned was in touch with groups or individuals being investigated themselves. (21) A full investigation according to the above criteria would follow if this preliminary work revealed facts coming within (i) - (iv) above.

One commentator has said that these standards did not make a great deal of difference in practice:

> "From the point of view of agents in the field the changes made little difference. They now had to secure headquarters' approval for each full investigation and attach a brief statutory 'predication' to their request. But once they satisfied these formalities, they were free to continue the same kinds of investigation as before. The FBI still could conduct sweeping

> preliminary investigations . . . using established sources. [They had been allowed] on the theory that even if there was no specific information linking the [targets] to violent activity, their active participation in movements that had some violent members was enough to suggest that they too, might turn to violence." (22)

An example of such a "Predication for Investigation" was an exhibit in the case of Richard Marshall, (23) which appears to indicate that all members and supporters of AIM were investigated by the FBI in 1975. A further documentary exhibit in the case reveals that Richard Marshall who "was arrested 3/1/75 [as a] suspect in a shooting [is under investigation indicating that he] is engaged in activities which could involve a violation of Title 18, US Code, Section 2383 (rebellion or insurrection) or 2384 (seditious conspiracy)." (24)

These documents seem therefore to establish at least two matters:

(i) all members and supporters of AIM were investigated by the FBI in 1975;

(ii) they included Richard Marshall specifically before his trial for murder (see below).

The text of the "predication" document was as follows:

> "Predication for Investigation of Members and Supporters of AIM
>
> This investigation is based on information which indicates that the subject is engaged in activities which could involve a violation of Title 18 US Code Section 2383 (rebellion or insurrection) or 2384 (seditious conspiracy), as indicated hereafter. The subject has been identified as being actively involved in militant activities of the AIM. Since January 1973, AIM has been actively involved in demonstrations and violent confrontation with local authorities in Scottsbluff, Nebraska, and the Rapid City and Custer areas of South Dakota. From February 27 through May 8, 1973, AIM leaders and members and their supporters occupied the community of Wounded Knee, South Dakota, by force of arms taking a number of the community's residents as hostages. Before surrendering to federal authorities, they engaged in numerous violent and destructive acts and gunfire was exchanged with federal authorities resulting in the death of two of the insurgents." (25)

This document had 3 March 1975 stamped on it. (26) A number of AIM leaders had reportedly been arrested on 1 and 2 March. (27)

* * * *

On 7 July 1976 the then Director of the FBI, Clarence Kelley, stated that AIM "is a movement which has fine goals . . . many fine people and . . . as its general consideration of what needs to be done, something that is worthwhile and . . . is not tabbed by us as an un-American, subversive or otherwise objectionable organisation." (28)

Although so described by Clarence Kelley, AIM has featured in the "FBI Domestic Terrorism Digest", a document which summarizes "the possibilities of terrorist activities and report[s] on some of their activities." (29) The digest is issued in the regular course of FBI business and is distributed, according to Clarence Kelley, "in places throughout the country where it is felt that it is informative". (30) The word "terrorism" in the title means "activities which in this context could lead to violence or possibly to the violent overthrow of the government." (31)

This seeming contradiction, (32) particularly in view of the judicial opinions reproduced in this report stating that AIM is now working responsibly within the system, prompts the question: is the FBI investigating citizens whose activities do not in fact threaten the domestic security of the USA? (33)

Pre-1976 practice seems relevant:

> "What went wrong in the past, and what led to the low productivity of FBI domestic intelligence investigations before 1976, was the Bureau's use of such sweeping terms as 'subversion', 'sedition', and 'overthrow of the government' to define the scope of its inquiries. Instead of concentrating on cases in which individuals or groups had a record of violence or were likely to use violence in the near future, the FBI investigated people because of their adherence to revolutionary or extremist ideologies. The Bureau did so, at least in part, because of the vague and outdated sedition laws that had remained on the books for decades . . . (34)
>
> "Until 1976, the FBI could rely on these sedition laws as a mandate for sweeping domestic intelligence investigations. They went far beyond looking for information about terrorists, unless the concept of terrorism is stretched to encompass the political beliefs and associations of people who support revolutionary or totalitarian ideologies. It is no wonder that the FBI's investigations failed to contribute very much to the achievement of tangible law enforcement objectives." (34A)

In 1976 FBI practice became defined by new guidelines regulating domestic security investigations and the use of informants and including instructions as to when investigations might be started.

The 1976 guidelines indicate that the FBI is concerned about "activities" rather than advocacy of political ideas. Full investigations require "specific and articulable facts giving reasons to believe" (35)

that an individual or a group is, or may be, engaged in activities which involve the use of force or violence, and which "involve or will involve the violation of federal law" (36) for certain purposes including:

(i) overthrowing state or federal government; (37)

(ii) substantially impairing the functioning of state or federal government in order to influence US government policies or decisions; (38)

(iii) depriving people of their civil rights under the constitution, laws or treaties. (39)

The guidelines specify that "all investigations undertaken through these guidelines shall be designed and conducted so as not to limit the full exercise of rights protected by the Constitution and law of the United States." (40) Preliminary and limited investigations are permitted as a method of checking and verifying initial information and seeing if there is a "factual basis for opening a full investigation". (41)

In late 1976 the domestic security section of the FBI decided to discontinue investigations of ordinary members of organizations; investigations were to be confined thereafter to organizations and their policy-making members. (42) Richard Marshall and Leonard Peltier, whose cases are considered in this chapter, were two such people.

The fact that the investigation of rank and file members was ended did not necessarily mean that the names and activities of AIM members and supporters were no longer included in investigation reports and file indexes. (43) FBI headquarters did, however, advise field offices not to record what was said by individuals when exercising their right to freedom of speech, (44) and to get instructions from headquarters if any questions arose with regard to this. (45)

It was, however, considered "pertinent to the investigation of an organisation to maintain records concerning membership, public utterings, and/or other activities" of the organization. (46) Herein would seem to lie the distinction between AIM and "each and every individual member and associate", (47) as well as between current practice and practice at the time of the "predication" document in Richard Marshall's case. This will be discussed later in this chapter.

B. Chronology of Events

The following is the chronology of some of the events relevant to the discussion of cases which appear in part C.

1 March 1975	Murder for which Richard Marshall was convicted. Richard Marshall arrested.

3 March 1975	Date stamp on the "Predication for Investigation" of AIM members and supporters and Richard Marshall.
26 June 1975	Murder of which Leonard Peltier was later convicted.
15 January 1976	Leonard Peltier, Darelle Dean Butler, Robert Eugene Robideau and James Theodore Eagle indicted on two counts of first degree murder.
19 February 1976	Myrtle Poor Bear gives first affidavit to FBI concerning Leonard Peltier involvement in 26 June 1975 shooting.
23 February 1976	Myrtle Poor Bear gives second affidavit to FBI about Leonard Peltier.
24 February 1976	Myrtle Poor Bear has interview with FBI about Leonard Peltier.
10 March 1976	US Attorney-General's guidelines for FBI domestic security investigations.
22 March 1976	Myrtle Poor Bear makes first statement to sheriff concerning Richard Marshall.
6 February 1976	Leonard Peltier arrested in Canada.
25 March 1976	Myrtle Poor Bear endorsed as witness for Marshall trial.
29 March 1976	Jury selection in Marshall trial begins.
31 March 1976	Myrtle Poor Bear makes third affidavit about Leonard Peltier.
1 April 1976	Testimony in Marshall trial begins.
2 April 1976	Myrtle Poor Bear testifies in Marshall trial.
6 April 1976	Jury verdict given in Marshall case.
7 June 1976	Trial begins in Cedar Rapids of Darelle Dean Butler and Robert Eugene Robideau. (48)
17 July 1976	They are acquitted.
15 December 1976	US Attorney-General's guidelines for FBI use of informants in domestic security (and other) investigations.

January 1977	Leonard Peltier extradited to USA.
14 March 1977	Trial of Leonard Peltier begins.
13 April 1977	Myrtle Poor Bear testifies as a defence witness in Peltier case.
18 April 1977	Leonard Peltier found guilty on both counts.
11 May 1977	Myrtle Poor Bear signs affidavit repudiating her testimony against Richard Marshall and separate affidavit further repudiating her prior sworn statements against Leonard Peltier.
1 June 1977	Leonard Peltier sentenced to two consecutive terms of life imprisonment.
12 April 1978	South Dakota Supreme Court confirms conviction of Richard Marshall.
12 April 1978	During oral argument before US Court of Appeals US Attorney admits that Myrtle Poor Bear affidavits were false.
12/13 March 1979	Post-conviction hearing asking for relief for Richard Marshall.
17 July 1979	Decision denying post-conviction relief in Marshall case.
31 January 1980	Order denying post-conviction relief in Marshall case.
9 September 1980	South Dakota Supreme Court hears appeal from order denying Richard Marshall post-conviction relief.
20 May 1981	South Dakota Supreme Court denies Richard Marshall's appeal from order denying him post-conviction relief.

C. Cases which Included Matters of Concern to Amnesty International

Introduction

This part of the chapter is a description of FBI misconduct in relation to certain cases which occurred simultaneously with FBI investigation of AIM. The main question is whether or not the integrity of a domestic security investigation is called into question by such simultaneous FBI misconduct over the collection of evidence for use in a prosecution. The

answer is not dependent upon whether a defendant is found guilty in court; the prime issue is FBI conduct, its motives and possible effect upon the criminal justice system.

When defence counsel for an AIM member seeks to demonstrate that the FBI has been guilty of misconduct in other AIM prosecutions, is this relevant to the facts of the case being tried? First it must be assumed that a court will admit only "relevant" evidence. The word "relevant" means that any two facts to which it is applied are so related to each other that one fact (whether on its own or with others) proves or renders probable the existence of other facts. (49)

The defence is likely to say that evidence of misconduct should be presented to the jury to show that the government is prepared to use improper methods to secure a conviction. (50) The government is likely to reply that there is no direct proof that the evidence is relevant to the particular prosecution, and to argue that it is "collateral" to the actual facts at issue (for instance, how a homicide was committed and by whom). (51) They may assert that the defence is arguing in bad faith and seeking to sidetrack the court from the pertinent issues. A court might accept the contentions of either party.

The feelings of members of groups that are kept under surveillance should not be underestimated when evidence of FBI conduct is excluded as "irrelevant" or "collateral". The resentment aroused in such cases can perhaps best be seen as that of a minority which suffers discrimination and which believes, rightly or wrongly, that such a decision means they will get no real opportunity to submit to the jury matters they consider germane to the trial. The defence has been known to describe such decisions as "oppression in the courtroom"; (52) the prosecution may refer to "irrelevant political statements". (53) Accusations of bad faith between counsel are not uncommon. (53A)

Example No.1. US -v- Leonard Peltier

(i) Myrtle Poor Bear's evidence

Leonard Peltier was convicted of the murder of two FBI Special Agents on the Pine Ridge Indian reservation in South Dakota. In February and March 1976 Myrtle Poor Bear signed two affidavits purporting to be an eye-witness account of murders which had taken place on 26 June 1975. Leonard Peltier was arrested in Canada and two of these affidavits were presented to a court, together with other evidence, in extradition proceedings. (54) The Myrtle Poor Bear affidavits formed a vital part of the case against Leonard Peltier as she claimed to have been an eye-witness. Extradition was ordered and upheld by the Canadian Minister of Justice. (55)

Shortly afterwards, Leonard Peltier's counsel in the USA acquired a third affidavit sworn by Myrtle Poor Bear before the other two were. It indicated that she had not been present on Pine Ridge the day the FBI

agents were killed. The US Court of Appeals later said:

> ". . . Anybody who read those affidavits would know that they contradict each other. Why the FBI and prosecutor's office continued to extract more to put into the affidavits in hope to get Mr Peltier back to the United States is beyond my understanding . . . Because you should have known and the FBI should have known, that you were pressurising the woman to add to her statement." (56)

Myrtle Poor Bear was called as a defence witness after it became apparent that the government was not going to use her testimony at the trial. (57) This was to "demonstrate that the government had resorted to fabrication of evidence, obstruction of justice, subornation of perjury and intimidation, all classic indicia of consciousness of a weak cause, and to lay bare the bias and hostility of two FBI agents [working on the case]." (58)

The trial court's guidelines were unequivocal:

> "The court's position with reference to evidence to be offered by the defence is simply that evidence relative to the issues and the evidence presented by the government will be admitted. I will state, however, that witnesses who have testified will not be impeached by a showing of misconduct of the FBI unless that misconduct relates to the testimony of individual witnesses who have testified or . . . exhibits that have been received in evidence." (59)

During a court hearing to determine whether or not the jury should hear her evidence, Myrtle Poor Bear "disclaimed virtually every allegation she made in the affidavits [which had gone to Canada]. She testified that she had been forced to sign the affidavits, which were prepared by the FBI, under threats of physical harm." (60) Her evidence to this effect was not presented to the jury on the grounds that it was "collateral". (61)

The Court of Appeals later described the FBI's conduct thus:

> "What happened happened in such a way that it gives some credence to the claim of the . . . Indian people that the United States is willing to resort to any tactic in order to bring somebody back to the United States from Canada . . . And if they are willing to do that, they must be willing to fabricate other evidence. And it's no wonder that [Indian people] are unhappy and disbelieve the things that happened in our courts when things like this happen." (62)

The prosecution argument on appeal was simple. Although the defective affidavits should not have been submitted to the Canadian authorities, they argued, the other evidence presented in Canada of Leonard Peltier's involvement in the murders should not be forgotten.

They pointed out that the Canadian Minister of Justice had evidence of the falsity of the affidavits before him when he upheld the extradition order. They contended also that Leonard Peltier had not presented valid reasons why the jury should consider the truthfulness or falsity of evidence given at the trial in the light of other evidence given at the extradition hearing. (63) They seem to have meant that nothing concerning the affidavits was relevant to whether or not Leonard Peltier had committed the murders, and that the prosecution had not tried to rely on Myrtle Poor Bear's evidence at the trial.

The government answer on appeal on the matter of bias and hostility on the part of the FBI was in the same vein. They argued that the agents concerned were not witnesses before the jury and that therefore their conduct was not pertinent. (64)

Another example from the same case is Jimmy Eagle.

(ii) Jimmy Eagle

Jimmy Eagle, a young Indian, was charged with the same murders as Leonard Peltier, but the government dropped the proceedings. He testified, not in the presence of the jury, that he had been questioned by FBI agents who had threatened to have him indicted for the murders if he did not cooperate with the investigation. (65) He had not cooperated and had later been indicted. After reporting the FBI threats to his lawyer, he had been warned to keep quiet at all times as the government would probably put informers in his cell. (66)

While he was in prison, the government had obtained statements from four of his cell-mates which purported to be a description by Jimmy Eagle of the murders. (67) Jimmy Eagle testified, again at a hearing to decide whether his evidence should be presented to the jury, that he had never made any of the statements attributed to him. (68) The defence later contended that because the statements of the four were so thorough, and so completely matched the FBI's theory about the murders, this strongly indicated that the FBI had concocted them and sought the cooperation of four felons in exchange for better treatment. (69)

The government argued in the Court of Appeals that:

> "It was never established . . . whether Eagle or the cell-mates were lying concerning the jailhouse confessions. But regardless of who was lying, the issue had no bearing whatsoever upon the facts at bar. Even if it were assumed that the cell-mates were lying the defendant has offered no evidence which established a connection between the cell-mates' supposed misconduct and the FBI. Something more than accusation by defendant's counsel is needed to make such a connection." (70)

Another example from Leonard Peltier's case relates to Anderson, Draper and Brown.

(iii) Coercion of three government witnesses: Anderson, Draper and Brown (71)

These three important government witnesses testified on cross-examination that FBI agents had threatened, intimidated or physically abused them when they were questioned about the murders in the initial stages of the investigation. (72) The Court of Appeals said the following:

> "Brown, in his testimony as a witness for the defence . . . stated that he testified falsely before the grand jury as a result of fear of the FBI. All three witnesses testified that when they were interviewed at early stages of investigation, their answers to the FBI's questions were inconsistent with the truth for one reason or another. However, upon further questioning at the trial by the government attorney, they stated that the evidence they gave at the trial was the truth as they best remembered it. [And that therefore there was no evidence that] the government induced them to testify falsely in this trial or in a related trial." (73)

The relevance of this is discussed below.

(iv) The Appeal Court's response to (i), (ii) and (iii) above

The Court said that the evidence was only "minimally relevant":

> "Neither Jimmy Eagle nor Myrtle Poor Bear testified as a government witness against Peltier. Furthermore, Peltier made no showing that the integrity of the government's evidence against him was in any way tainted by the Myrtle Poor Bear and Jimmy Eagle episodes. (74)
>
> "Peltier argues that the evidence was relevant to show bias on the part of the government witnesses, Anderson, Draper and Brown. He argues that Poor Bear's and Eagle's testimony, believed by the jury, might have caused the jury to speculate further as to whether the knowledge Anderson, Draper and Brown testified to was implanted in their minds by coercive FBI interrogation. (75)
>
> "It is true that evidence tending to show a substantial reason for bias or interest in an important witness is never collateral or irrelevant. It may be . . . the very key to an intelligent appraisal of the witnesses. However, Eagle's and Poor Bear's allegations of FBI harassment, even if true, shed very little, if any light on the credibility of other witnesses, since the trial court allowed full inquiry into the dealings of Anderson, Draper and Brown with the FBI. . . . (76)

"Peltier also argued that the Poor Bear and Eagle testimony was admissible to show the intention of the FBI to bring about his conviction no matter what the cost. This issue is a more difficult one. As we stated earlier, Peltier's theory of the case was that the FBI framed him by manufacturing evidence and inducing witnesses to testify in accordance with its theory of murders. The Poor Bear and Eagle testimony was certainly consistent with that theory. However, we do not find an abuse of discretion on the part of the District Court in excluding the evidence. The District Court weighed the following facts:

"(a) the defendant's failure to point to specific evidence used against him, the reliability of which was directly affected by the Poor Bear or Eagle episodes;

"(b) the lack of probative value of the proffered evidence." (77)

The court said that Myrtle Poor Bear had not been a reliable witness and that her evidence had been very vague as she had often responded that she could not remember things. The court also pointed out that defence counsel had earlier referred to her as a "witness whose mental imbalance is so gross as to render her testimony unbelievable." (78)

As regards Jimmy Eagle, the court pointed out that the defence, in addition to presenting his evidence, had called two of the four cell-mates who had allegedly given false statements to the government. (79) The witnesses affirmed that their earlier statements to the FBI had been true and denied that the FBI had induced them to make false statements. The court said that the two witnesses had later stated they had been threatened by Leonard Peltier that their lives would be in danger if they did not return to court and testify that their earlier testimony had been the result of FBI threats: (79A)

"There was thus no real proof that the FBI solicited statements from the four cell-mates. There was only proof that Eagle denied making the statements." (80)

The court said that it realized the government would probably have presented evidence to the contrary, thus an already lengthy trial would have been extended. It referred to the danger of unfairness to the government as the evidence presented would clearly have tended to divert the jury's attention from the specific question of Leonard Peltier's guilt or innocence. (81)

The Appeal Court's conclusion was interestingly worded:

"While the more prudent course might have been to allow the defence to present the evidence, we find no abuse of discretion in the trial court's exclusion of the testimony of Jimmy Eagle and Myrtle Poor Bear in the light of its low probative value, the potential for further delay in the trial and the danger of unfair prejudice to the government." (82)

The defence tried to get the case heard by the US Supreme Court. The government's reason for opposing this is interesting. Taking up the defence argument that the Myrtle Poor Bear evidence should be seen as "government consciousness of a weak cause" (83) they said:

"An attempt by a government agent to suppress or alter evidence should it occur, can show no more than prosecutorial doubts concerning the probative value of the rest of the government's evidence. These doubts are not knowledge; they are opinion or evaluation. The prosecutor's or investigator's evaluation of the strength of this case is not relevant proof of the defendant's guilt or innocence." (84)

Amnesty International believes that, seen in its full context, the suppression or alteration of evidence can reveal a great deal more than the government suggests. This is discussed further in the Conclusion.

Example No.2. State of South Dakota -v- Richard Marshall (85)

This case too involves Myrtle Poor Bear and retracted testimony. In the South Dakota state prosecution of Richard Marshall for murder, Myrtle Poor Bear gave evidence for the prosecution, saying that the defendant had twice confessed to her that he was the murderer. (86) She later stated that this evidence was false and "contrived by FBI agents". (87) She said that FBI agents forced her to testify against Richard Marshall by threatening to take her and her daughter's lives. (88)

Myrtle Poor Bear was a surprise witness in this case. The prosecutor, directed by the court, apparently disclosed the names of his witnesses at a pre-trial meeting on 16 March 1976 at which Myrtle Poor Bear was not mentioned. (89)

On 22 March she made a statement to a Rapid City Deputy Sheriff about Richard Marshall's alleged confessions; and on 23 March the state's attorney asked to have her name on the record as a witness. (90) This request was granted on 25 March and the defendant asked the court to defer the trial so that the additional witness could be investigated. As far as Amnesty International knows, this latter request was refused. (91)

The trial began on 29 March, and on 2 April Myrtle Poor Bear gave evidence. Apparently she was supplied by the FBI to the state on 23 March 1976 (this was when she made her statement) and accommodation had been arranged for her by FBI agents for three days beforehand. (92) One of the Leonard Peltier affidavits was made on 31 March 1976, a few days later, so evidently she was still in touch with the FBI agents after she had been supplied to the state. (93)

Although she said at the post-conviction hearing that her evidence at the trial was untrue, the court was not satisfied that the jury might have reached a different conclusion had she not testified. (94) The court refused to order a retrial and held that she was not a "significant" witness and that the jury had been given "overwhelming evidence" on which to base a conviction without her testimony. (95)

Significantly, however, the court did express some concern about the nature of Myrtle Poor Bear's contact with the FBI agents, and pointed out that the latter had had difficulty in recalling the circumstances of her contact with them before the trial. (96) The court continued:

> "While the circumstances and their testimony creates some concern in the mind, yet there is no articulable basis upon which this court can find that they participated in any subornation of perjury or coaching of the witness, Myrtle Poor Bear, in preparation of the Marshall trial. While their conduct in some instances seem inappropriate and inconsistent, such is not a sufficient basis for this court to find intentional governmental misconduct." (97)

The main point demonstrated by this is that a court may not be in a position to determine the true import of "inappropriate and inconsistent" FBI conduct in an individual case, unless it is considered in the context of a pattern of such conduct. In Marshall and Peltier Myrtle Poor Bear's retractions reveal obvious similarities with each other. The court in the Peltier case concluded that Myrtle Poor Bear's evidence was collateral; the court in the Marshall case found no "articulable basis" for concern. Amnesty International argues that, if both cases are considered together, it can reasonably be inferred that the serious and deliberate FBI misconduct over Myrtle Poor Bear in the Peltier case is likely to help explain her position in the Marshall case. The court hearing Richard Marshall's argument for a retrial was invited to follow this line, but declined to admit as evidence a statement by the prosecutor in the Leonard Peltier appeal admitting in effect that the FBI had itself been guilty of misconduct in using the Myrtle Poor Bear affidavits. It said the statement was hearsay and inadmissible. (98)

Amnesty International considers that these examples reveal, at the very least, some disrespect for the law on the part of the FBI. In Peltier, the Court of Appeals held that the more prudent course might have been to allow the defence to present Myrtle Poor Bear's evidence to the jury; (99) In Marshall the judge felt some "concern". (100) Considered together these two cases give rise to sufficient doubt about the integrity of the FBI in these matters to warrant further examination.

On 20 May 1981 the Supreme Court of the State of South Dakota gave its opinion on the case. The majority considered a retrial unnecessary:

> "We are not reasonably well satisfied that Poor Bear's testimony was false or that, without it, the jury might have reached a different conclusion. We further conclude that petitioner was able to effectively cross-examine Poor Bear at trial. Here, there were factual issues to be decided. We cannot say that the court's findings are contrary to a clear preponderance of the evidence, nor are we left with a definite and firm conviction that a mistake has been committed." (100a)

The Supreme Court referred to Richard Marshall's argument that a retrial was required because of the prosecution's failure to comply with an order by the trial judge that Myrtle Poor Bear's medical records should be produced. Richard Marshall's lawyers had argued that to have known about her use of drugs and her psychological problems would have affected her credibility as a prosecution witness. (100b) The court, however, said:

> "In view of the strong circumstantial evidence of guilt presented at the murder trial, we cannot say as a matter of law that the medical records of Poor Bear would have been outcome-determinative in this case." (100c)

The Chief Justice dissented. He based his opinion on "information concerning Myrtle Poor Bear that has emerged since the murder trial", (100d) and, among other things, said:

(i) "Petitioner did not know of the contemporaneous and apparently false affidavits given by Poor Bear with regard to the shooting of the two FBI agents and did not even know Poor Bear's true relationship with the FBI." (100e)

(ii) "Petitioner was unable to review Poor Bear's medical history, which in itself would probably have had a substantial effect on her credibility." (100f)

(iii) "Poor Bear was a material witness at petitioner's trial and . . . the jury might have reached a different conclusion without her testimony." (100g)

(iv) "The testimony of the various witnesses with regard to who was [there] at the time [the victim] was shot is anything but clear-cut." (100h)

(v) "One witness misidentified [Marshall] and the other witness was unable to identify him at a preliminary hearing two months after the shooting." (100i)

(vi) "In addition to [certain stated] inconsistencies the testimony of Myrtle Poor Bear may have been the key evidence on several critical areas raised during the trial." (100j)

(vii) "The medical records of Poor Bear, which were not available at petitioner's original murder trial, together with the testimony of Poor Bear's family, indicate that Poor Bear is a seriously disturbed young woman who often fantasizes and tells stories and lies." (100k)

(viii) "I am not disposed to take lightly statements made by a United States Attorney before a panel of judges in a United States Court of Appeals"about Poor Bear's incompetence as a witness. (101L)

(ix) "Based on Poor Bear's recantation alone, I might well agree with the post-conviction court's finding that her testimony at the murder trial was not false. In addition to Poor Bear's recantation of her testimony, however, there is the additional fact that immediately before her testimony in petitioner's trial she signed affidavits concerning another serious matter that so contradicted each other that she had to be lying in one or more or all of them." (100m)

(x) "The cumulative effect of this evidence persuades me that Poor Bear testified falsely at petitioner's murder trial." (100n)

This will be discussed further in the Conclusion.

Example No. 3. The Informant Cases (See Appendix)

(i) General

The use of informants in criminal investigations in the USA is quite common; but where they are used to infiltrate political groups careful monitoring is needed to ensure that freedom of expression and association are not curtailed. (101) What matters in this connection is whether informants have ever infiltrated defence committees and reported back to the FBI thus infringing the right to privileged communication between lawyer and client. (102) When this happens it is significant in that it may indicate a policy of trying to deny the defendant's right to a fair trial. (103)

* * * *

AIM has been infiltrated by FBI informants. (104) In March 1975 the New York Times reported that:

> "The American Indian Movement's chief security officer during the trial of the leaders of the Wounded Knee takeover said today that he was a paid informer for the Federal Bureau of Investigation.

> "The Government, in a sworn affidavit at the trial, had appeared to contend that it had no informer in the defence ranks. The informer, Douglas Durham, was the chief aide and confidant of Dennis J. Banks, one of the two defendants and a co-leader of the American Indian Movement. In addition to being the organization's national security director he became, in effect, its chief bureaucrat." (105)

The paper reported also that Douglas Durham's payment by the FBI was raised at one point from $900 to $1,100 a month. (106) This is relevant inasmuch as the Church report indicates that at approximately the same time: (107)

> "Special Agents may pay an informant up to $400 on their own authority; after that amount has been expended Bureau HQ authorization is required for any additional payments. Although there is no formal ceiling on payments for services (i.e. information provided) FBI informants average approximately $100 a month with the most valuable and productive informants . . . earning in the range of $300 - $400 monthly." (108)

Evidently therefore Douglas Durham was an agent of some importance and decisions about his work were taken at headquarters in Washington DC.

It is against this background that the following cases are considered:

(ii) Cases

US -v- Dennis Banks and Russell Means: The Wounded Knee Trial (109)

In this prosecution, which was terminated by the judge for a number of reasons in 1974, (110) the informant issue was one among a number taken up by the court. It is this case which is referred to in the New York Times article quoted above.

The FBI Special Agent in Charge for Minnesota, North Dakota and South Dakota gave evidence that the FBI had used informants against AIM but had not infiltrated them into the defence camp. (111) The evidence was as follows:

> "Q. To your knowledge, and I am asking you for your knowledge based upon reports made to you orally or in writing . . . have any of these informants attended any meetings at which there were present defendants in matters arising out of any of the incidents of Wounded Knee and the lawyers?
>
> "A. The answer is no.
>
> "Q. You are sure of that?

"A. Yes.

"Q. Have any of the informants about whom you have given testimony . . . talked to any of the members of the Wounded Knee Legal Defence/Offence Committee?

"A. Not to my knowledge.

"Q. And what is your knowledge based on?

"A. The fact that I have no such affirmative information plus the fact that the FBI as a matter of policy is not going to try to infiltrate the defence circles or defence strategy plus the assurance that I have . . . that this was a situation wherein there were no such efforts on our part." (113)

Although it later transpired that this evidence was false, the main lesson for Amnesty International (so long after the event) is that the trial court was never actually in a position to know that it was being misled. This is what happened. A procedure was agreed whereby a list of all individuals who worked for the defence committee would be drawn up and compared with the names on the informer file in Washington. (114) The court asked to be told whether any names appeared on both lists. The names of Douglas Durham and Harry E. Shafer (115) were on the former list; even so affidavits were submitted to the court by the prosecutors stating that their review had revealed no evidence of an infiltration of the defence camp. (116)

There the matter rested until 1975, when it emerged that Douglas Durham and Harry Shafer were FBI informants. The court and the defence appeared therefore to have been misled. (117)

In other cases involving members and supporters of AIM this matter has been mentioned.

(a) US -v- Dodge, Escamilla and Alvarado (118)

"Were we concerned on this appeal with the question of whether the conviction of Dennis Banks and Russell Means tried in St Paul could be upheld we would have another case. There is evidence in the record and FBI files to indicate that Durham was privy to numerous conversations between Banks and his lawyers, that he was present in St Paul during the course of the trial and that he was in constant communication not only with Banks and the other defendants during the trial, but with the FBI. (119/120)

(b) US -v- Crow Dog (121)

"The strained construction placed by the government upon the court order issued by Judge Nichol directing disclosure of information pertaining to FBI informers, including 'evidence arguably relevant

to invasion of, or contact with, the defence attorney's camp' is a possible contempt matter to be dealt with by Judge Nichol, should he so desire, in that manner." (122)

(c) US -v- Cooper, Fleury and Alvarado (123)

This case was of post-trial motions by the defence. It was heard together with that of Dodge, Escamilla et al. on appeal and affirmed. (supra)

"Nothing before the court, including Durham's testimony, and the Federal Bureau of Investigation file regarding Durham, indicates that he ever communicated to the FBI or any other person associated with the prosecution any defence strategy or any information of possible usefulness in the defence or the prosecution of any of the defendants at bar. He undoubtedly heard trial strategy regarding the Banks-Means trial, but that is not shown to have had bearing on the defence of the persons now before the court." (124)

Unless it can be shown that the prosecuting attorney is in possession of the confidential material, the defendant may find it difficult to prove that she or he has been informed on. The court said:

"It makes sense to me that no prejudice needs to be shown as a prerequisite to a new trial if overheard confidential communications between defendant and his counsel, or conversations with counsel about the defendant's case, are within the knowledge of the prosecuting attorney at the time of the trial. The dangers of subtle use by the prosecutor of the information from the conversation, either evidentially or strategically, are obvious. On the other hand, when the prosecution knows nothing of the fact or content of the conversation, danger to the defence or advantage to the prosecution is imperceptible, even by an agile imagination. A prophylactic rule to avoid temptation of a government investigative agency, such as the FBI, to pass to the prosecution evidence gained from such conversations intercepted would serve no purpose in the present cases, where it appears that no such conversations were communicated to the FBI by the informant. An informant realistically must be considered to be a step further from the prosecution than FBI special agents who work regularly with prosecuting attorneys and the prospect of an informant's relaying facts to prosecutors when the informant has been reporting to an investigative agency is too remote to require a rule of presumed prejudice when such an informant overhears but does not report to anyone confidential communication." (125)

(iii) Comment

The reality of the situation from the defence point of view is different. Defendants and their supporters find it difficult actually to prove that they have been prejudiced by an informant when in the past there has been evidence that the FBI cannot be trusted to comply with court orders to reveal pertinent files. (126)

The case of US -v- Dodge, Escamilla and Alvarado (127) clearly shows that this all-important question of fact is the dominant issue:

> "The record clearly indicates that the termination of the relationship of the Shafers to AIM was at such time as to make any likelihood of invasion of an attorney-client relationship affecting these appellants virtually impossible. Moreover, the record shows clearly that the Shafers did not have access to the records or strategy or to conversations between appellants and their attorneys or to any attorney work product.
>
> "The record is also void of evidence that Durham was present when defence strategy relating to the appellants was discussed. It is equally devoid of evidence that Durham examined the files of any of the appellants' case or defence strategy. Moreover, there is nothing in the records to indicate that Durham was present in the communities where the appellants were tried while the trials were underway . . .
>
> "The most that can be said is that Durham served as an FBI informant during the months that the appellants' cases were being prepared and tried, that he occupied a position of responsibility in AIM and was a confidant of Dennis Banks, an AIM leader, during this period." (128)

The US Court of Appeals for the eighth circuit dealt with the issue in US -v- Crow Dog too. (129)

> "The record here merely indicates that during the period of Durham's service as an informant for the FBI he occupied various leadership positions within AIM and was a confidant of Dennis Banks. Any close proximity with appellant Crow Dog is neither alleged nor apparent from the record. No prejudice for appellant has been shown to arise from this tangential relationship with his case. We adopt the position that in the absence of the showing of actual prejudice: there must be the actual gaining, rather than the mere opportunity for gaining, of information relative to a charge against the defendant and the information must be obtained by the informant from an intrusion into the attorney-client relationship. No such 'gaining' or 'intrusion' has been shown in the instant case." (130)

AIM claims that the mere presence of an informant in the defence team, with an opportunity to acquire confidential information relevant to the defence case fits into the past pattern of FBI bad faith and harassment, and that therefore the matter requires careful study. Amnesty International agrees with this point of view.

D. Conclusion

Amnesty International does not have any views about the need for any particular domestic intelligence investigation, but it wonders what conclusion should be drawn when a federal government agency (the FBI) conducts such an investigation and at the same time appears willing to fabricate evidence against its "targets" and to withhold information which, according to law, should have been disclosed. It is, moreover, clear that the FBI have abused their power by producing false evidence and infiltrating the defence teams of people indicted on serious charges.

Amnesty International takes no position on whether informants should be used by law enforcement agencies in domestic intelligence investigations; but it is evident that informants have improperly reported on discussions between lawyers and their clients; and evidence of this appears to have been improperly withheld from the court and the defence. This is cause for serious concern. (See Chapter I)

Domestic intelligence investigations are intended to safeguard domestic security. But fundamental issues are raised when the agency carrying out the program also jeopardizes the right to fair trial.

As pointed out above, on 17 March 1976 the Director of the FBI wrote that "a search of our central records reveals no information concerning the establishment of counter-intelligence disruption programs" against AIM. (131) Yet between 19 February 1976 and 31 March 1976 the FBI was acting in a way which led a federal court of appeals to observe that:

> "What happened happened in such a way that it gives some credence to the claim of the . . . Indian people that the United States is willing to resort to any tactic in order to bring somebody to the United States from Canada . . . And if they are willing to do that, they must be willing to fabricate other evidence. And it's no wonder that [Indian people] are unhappy and disbelieve the things that happened in our courts when things like this happen." (132)

On 21 March 1979 the FBI Special Agent-in-Charge in Minneapolis, Minnesota, wrote that "the FBI does investigate AIM", (133) while on 12 and 13 March 1979 an Amnesty International observer in South Dakota Circuit Court heard FBI agents give evidence in the Richard Marshall case which led to the court deciding:

"While the circumstances and their testimony creates some concern in the mind, yet there is no articulable basis upon which this court can find that they participated in any subornation of perjury or coaching of the witness . . . in preparation of the Marshall trial. While their conduct in some instances seems inappropriate and inconsistent, such is not a sufficient basis for this court to find intentional governmental misconduct." (134)

Later the Chief Justice of South Dakota pointed out that Richard Marshall "did not even know Myrtle Poor Bear's true relationship with the FBI" (135) and that the cumulative effect of the evidence "persuades me that Poor Bear testified falsely at trial". (136)

Allegations against the FBI of a pattern of FBI intimidation of AIM must be considered against this background. Moreover, within this context what is legally relevant to a case becomes important; for the discretion to exclude evidence as "collateral" may coincidentally serve to conceal from the public an authoritative record of a pattern of misconduct.

How widespread is such FBI misconduct? -- Amnesty International does not know.

CHAPTER IV

Racial and Political Bias: A Discussion of Some Central Issues

A. Introduction

This chapter covers certain areas where, in the opinion of Amnesty International, the course of criminal justice may have been affected by the defendant's ethnic origin or political views. The issues discussed have all been the subject of vigorous legal argument in both state and federal courts; Amnesty International therefore stresses that potential remedies are available in court for the victims of law enforcement agencies' excesses, or of the practices referred to below, provided they can establish the facts.

No legal arguments are being offered, nor is this an indictment of the American legal system. The aim is to present evidence of possible bias and unfairness. Separate issues are considered, but in each case there are indications why the defendants believe they may not get a fair trial in certain courts.

Amnesty International would not necessarily share this belief as it has learnt from experience that close examination of individual cases may fail to reveal any clear connection between a defendant's political ideology or ethnic origin and the fact that he or she is being prosecuted.

The following issues are considered in this chapter:

(i) selective prosecution;

(ii) juries and defendants' ethnic origins;

(iii) a case study of imprisonment on overtly political grounds.

Amnesty International's experience is that when trials have political overtones allegations of non-compliance with internationally recognized standards on the due process of law are more apt to be made. Such allegations must be carefully tested.

The passage in Amnesty International's Statute pertaining to racial and political bias in a criminal justice system runs thus:

"Considering that every person has the right freely to hold and to express his or her convictions and the obligation to extend a like freedom to others, the object of Amnesty International shall be to secure throughout the world the observance of the provisions of the Universal Declaration of Human Rights, by:

Irrespective of political considerations working towards the release of and providing assistance to persons who in violation of the aforesaid provisions are imprisoned, detained or otherwise physically restricted by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, colour or language, provided that they have not used or advocated violence (hereinafter referred to as 'Prisoners of Conscience')." (1)

Therefore before a prisoner is adopted by Amnesty International as a prisoner of conscience on the grounds that he or she has been imprisoned on account of ethnic origin, the organization must be satisfied that she or he has been convicted of a criminal offence for that reason alone -- that is that the conviction was wholly discriminatory. Cases not falling into this category are examined to see if the trial procedures conform to internationally recognized standards. (2)

B. Selective Prosecution

Quite often Amnesty International receives allegations that a prosecution was "selective" -- that is, it involved the singling out of the members or supporters of a particular group after law enforcement agencies had decided to prosecute at the first opportunity on any available grounds. Such methods were used by COINTELPRO. (3)

The law is clear: intentional discrimination in the enforcement of the criminal law by either state or federal officials is a denial of the constitutional guarantee of equal protection of the laws. No such prosecutions should therefore be initiated. (4) The application of the law is less clear however. How, for example, is selectivity proved? It is generally accepted that discriminatory law enforcement involves using the prosecutorial prerogative to discriminate against those whose constitutionally protected views or activities are not popular with the government. (5) But defence lawyers sometimes contend that an indicator of selective prosecution is the use by law enforcement agencies of methods other than prosecution to harass those with such views.(6) This may pose the perennial question of pattern in another guise. (7)

An examination of the way allegations of selective prosecution are handled by courts reveals the close connection between selective prosecution and unlawful harassment by law enforcement agencies. The latter may clearly constitute evidence of the former, but there is a heavy burden upon a defendant to show that he or she has been singled out for special prosecutorial attention because of ethnic origin or political views. (8)

1. The factors Amnesty International must take into account in deciding whether a case has involved selective prosecution

None of the following factors provides a definitive answer to whether a prosecution was selective, but all help to put the case in context: (9)

(i) previous history of arrests and questioning of the defendant or members of her or his political movement;

(ii) previous history of prosecutions of the defendant or members of her or his political movement;

(iii) previous history of harassment or surveillance of the defendant and members of her or his political movement;

(iv) any indication of a COINTELPRO or similar program;

(v) any relevant statements about prosecution policy by law enforcement officers;

(vi) any previous trials in which the evidence indicated a policy of discrimination by law enforcement agencies;

(vii) nature of the offence with which the defendant is charged -- a mere breach of regulations or a serious crime -- (10) and any de facto policy of not normally prosecuting for this offence; (11)

(viii) the general pattern of prosecution for such an offence when people not belonging to the political group concerned may be suspects;

(ix) who decided to prosecute;

(x) whether the issue is being properly presented to the court. (12)

Of relevance in Elmer Pratt's case is the fact that the FBI apparently encouraged the LAPD to prosecute members of the BPP. (12A) In the Wounded Knee cases there was evidence that the US attorney for the District of South Dakota made the decisions on his own. (12B)

2. The method adopted by courts in dealing with allegations of selective prosecution

Where a defendant is able to adduce evidence which raises a reasonable doubt about the prosecutor's motive, it is up to the latter to prove with compelling evidence that the decision to prosecute was arrived at

in good faith. (13) This rule is a recognition of the difficulties facing the defence over this, and is intended to alleviate them. (14)

Two cases are cited in connection with this. The first is the prosecution of Dennis Banks and Russell Means arising out of the occupation of Wounded Knee in 1973. (15) The second, arising from the same incident, is the prosecution of Leonard Crow Dog. (16) These cases have not been chosen because they may in some way be typical, but rather because the issues dicussed in court seem to have been clearly expressed. This means they may constitute a framwork within which later cases can be considered. (17) In both cases the court ruled that the evidence of selectivity did not raise a reasonable doubt about the prosecutor's purpose. (18)

The defence evidence in both cases included facts relating to a road block which had been unlawfully set up outside Wounded Knee by Indians who were opposed to AIM. (19) Those at the road block refused to let a US marshal pass through with supplies in clear violation of a federal court order that foodstuffs and medical supplies could be taken to Wounded Knee. The marshal made no attempt to enforce the court order at the road block. (20) Two courts were later invited to hold that the fact that those who were defending the road block had not been prosecuted for doing so, although AIM members had been taken to court for their alleged crimes, amounted to a policy of selectivity in the application of the criminal law. They did not do so.

The court in Banks and Means said this:

"Not only were the marshall and his fellow law enforcement officers entrusted with the task of liberating the occupied town of Wounded Knee, but they were also responsible for doing everything possible to avoid bloodletting between the AIM people and the tribal Indians and residents of Wounded Knee. Far be it from this court to add to those burdens by telling the US marshall what he should have done under those pressurised circumstances. Perhaps now, after the event, fairness would be served by the bringing of criminal action against those manning the road blocks. The mere fact, however, that indictments have not been sought prior to this time [17 December 1973] does not raise that reasonable doubt about the motives of the US Attorney." (21)

Clearly the question whether or not a particular prosecution is an example of selective enforcement is difficult to answer since direct evidence of discriminatory policy is unlikely to be available.

The court in Banks and Means was unequivocal:

"It is the conclusion of this court that while there may have been harassment by government and tribal officials of the American Indian Movement affiliated people, that harassment

did not originate in governmental policy, nor was it a part of a governmental effort to stifle any constitutionally protected activities of the defendants. The decision to prosecute the defendants was undertaken by the United States attorney's office in good faith for the purpose of attempting to bring to justice those who violate the law." (22)

The same point was made in the case of US -v- Crow Dog (23) where the defendant had argued that "the prosecutions were part of an effort by the government selectively to enforce the laws against those Indians who are members or sympathisers of the American Indian Movement". (24) The US Court of Appeals disagreed and cited a legal presumption that prosecutions for breaking the criminal law are undertaken in good faith and in a non-discriminatory fashion. (25) Earlier cases were cited in which it had been said that a "reasonable prosecutorial discretion is inherent in the judicial system" (26) and there is no "unconstitutional discrimination unless it is deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification". (27)

Selective prosecution and other governmental misconduct towards a political movement are connected if harassment and intimidation of a political group is the motive behind the prosecution. Leonard Crow Dog's contention was that other examples of FBI bad faith indicated that the selectiveness was "purposeful and intentional", and meant to deny the right of Indians to associate freely with AIM and adopt its views if they wanted to. (28) Counsel had adduced three lines of evidence at the District Court hearing:

(i) That the conviction rate in Wounded Knee cases was much lower "in comparison with the average conviction rate for all criminal cases instituted by the Department of Justice". (29) It was argued that the "factual basis for many of the criminal charges brought against paricipants in Wounded Knee was weaker than in most criminal cases pursued by the Justice Department". (30)

(ii) That people not belonging to AIM had not been prosecuted for violent criminal conduct (tne targets of which were often AIM sympathizers) but that charges had been brought against AIM members for alleged breaches of the criminal law which were similar or less grave. (31)

(iii) That the unauthorized road block was relevant for the following reason:

"Testimony . . . established that an automobile was forcibly stopped at this road block and a rifle pointed at one of the occupants of the car [the] Solicitor-General of the Department of the Interior. Defendants argue that the failure to prosecute any of those present at the road block either for this assault or for unlawfully maintaining the road block

indicated a policy of "selective non-enforcement". (32)

The court dealt with these issues thus:

(i) Conviction rate

The court said that such "statistical correlations" as were presented did not imply that "their causation was a desire to discriminatorily prosecute AIM supporters". (33) The court said that the reason for the low conviction rate could be "logistical difficulty in prosecuting criminal charges arising from a massive civil disorder, or a host of other factors". (34)

The defence adduced approximately 20 examples of offences, including murder and shooting at AIM members' houses, saying that no "meaningful investigation" (35) into the incidents had been conducted by the FBI, and no arrests made or indictments sought even though there was incriminating evidence. The court ordered the FBI to hand over its investigation files and examined them in camera. It held that "the allegations of the defendants are unfounded . . . the files do not reveal a lack of investigatory effort on the part of the FBI towards non-AIM members, nor do they indicate a failure to prosecute once meaningful evidence had been discovered". (36) The court concluded there was no evidence of discrimination against AIM in this matter. (37)

(ii) The road block

The fact that those involved in the incident had not been indicted, "considered in the context of a disorder where literally hundreds of infractions were being committed", (38) did not by itself raise serious doubt as to prosecutorial motives.

Clear conclusions of fact are difficult. The possibility that a case might involve selective enforcement requires a close consideration of many issues. (39)

C. Juries and Defendants' Ethnic Origins

Amnesty International sometimes receives allegations that a defendant has been tried by a jury that is unrepresentative of his or her ethnic group and is biased. The organization is asked to adopt the person in question as someone convicted and imprisoned because of ethnic origin (41) or, at least, to declare that the defendant has been unfairly tried. However, Amnesty International needs to be cautious; for it is unlikely

to have the knowledge or skill to ascertain whether a jury is truly representative of a particular local community or group within it; and, even if a jury is racially unrepresentative, this does not necessarily mean it is prejudiced. (42)

The legal term voir dire, which is relevant to these issues, needs to be defined. Voir dire is the procedure whereby potential jurors are questioned by the judge and/or counsel for both sides in an attempt to decide whether they are fit to serve on the jury -- for instance, whether they are biased or prejudiced. The extent to which the prospective juror is questioned varies not only between jurisdictions but between courts within a single jurisdiction. In some jurisdictions jurors are questioned individually, in others collectively. (43)

Possible racial bias is of immense importance, and usually prompts the defence to seek a change of venue for the trial or to challenge an indictment on the grounds that there cannot be a fair trial. The cases below illustrate this.

1. United States -v- Means and Poor Bear (44)

The defendants, members of AIM, filed a petition in the US District Court in 1976 for their trial to be shifted from the District of North Dakota on the grounds that prejudice against them there was so great that they would not get a fair, impartial trial. (45) The defence evidence in support of this contention included 11 affidavits that there was considerable prejudice in the south western division of the state against "Indians in general and the American Indian Movement and Russell Means in particular". (46) The defendants also presented a statistical survey by the National Jury Project of New York City which concluded that as "racial prejudice and authoritarianism were mutually supportive, and negative attitudes towards AIM and Means were broad and general, the defendants could not receive a fair trial in the South Western Division." (47)

The government responded by producing evidence that in the western divisions of North Dakota on a "comparative basis, as to Indian people, more than a national average number of defendants who went to trial were being found not guilty." (48)

The court made the following findings of fact:

(i) "Substantial racial prejudice exists in the South Western Division of the District of North Dakota, and the Indian people are the objects of that prejudice." (49)

(ii) "The fact of prejudice requires special attention by the court in order to ensure that Indian people receive a fair trial. But the assertion that Indian people cannot receive a fair trial in the South Western Division of the District of North Dakota has not been proved." (50)

(iii) "Extreme prejudice exists against Russell Means, the American Indian Movement, its members and associates which renders it impossible for Russell Means or those charged with him under an indictment, to receive a fair trial within the South Western Division of the District of North Dakota. But it has not been proved that they cannot receive a fair trial within the [whole] District of North Dakota." (51)

The court refused the defence application for the trial to be heard outside the District of North Dakota,(52) but ordered that it should be held in the south east division of the state to "assure that the defendants receive a fair trial". (53) The court ordered in addition that the cases against the two men be heard separately and that each defendant have the right to reject up to 18 jurors without giving a reason (this is known as peremptory challenges to the jury). (54) The defendants were (as is usually the case) to have an unlimited number of "challenges of jurors for cause . . . on a narrowly specified, provable and legally cognisable basis of partiality." (55)

In addition, at the end of voir dire by the judge, counsel for each side were permitted two hours in which to voir dire the entire jury panel on the general issue of racial prejudice and the specific issue of prejudice against AIM. (56)

2. State of South Dakota -v- Wabun Nuwi Nini and others (57)

In this instance the defence argued for the case to be dismissed on the grounds that they were unable to get a fair trial. (58) At first this request was refused:

> "I do not doubt that there is prejudice in Minnehaha County against AIM and against Indian people. I am not persuaded by the evidence that this is so pervasive that these defendants will never be able to obtain a fair trial or even that at this time they cannot obtain a fair trial. Voir dire is a tool that will disclose far better than the evidence that I have before me now whether these defendants can obtain a fair trial in Minnehaha County in March of 1975." (59)

The defendants later made a similar request for dismissal, and argued that the voir dire had revealed that an impartial jury could not be achieved. (60) The court considered a further issue: whether the considerable pre-trial publicity about the case made it impossible to get an impartial jury since such publicity had prejudiced the local population. (61)

The judge, finding that approximately 80 per cent of the jurors who were examined had "actual bias", (62) added that:

> "I have grave doubts concerning the jurors already tentatively seated. Not as to their honesty and sincerity but as to whether even with a concerted effort, they can stand indifferent to the defendants in the case." (63)

News coverage of the events were the background of the case, he said, which would have a subliminal effect and "at least to that extent their minds have been conditioned". (64) The judge considered this a crucial aspect of the case and said that "it is not essential that the community bias be against the defendants personally . . . it is sufficient if that bias is towards a group of which the defendant is a member . . ." (65) He pointed out that all the defendants were members of AIM, and that they had all been emphatic that the state courthouse is "a symbol of injustice where Indians are concerned". (66) The judge found that there was bias and that "an impartial trial cannot be obtained in this county at this time." (67)

The constitution of the state of South Dakota gives defendants an absolute right to a trial in the county where the events concerned allegedly took place. A change of venue for the trial was therefore not ordered. (68) The judge did not delay the trial because a year had already passed and he did not "think the passage of time would work any appreciable change". (69) "Perhaps somewhere down the line an impartial jury could be obtained", he said, but only at the expense of the defendants' constitutional rights to a speedy trial. Such a price may not be exacted from them." (70) The case was therefore dismissed.

* * * *

In March 1979 Amnesty International was told by members of AIM and their lawyers that the prejudice found in the Wabun Nuwi Nini case is no different from the prejudice that exists today. (71) They argued that it is still impossible for any AIM defendant to get a fair trial in the state, and that those who are tried and convicted have probably been convicted because of their ethnic origin. (72)

Amnesty International's representative went to the State Attorney-General's office and was referred to a state case in which it had been held that a defendant's constitutional right to equal protection of the laws was violated by the deliberate exclusion of or discrimination against members of his or her race in the jury selection procedure. (73)

It must be stressed, however, that what usually matters to Amnesty International is not whether there has been any intentional discrimination against members of a minority group in drawing up the list of those who are eligible to serve on a jury, but whether there has been adequate testing for prejudice.

3. How do defendants prove jury prejudice against themselves?

It is difficult and expensive for a defendant to prove that there is prejudice in the community. This is illustrated by the case of Russell Means who was prosecuted for rioting to obstruct public officers in the course of their lawful duties. (74)

It is normally defendants belonging to poor minorities who seek to prove that they are the victims of prejudice. (75) Investigation and the evidence of expert witnesses are essential elements in the adequate presentation of such cases, yet the task is so great that poor defendants are faced with extremely high costs. (76)

The court in this case had declared Russell Means to be "indigent and incapable of employing counsel"; (77) so on 12 June 1975 he petitioned the court to be allowed to commission at public expense a "survey and a statistical analysis of the racial attitudes held by the citizens of Minnehaha County." (78) The request was denied, as was his subsequent one for the court to dismiss the case against him because of inability to hold a fair jury trial. (79) Russell Means therefore gave up his right to jury trial and accepted trial by judge alone. (80)

One of the matters raised on his behalf on appeal to the State Supreme Court was:

> "Did the trial court err by denying appellant's several dismissal motions based on massive pretrial publicity, inability to secure a fair and impartial jury, continued prejudicial publicity during jury selection, denial of a speedy trial, failure to bring the case on for trial, and denial of the benefit of stare decisis, (81) when it became manifestly apparent that the court could not empanel a fair and impartial jury from the citizens of Minnehaha County . . ." (82)

Another question put was:

> "Did the trial court err by denying appellant's motions for daily transcripts and for funds to conduct an attitudinal survey thereby denying to appellant due process of law and equal protection of the laws?" (83)

The state submitted that:

> "An attitudinal survey such as that requested by the defendant is a luxury which few defendants which have retained their own counsel can afford. Defendant's indigency status entitles him to a reasonable defence effort. It emphatically does not entitle him to the myriad of defence tactics which are usually only available to someone like Patricia Hearst whose family has considerable financial capabilities. An indigent defendant, such as Mr Means, is entitled to an ordinarily competent and meaningful defence and not to the best defence that money can buy." (84)

The Supreme Court ruled against Russell Means. (84A)

The question remains, are the state authorities doing enough to determine the level of prejudice in the community, and its effect, if any, on the state criminal justice system? (85) Bearing in mind that there is a duty under international law to see that an "impartial" tribunal adjudicates on cases, the attitude of the state of South Dakota on this matter is important. (86) In the past the state has argued that a private study conducted by a defence committee on whether or not prejudice existed was designed to "establish the existence of community bias; not to determine whether such bias in fact exists". (87)

This discussion will be resumed at the end of the chapter.

D. A Case Study of Imprisonment on Overtly Political Grounds (88)

The prisoner in this case was later freed by a federal court -- which shows the potential effectiveness of constitutional remedies in US courts. (89) Amnesty International has noted that the state of South Dakota courts did not provide a remedy. The main issue in the case involved the revocation of bail.

On 15 December 1975 Russell Means was convicted of "rioting to obstruct" and was sentenced to four years' imprisonment in South Dakota Circuit Court. (90) He filed a notice of appeal and asked for bail pending the hearing. (91) This was granted on 6 January 1976. Bail conditions included the following:

> "That the defendant will refrain from participating in any American Indian Movement activities except . . .
>
> (a) Fund raising
>
> (b) The International Treaty Organization
>
> (c) Activities of the American Indian Movement within the courts." (92)

A year later, on 5 January 1977, the state requested that bail be revoked and alleged that Russell Means had violated the above and one other condition.

The events claimed to have constituted infringement of bail conditions occurred at a meeting in Sisseton, South Dakota, of various Indian leaders, including Russell Means and local law enforcement officials. The meeting was about the "potentially explosive situation between the local Indian population and the white members of the community" following the earlier charging of six Indians on six counts of attempted murder and one count of rioting while armed. (93) The state attorney described the meeting as "very orderly [and] rather useful, in fact". (94)

The Indian leaders had made a number of demands including reduction of bail for the defendants, more thorough investigation of telephone bomb threats to the jail where the defendants were being kept, measures to ensure the safety of defendants' families and the establishment of a "community forum" to enable local people to express their dissatisfaction with local law enforcement. (95)

Russell Means had his bail revoked following this meeting. The case was taken to the Supreme Court of South Dakota where it was held that the imposition of this condition did not infringe Russell Means' rights of freedom of association, speech and travel as it was based on the "number of violent incidents in connection with the activities of the American Indian Movement" (96) in which he had been involved.

Justice Wollman of the State Supreme Court dissented on the facts and held that he would not have allowed the revocation of bail since, although the condition itself was constitutionally permissible, its infringement, "although deliberate, was one that occurred in the course of a good faith attempt to avert what might otherwise have resulted in a violent confrontation." (97) He said that he put "such a high premium upon peace and non-violence" (98) that in his opinion revocation was unwarranted:

> "We have witnessed a turbulent period in our state's history during the last four years. At least two of our court houses have been damaged through violence, tensions between Indian and non-Indian citizens have run extremely high at times. Hopefully, the days of violence are passed, never to be repeated. This period has been a difficult one for our law enforcement agencies and our judicial system, for our legal system is premised upon the assumption that the resolution of social grievances and disputes and criminal charges will be determined in an atmosphere of studied deliberation and calm. If we have learned anything from this period of strife and tension it is that our system of government can exist successfully only in an environment of peace and in a spirit of mutual understanding and rational discussion." (99)

According to another dissenting opinion the bail condition was unconstitutional: (100)

> "The American Indian Movement is a political movement among the Indian people. I do not pretend to know its philosophy nor do I, by this opinion, indicate any approval as to either its ends or the means used in the past to obtain those ends. However, it is not an illegal or unlawful organization. As the majority opinion gratuitously points out, AIM attained its prominence in the 71 day occupation of Wounded Knee, in the Custer courthouse incident, (101) and subsequently in the Minnehaha County Courthouse incident. (102) However I do note that since the Minnehaha County incident on April 30 1974 no violent confrontations have occurred and it is apparent to me

> that the leaders of the Movement have decided that it is to their advantage to work within the system. (103) The success of their change in tactics is apparent for our judicial system has provided them with fair trials resulting with numerous acquittals including the defendants of the Wounded Knee trial.
>
> "The majority feel that it was merely fortuitous that there was no violence at Sisseton and in fact the meeting produced some good effects. I prefer to believe that this is another example of the effect of responsible leadership attempting to work within the system. It is only in a most unusual case that bail may be conditioned upon a curtailment of first amendment freedoms and then only when shown to be absolutely necessary to assure the defendant's presence or society's protection . . . I would hold . . . the imposition of [this condition . . . totally unnecessary for either . . ."] (104)

As Russell Means stayed in prison the matter was taken to the federal courts, where it was held that the bail condition was constitutionally invalid. Russell Means was released. (105) The court's reasoning is instructive: (106)

> "[It is contended that Russell Means] is in state custody at this time solely because of a [state] determination that he broke [the] condition of his appeal bond order, and that such custody is unconstitutional because [it] unconstitutionally infringes upon his First Amendment freedoms of speech and association.
>
> "I agree. By the restriction imposed under this condition [Russell Means] is prohibited, for example, from making speeches on behalf of the American Indian Movement. He is prohibited from most organizational activities, from participating in American Indian Movement marches or assemblies, from recruiting members for the organization, or from even writing literature or letters on behalf of the movement. What the court is attempting to do through [this] bail condition is to regulate not only conduct in certain situations but more critically, to regulate the exercise of 'pure speech' . . . This nation's laws and our dedication to the Bill of Rights will simply not permit this . . .
>
> "The First Amendment protects not only freedom of speech, assembly and petition, but also implicit within the language of the amendment is the protection of the freedom of association . . .
>
> "If the state would have immediately incarcerated Russell Means upon his trial court conviction, it could not have stripped him of his human quality; it could not have closed his intellect to free thought and ideas; and it could not

have silenced his voice from the free and open expression of ideas. And what the state could not constitutionally do behind the prison walls, will not be permitted by this court in open society. The First Amendment protects [Russell Means] from such abnegation of rights . . .

"Here the interests of the state in assuring the appearance of the defendant and protecting the public failed to demonstrate a compelling interest necessary to restrict First Amendment liberties. [Russell Means] in his numerous contacts with the courts of this state, has always been faithful to required court appearances. As to protection of society, an invasion of First Amendment rights cannot be predicated on a speculative concern of danger . . . Such a speculation can too easily be made. Here, this conviction of [Russell Means] represents his first and only felony conviction. The political movement with which he is so closely associated, the American Indian Movement, has not been involved in any violent activity since the affair at the Minnehaha courthouse which resulted in [his] conviction. Moreover, the American Indian Movement is neither an illegal, un-American, subversive or otherwise objectionable organization (107) . . . [The] condition serves only to stifle [Russell Means'] freedom of expression and association while giving judicial credence to the unfair and unjustified inference that violence is the shibboleth of the American Indian Movement." (108)

The implications of this incident are considered at the end of the chapter. However, a number of matters -- three in particular -- need to be mentioned now.

First, the very imposition of the bail condition could help create or perpetuate community belief that violence is the hallmark of AIM. Such judicial pronouncements rely on unverified assumptions and may help to foster prejudice in the community.

Second, the case shows that the judicial system provided a remedy for this violation of Russell Means' constitutional and human rights. But such remedies depend on the discretion of a court. In this case a decision that was wrong in principle was nonetheless upheld by the State Supreme Court.

Third, Amnesty International would have considered the adoption of Russell Means as a prisoner of conscience before his release by the federal court. He was, in the words of the Federal District Court quoted above, imprisoned "solely" because of his infringement of the constitutionally invalid appeal bond order. (109) Amnesty International realizes that arguably the reason for making the bond order was a criminal conviction; nevertheless the case shows clearly that this incorrect exercise of discretion resulted in imprisonment on political grounds.

E. Conclusion

This chapter is about matters usually raised by defence committees as relevant to trials of political activists. Each separate matter may not be relevant to a particular case, but taken together they reveal part of the background to the whole issue of fair trial.

Federal and state law provide adequate safeguards for fair trial. If a prosecution is clearly based on intentional discrimination, this is a denial of the constitutional guarantee of equal protection, and the law requires that the case be dismissed. If a defendant believes that she or he may be tried by a biased jury, prospective jury members can be questioned and an application made for a change of venue. A defendant may feel compelled to waive the right to trial by jury, but this is not to say that the law itself is inadequate.

This report was not based on systematic research into the position of American Indian defendants in state and federal courts. Amnesty International is not in a position to conduct such research, nor would this necessarily be within its terms of reference. However, it considers that an inquiry is necessary to examine the issues raised in this chapter, in order to provide objective information to guide federal and state officials, legislators and the public.

Unfairly treated minorities lose faith in the law and its institutions if there is insufficient opportunity for discussion on the reasons why they feel they are still the victims of injustice.

Perhaps the clearest example of this is the revocation of Russell Means' bail following a meeting to discuss community relations between Indians and whites. As previously stated, the meeting was described as "very orderly [and] rather useful in fact" by a state official, yet Russell Means was rearrested because of it. This raises a further issue. The bail conditions were upheld in the state court but ruled unconstitutional in the federal court; and it was claimed that this was symptomatic of the failure of state judges to appreciate the implications which such a stifling of American Indian dissent could have upon local confidence in the state judicial system. This claim needs to be examined.

APPENDIX

THE RULES REGULATING THE USE OF INFORMANTS

The rules regulating the FBI's use of informants were changed in 1976. (1) As Amnesty International does not think a full picture of their use is given by the cases mentioned in this report, the following information is attached as an appendix.

A. Informants before the 1976 Guidelines

Since 1973 the FBI has distinguished between full and preliminary intelligence investigations; different limits on the duration, scope and sources of information apply to each. (2) A preliminary investigation is undertaken when the subject's involvement in subversive or extremist activities has not been substantiated. Its purpose is to decide whether there is the basis for a full investigation:

> "A preliminary investigation is supposed to be confined to a review of public source documents, record checks and established sources and informants. The General Accounting Office study on FBI domestic intelligence operations, however, found that in practice, FBI field offices have not adequately distinguished between the types of investigations. In particular the GAO found that the limits on the use of informants on preliminary investigations were subject to varying interpretations and loose observance." (3)

The blurred distinction between full and preliminary investigations suggests that, before 1976, informants reported on political activity without a definite decision being made that subversive or extremist elements were involved. (4)

B. The Attorney-General's Guidelines for FBI Use of Informants in Domestic Security, Organized Crime and Other Criminal Investigations (5)

A memorandum from the Attorney-General to the Director of the FBI on 15 December 1976 was prefaced thus:

> "Courts have recognized that the government's use of informants is lawful and may often be essential to the effectiveness of properly authorised law enforcement investigations. However, the technique of using informants to assist in the investigation of criminal activity, since it may involve an element of

> deception and intrusion into the privacy of individuals, or may require government cooperation with persons whose reliability and motivation may be open to question, should be carefully limited. Thus while it is proper for the FBI to use informants in appropriate investigations, it is imperative that special care be taken not only to minimise their use but also to ensure that individual rights are not infringed and that the government itself does not become a violator of the law. Informants as such are not employees of the FBI, but the relationship of an informant to the FBI imposes a special responsibility upon the FBI when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or direction for that activity from the FBI." (6)

This document stated also that many of the limitations and duties specified in the guidelines were already recognized in practice. It continued:

> "As a fundamental principle, it must be recognized that an informant is merely one technique used in the course of authorized investigation. The FBI may not use informants where it is not authorized to conduct an investigation nor may informants be used for acts or encouraged to commit acts which the FBI could not authorize for its undercover agents. Where an FBI informant provides information concerning planned criminal activity which is not within the investigative jurisdiction of the FBI, the FBI shall advise the law enforcement agency having investigative jurisdiction. If the circumstances are such that it is inadvisable to have the informant report directly to the agency having investigative jurisdiction, the FBI, in cooperation with that agency, may continue to operate the informant." (7)

This raises an issue in those cases where a prosecution is brought by the state and it appears that a federal informant has been involved. State prosecutors have asserted that the use of a federal informant cannot be relevant in a state case. The above quotation from the memorandum seems to suggest, however, that this may not always be so. (8)

C. The Use of Informants

The 1976 guidelines set forth rules regulating the use of informants in authorized investigations.

In considering whether or not to use an informant, the FBI must weigh up a number of factors:

(i) The risk that the use or conduct of an informant may, "contrary to instructions" (9) infringe individual rights or interfere with privileged communications has to be considered, as should the unlawful hindering of the "free association of individuals or the expression of ideas". (10) Another consideration is whether use of an informant may in any way impair the investigation or subsequent prosecution. (11)

(ii) The nature and seriousness of the matter under investigation should be considered, so should the likelihood that the information which the informant may provide is not readily available via other sources or by "more direct means". (12)

(iii) The character, motivation and reliability of the informant must be considered. (13)

(iv) The FBI must consider how far it can control the informant and whether the informant's conduct would be in accordance with relevant law and guidelines. (14)

(v) The potential value of the information must be considered, so must the personal advantage the informant may be seeking through cooperation with the government. (15)

D. Instructions to Informants

The FBI must instruct informants not to:

(i) participate in acts of violence; (16)

(ii) use unlawful methods to obtain information; (17)

(iii) plan to commit criminal acts; (18)

(iv) participate in the criminal activities of people under investigation, except insofar as the FBI has decided such participation is necessary to obtain the information required for a federal prosecution. (19)

The guidelines instruct informants to try to discourage acts of violence when the FBI learns that someone under investigation intends to commit a violent crime. (20) The implications of such pre-emptive action have in the past been wide. (See the discussion of COINTELPRO in Chapter II.) (21) They also contain specific provisions about the disregard by informants of their instructions or the law both during and not during an assignment. (22)

E. What an Informant Should Report

An informant's brief is wide: he or she is expected to report any relevant information. (23) One field office described the established practice in late 1975 (before the 1976 changes) thus:

> "Our informants, after attending meetings of these organizations, usually submit reports in which they describe briefly the activities and discussion which took place as well as listing those members and non-members in attendance at such meetings. Copies of these informant reports are disseminated to various individual's files and the names of those in attendance, where no individual's file exists, are indexed to the organization's file." (24)

Attorney-General Bell told the Senate Judiciary Committee in 1978 that the FBI "should not be monitoring legitimate first amendment activities of our citizens because the views they are expressing are controversial or even antithetical to our constitutional system . . . The FBI would be branching too far afield (25) if it were to investigate (26) legitimate protest groups who speak of violence in the abstract but do not engage in it . . ." (27) Attorney-General Bell stated also that "information that a group is preparing to commit a violation of law, or is engaging in a continuing pattern of federal law violation" (28) was the correct criterion for FBI domestic security investigations.

According to the FBI manual, informants should not assist in legal defence (29) nor "handle an assignment where such information is readily available . . . nor report any information pertaining to defence plans or strategy." (30) The manual (at the time of the Church report) stated:

> "If an informant is present in conversation between an attorney and individual under criminal indictment, he should immediately leave. If he is unable to do so and inadvertently learns defence plans or strategy, he is not to report the substance of any conversation to the FBI. Additionally, the informant is not to engage in or to report the substance of a conversation with a criminal defendant dealing with the offence for which the defendant is under indictment." (31)

According to Church, the FBI interprets this as prohibiting "only the reporting of privileged attorney-client communication or legal defence matters in connection with a specific proceeding." (32) General legal defence information, such as "manuals for general use in legal matters", can be reported. (33) This matters to Amnesty International as informants act under the "close control" of FBI agents. (34)

When an informant's activities have prejudiced a defendant in a criminal proceeding, the responsibility lies with the FBI itself. The

FBI manual contains passages about the direction and control of informants, including the following:

> "Contacting agent should not only collect information but direct informant, be aware of his activities . . . close control must be exercised over activities of informants to obtain maximum results and prevent any possible embarrassment to the Bureau. . ." (35)

There has only occasionally been judicial discussion on what, constitutionally, an informant is allowed to do in a domestic intelligence operation. (36) Legal decisions about this have normally been made in connection with criminal investigations. (37) Church reported that:

> "The select committee's investigation has revealed for the first time the extremely broad scope of FBI intelligence informants' surveillance and reporting. The Supreme Court has yet to be presented with the types of factual situations - such as intensive informant coverage of lawful political activity and personal matters - which may produce the chilling of rights guaranteed by the First Amendment. Moreover, apart from particular cases which may come before a court, the overall effect on the exercise of initial First Amendment rights in the society at large may be very great where it is known that a large-scale intelligence informants system is operating. No court has seen the overall pattern of FBI intelligence informant coverage of citizens and groups.
>
> "Consequently, courts have been unable to assess the full impact of the informant system on the exercise of constitutionally protected rights." (38)

F. Conclusion

The rules in the 1976 Guidelines are relevant to the current FBI investigation of, for instance, AIM. (39) The cases described in Chapter III, however, should be considered in the light of the FBI Manual of Instruction rules then applicable.

The Attorney-General's 1976 Guidelines on the use of informants state that an informant should not report privileged communication between lawyer and client. But a safeguard is only as effective as its enforcement; and this depends in turn upon an accurate assessment of current practice. This is what is lacking.

NOTES TO CHAPTER I

1. -- that is, a person who, in violation of the Universal Declaration of Human Rights, is

   > "imprisoned, detained or otherwise physically restricted by reason of . . . political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, colour or language provided that they have not used or advocated violence."
   >
   > (Amnesty International Statute, Article 1a)

2. Their defence in court is that they have been "framed". "Framing" usually means the fabrication of evidence by law enforcement agencies so that a person charged with a criminal offence is found guilty even though he or she is in fact innocent. Non-political frame-ups are not within Amnesty International's terms of reference.

   Amnesty International will not adopt an individual as a prisoner of conscience unless satisfied both that the person was innocent and that the prosecution had acted in bad faith.

3. See Chapter II, part one and Chapter III, A.

4. See, for instance, conclusion to Chapter III.

5. This report does not necessarily refer to important aspects of the evidence presented during the prosecution or defence case. Evidence called in support of Elmer Pratt's alibi, for example, (see text to Chapter II, note 110) is not examined.

6. See Decision of California Court of Appeal, Second Appellate District, Division One, 2 Crim. No. 37534, filed 3 December 1980: Dissenting opinion of Dunn, J. page 1.

7. The selectivity implicit in this approach is based on exhaustive reviews of transcripts of evidence. Amnesty International has also despatched observers to attend trials and hearings in court.

8. See sources cited in Appendix, notes 1 and 5.

9. See, in particular, text to Chapter III, note 92; for the reverse situation, see Intelligence Activities and the Rights of Americans, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, US Senate, 94th Congress 2d. Session, No. 94755 (hereafter Church, II), page 78:

   > "Local police intelligence provided a convenient manner for the FBI to acquire information it wanted while avoiding criticism for using covert techniques such as developing

campus informants . . . Field offices were instructed, however, that one way to continue obtaining intelligence on 'situations having a potential for violence' was to develop 'in-depth liaison with local law enforcement agencies' (citing SAC letter 69-44, 8/19/69).

"These Federal policies contributed to the proliferation of local police intelligence activities, often without adequate controls. One result was that still more persons were subjected to investigation who neither engaged in unlawful activity, nor belonged to groups which might be violent."

10. See op. cit. Chapter III, note 1 (Church, III) pages 6-7:

"Protecting national security and preventing violence are the purposes advanced by the Bureau for COINTELPRO. There is another purpose for COINTELPRO which is not explicit but which offers the only explanation for those actions which had no conceivable rational relationship to either national security or violent activity. The unexpressed major premise of much of COINTELPRO is that the Bureau has a role in maintaining the existing social order, and that its efforts should be aimed toward combatting those who threaten that order."

11. See Church, III, page 6 and note that:

"In Brandenberg -v- Ohio, 395 US 444 (1969), the US Supreme Court held that the government is not permitted to 'forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed toward inciting or producing imminent lawless action and is likely to incite or produce such action.' In the absence of such clear and present danger, the government cannot act against speech nor, presumably, against association."

12. See The Reform of FBI Intelligence Operations. John T. Elliff. Princeton University Press, Princeton, New Jersey 1979. Chapter 5. (The Development of Guidelines) pages 105-112. This book was written under the auspices of The Police Foundation.

13. ibid. This passage is taken from a discussion on "Domestic Security and Law Enforcement" (page 111). The chapter is concerned mainly with terrorism.

The author also points out that:

"Political advocacy or association, short of indications of preparation for violence, should not start a domestic security investigation; once the investigation is underway there should be restrictions against gathering information that does not relate to the likelihood of violence."

(page 111)

But that:

"The risks to political freedoms protected by the First Amendment and the absence of normal signs of criminal activity are the main reasons for concern about domestic security investigations."

(page 112)

The First Amendment to the federal constitution provides that:

"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 the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

14. Church, II, page 212. Footnote 6 reads:

"Field offices were instructed that no one outside the Bureau was to know that COINTELPRO existed, although certain persons in the executive branch and in Congress were told about - and did not object to - efforts to disrupt the . . . Communist Party of the USA and the Klan. However, no one was told about the other COINTELPRO programs, or about the more dangerous and degrading techniques employed.

(See the conclusion to this chapter)

15. Church, II, pages 212-213.

15A. See sources cited in note 9, supra, and Chapter II, note 1. See Senate Resolution 21 of 27 January 1975, Sec. 1 and Church, II, pages V and 343.

16. See evidence of Senator Frank Church, US -v- Butler and Robideau: Transcript of Testimony, pages 3021-3022.

17. Church, III, page 63 re "Blurred Distinction between Counter-Intelligence and Investigation".

"The Bureau witnesses agree that COINTELPRO has no fixed definition, and that there is a large grey area between what is counter-intelligence and what is aggressive investigation. As the Black Nationalist supervisor put it, 'Basically actions taken to neutralize an individual or disrupt an organization would be COINTELPRO; actions which were primarily investigative would have been handled by the investigative desks,' even though the investigative action had disruptive effects."

(citing Black Nationalist deposition, 10/17/75 page 15)

18. See Chapter III, note 12.

19. ibid. note 13.

20. See, for example, Chapter IV, text to notes 103 and 104.

21. Such matters do not fall within Amnesty International's limited mandate.

22. See Chapter III, text to notes 56 and 62.

23. See Chapter III, text to notes 110-117 inclusive.

24. ibid.

25. See Church, II, 211, Committee Subfindings (a) and (b):

> "(a) Although the claimed purposes of these action programs were to protect the national security and to prevent violence, many of the victims were concededly non-violent, were not controlled by a foreign power, and posed no threat to the national security.
>
> "(b) The acts taken interfered with the First Amendment rights of citizens. They were explicitly intended to deter citizens from joining groups, 'neutralize' those who were already members, and prevent or inhibit the expression of ideas."

26. See conclusion to Chapter III.

27. Such as the First Amendment (see note 13 supra); and:

> "Amendment IV
> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> "Amendment V
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> "Amendment VI
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> "Amendment XIV
> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .
>
> "Section 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article."

28. See Chapter III, text to notes 49-53 and note 70.

29. ibid. Text to notes 81-82.

30. Such charges were commonly made during the case of Leonard Peltier. See Chapter III, part C.

31. ibid. Text to note 58.

32. ibid. Part C passim.

33. ibid.

34. op. cit. note 6 supra. Majority opinion, page 131, footnote 45.

35. It is within this perspective that the issue of selective enforcement of the laws can be seen. Constitutional guarantees are such that a prosecution should be dismissed if it improperly singles out an individual or group while others who have committed the same act are not prosecuted. But it is necessary to demonstrate an intentional pattern of discrimination. This is difficult.

    A court may ask for FBI files to be shown to it in camera so that it can decide if there is evidence of intention to discriminate unlawfully or "framing". But it is not uncommon for defendants to argue:

35. continued

"How can anyone accept as truth declarations and factual summaries that are based . . . on the FBI's selective disclosure . . . ? And how can a court, based on this 'information' then decide petitioner's fate and rule that there is no exculpatory evidence and no need for an evidentiary hearing to even test the submitted statements?"

See Petitioner's Response in Support of Evidentiary Hearing and Related Discovery. Pratt -v- Sumner, No. A-267-020, California Superior Court. Los Angeles County, page 6.

See Chapter III: "The Informant Cases".

36. op. cit. note 34 supra, page 125.

37. US -v- Banks and Means 374 F. Supp. 321 (1974). Wounded Knee is a settlement on the Pine Ridge Indian Reservation in South Dakota. It is the site of the massacres by the army on 29 December 1890 of Sioux Indian men, women and children. (See, for example, Wounded Knee Massacre: Hearings on S. 1147 and S. 2900 before the Committee on the Judiciary, US Senate, 94th Congress. 2nd Session. 5 and 6 February 1976. The area was occupied by members of AIM, among others, for 71 days from 27 February 1973.

38. ibid. page 331 [8, 9].

39. 383 F. Supp. 389, 393 [9, 10] (1974).

40. Amnesty International Statute Article 1b.

41. See, for example, notes 6 and 27 supra.

42. The law dealing with the matters raised in this report is clear. Its application may give rise to questions of proof. See, for example, Chapter III, part C, passim.

43. See Chapter II, text to note 41.

44. See Chapter II, text to note 45.

45. Elmer (Geronimo) Pratt. See Chapter II, part Two.

46. See Chapter II, part One and Chapter III, A.

47. See Recommendations.

48. COINTELPRO was officially terminated in 1971. See Church, III, page 1, note 1:

48. continued

"On March 8, 1971, the resident agency in Media, Pennsylvania, was broken into. Documents stolen in the break-in were widely circulated and published by the press. Since some documents carried a 'COINTELPRO' caption - a word unknown outside the Bureau - Carl Stern, a reporter for NBC, commenced a Freedom of Information Act lawsuit to compel the Bureau to produce other documents relating to the programs. The Bureau decided because of 'security reasons' to terminate them on April 27, 1971. (Memorandum from C.D. Brennan to W.C. Sullivan, 4/27/71; letter from FBI headquarters to all SAC's, 4/28/71.)"

49. See Chapter III, note 85.

50. See Chapter III, note 23 and text thereto.

51. ibid. notes 24, 25 and text thereto

52. ibid. text to notes 34 and 34A.

53. This information was not all known at the time of the trial.

54. In 1976 the rules regulating FBI domestic security investigations and the use of informants were changed. (See Chapter III and Appendix). This report explains those changes, but makes detailed reference to people at present imprisoned whose cases appear to have been affected by earlier practices.

55. No judgment is made at this stage as to whether there was any connection between the arrest and the intelligence operation.

56. This is often the main complaint appearing in defence committee leaflets.

57. See part A of this chapter.

58. See Chapter III, text to notes 49-53A.

59. ibid.

60. See Principle VII of the Helsinki Declaration, 1975. (Part F, this chapter).

61. See US -v- Crow Dog 532 F. 2d.1182, 1184 [30] 1976 and, in a somewhat different context, US -v- Cooper, Fleury et. al. and Alvarado and Williams. 397 F. Supp. 277 [key 913(i) 919(i)] (1975). (Chapter III, text to note 125).

62. See below.

62a. "FBI Task Force Report on Elmer Geronimo Pratt". Exhibit 48 to "Supplemental Submission in Support of Petition for Habeas Corpus". Supreme Court of the State of California: Pratt -v- Superintendent D.J. McCarthy. (Crim. No. 21826) pages 8-10.

62b. ibid. page 9.

62c. This is how the lawyers explained the incident to Amnesty International. Kathleen Cleaver's evidence starts at Pratt Transcript, page 999.

62d. See Chapter II.

62e. See, for example, 21 Am. Jur. 2d. Supp. paragraph 225. With one exception, this report does not cite the detail of the decisions in Brady -v- Maryland 373 US 83 (1963) and United States -v- Agurs, 427 US 97; 49 L Ed. 2d. 342; 96 S Ct. 2392 nor does it deal with how the matter may arise under the Federal Rules of Criminal Procedure, the Due Process Clause of the Fifth Amendment to the US Constitution or the Comparable Clause in the Fourteenth Amendment applicable to trials in state courts. Nor are the relevant technical provisions of California or South Dakota law discussed.

62f. US -v- Agurs 49 L Ed. 2d. 342, 352 [4].

62g. See, for example, the conclusions to Chapter III, the AIM cases.

62h. See exhibit 40 to Petition for Writ of Habeas Corpus, California Supreme Court. (Letter from FBI Director to Congressman Paul N. McCloskey, page 2.)

62i. op. cit. note 62a supra, page 8. Four of the 10 proposals were approved, five were not. That Elmer Pratt was a target of COINTELPRO was revealed earlier. See Chapter II, passim, and notes thereto.

62j. op. cit. note 62h supra, page 5.

62k. "Synopsis of Pratt Inquiry", enclosed with letter dated 10 March 1980 from FBI Director to Congressman McCloskey, page 7. Exhibit 12 to California Supreme Court Petition for Writ of Habeas Corpus.

62l. A recent example of this is the information in the FBI Task Force Report cited in note 62a supra about the FBI's contact with local law enforcement officials between 1968 and 1972 regarding Elmer Pratt and the BPP. Reference is made on page 4 to "Julius Butler's 'insurance' letter, which he had said would put certain members of the BPP in the gas chamber." (See Chapter II, note 99.) See, for example, Elmer Pratt's lawyers' argument in their Supplemental Submission concerning:

(a) "The FBI had an ongoing interaction with the Los Angeles Police Department Criminal Conspiracy Section (LAPD-CCS) regarding [Elmer Pratt] for four years prior to [his] trial." (pages 7-8).

and (b) "Supplemental Material regarding the credibility of Star Prosecution Witness and FBI informant Julio Butler." (pages 9-10).

62m. This is why the citations in the text alone require an inquiry to establish the question of FBI motive and its relationship with local and state law enforcement agencies.

63. The following articles of the Universal Declaration of Human Rights are relevant to this discussion:

"Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection to any discrimination in violation of this Declaration and against any incitement to such discrimination."

"Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."

"Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

"Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

64. A Status Report. Compiled and edited by the staff of the CSCE, Washington DC, November 1979.

65. ibid. page 72.

66. But note the majority in Elmer Pratt's Court of Appeal decision:

"'Due process', simply stated, requires notice and an opportunity to be heard by an impartial tribunal under applicable rules of general law."

op. cit. note 6 supra, page 126, footnote 45.

67. See Chapter II, text to notes 22-45 and 75-80.

68. Church, II, 212 citing "Moore, 11/3/75 page 83".

69. Amnesty International does not consider there is any necessary link between the "targeting" of individuals for intelligence investigation and criminal charges; and it notes that there is a distinction between federal criminal and intelligence investigations. The purpose of the former is arrest and prosecution for a criminal offence, with the US Attorney determining whether or not there shall be a prosecution. Domestic intelligence investigations have a different scope and aim and the law enforcement agency itself is the main user of the information rather than the prosecutor. cf Appendix, text to note 23.

70. See Chapter II, text to notes 52, 53 and 126-134.
See also Church, III, page 220;

> "The FBI enlisted the cooperation of local police departments in several of its covert action programs to disrupt and 'neutralize' the Black Panther Party."

71. By a legal procedure known as "discovery". This, in general terms, is the procedure whereby the defence is given certain documents in the prosecutor's possession which are relevant to the case. Evidence creating a reasonable doubt about guilt must be handed over.

Some of the official documents referred to in this report were obtained by defence lawyers on discovery. Others have been obtained under the procedures of the Amended Federal Freedom of Information Act (FOIA). (Title 5 US Code Section 552).

The majority in the Pratt opinion (see note 6 supra) said on page 126, footnote 45 that:

> "Defendant's petition for habeas corpus in an original proceeding before this court is primarily directed at 'governmental improprieties' on the federal level by the FBI. Inquiry at an evidentiary hearing into the nine items listed at the end of the dissenting opinion would be nothing more than a 'fishing expedition' into state waters burning up additional court time and resulting in an unnecessary expenditure of public funds. Defendant already has two 'lines' into federal waters by way of an FOI Act Case and a civil rights action in federal courts in Washington DC and San Francisco. As previously noted if those 'fishing expeditions' uncover evidence of a sufficient quantity and quality to adequately and legally support his contentions, he is not precluded from filing a new petition seeking appropriate relief."

72. See Chapter III, text to notes 54-64 and 86-100.

73. ibid.

74. See Chapter II, note 81.

75. See Opposition to Petition for Writ of Habeas Corpus, Pratt -v- Sumner, State of California Court of Appeals, Second Appellate District. (2d. Civ. 35754) 23 May 1980, page 15: "Relief cannot be premised on the extent of COINTELPRO". (In the absence of any "frame-up or conspiracy between the FBI and local law enforcement authorities to falsely procure a connection of petitioner . . ." page 13.) But see op. cit. note 621 supra.

76. ibid. pages 4, 14.

77. See Appellee's brief (by government) in the Supreme Court of the State of South Dakota. On appeal from the Circuit Court, Seventh Judicial District, Pennington County, South Dakota:

> "Witness Myrtle Poor Bear's relationship with FBI
>
> There has been no demonstration that the prosecution was privy to the FBI's information concerning Myrtle Poor Bear other than her conversation with Richard Marshall. The facts indicate that the FBI simply turned the witness over to the State on March 22 and that at the time she gave the statement to Deputy Phillips. There has been no showing of any other knowledge on the part of the State of any intimate or continuing correction (sic) between Myrtle Poor Bear and the FBI."
>
> (pages 17-18)
>
> "It also cannot be assumed that the Defendant was denied a fair trial by reason of lack of access to evidence of the relationship between Myrtle Poor Bear and the FBI where, as this court previously held, the defense counsel voluntarily abandoned cross-examination in this area before the trial court."
>
> (page 18)
>
> "At the very most, knowledge of state authorities can be imputed to state prosecutors. There can be no imputation of any knowledge on the part of the FBI agents to the state prosecutor in the present case."
>
> (page 19)

The State points out on page 6 that:

> "Nowhere in the record is there any evidence that Myrtle Poor Bear was at any time a paid informant."

77. continued

Although the defence says (Chapter III, op. cit. note 93) that an FBI agent had said that "Myrtle was working for him as an undercover agent". (Page 19, footnote 13 citing post-conviction transcript page 58, Petitioner's exhibit 38).

There is no doubt that Myrtle Poor Bear "furnished information". See Marshall post-conviction transcript page 26. This is the transcript of the post-conviction hearing referred to in Chapter III, note 85.

78. Helsinki Final Act, 1975. Basket III, Principle VII.

79. ibid.

Amnesty International notes that the US CSCE report (op. cit. note 64 supra) found that:

> "Given the need to examine more cases of possible civil rights violations, it appears that the Justice Department requires expansion of its investigative authority for cases which do not fall clearly within existing statutory guidelines . . .
>
> "In light of US commitments under the Final Act and other international agreements, the Commission feels the Justice Department does not devote sufficient resources to the task of monitoring possible human rights violations."
>
> (page 71)

Amnesty International notes that the US Department of Justice filed an amicus curiae brief in the case of the Wilmington 10. (Benjamin E. Chavis, et. al. -v- State of North Carolina) in the US District Court for the Eastern District of North Carolina, Raleigh Division (Nos. 76-0035 through 76-0043 and 76-0017 HC. Nos. 78-22 through 78-31 HC).

The Department of Justice believed:

> "that the record before this Court would, upon this Court's making factual determinations described herein, serve as a basis for granting a writ of habeas corpus, and that if this Court is unable to make those factual determinations on a plenary review of this record, the Court should hold evidentiary hearings . . ."
>
> (page 89)

79. continued

On page VII it said that:

> "The issue we discuss is not the good faith of the State of North Carolina, but whether its efforts to provide petitioners their rights under the United States Constitution to a fair trial were successful. As the Supreme Court recently noted, 'if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.' United States -v- Agurs, 427 US 97, 110, 96 S. Ct. 2392, 2401, 49 L.Ed. 2d. 342, 353 (1975)."

The CSCE report says on page 71 that:

> "Justice Department officials have been careful to downplay the significance of the amicus curiae role adopted in the Wilmington Ten case. They say that prior Department involvement enabled it to demonstrate a direct 'federal interest' and thus appeal on the defendant's behalf as a friend of the court. In testimony before the Commission, Deputy Assistant Attorney General John Huerta stated: 'In most state criminal proceedings . . . the Department has no authority to investigate or otherwise become involved in circumstances surrounding the prosecution.' In these circumstances, given the need to examine more cases of possible civil rights violations, it appears that the Justice Department requires expansion of its investigative authority for cases which do not fall clearly within existing statutory guidelines."

Amnesty International notes that FBI misconduct is an issue of direct "federal interest".

80. See the case of Leonard Peltier in Chapter III, and the opinion of the US Court of Appeals that "the use of the affidavits of Myrtle Poor Bear in the extradition proceedings was, to say the least, a clear abuse of the investigative process." (585 F. 2d. 314, 335, note 18).

This was not the first occasion when false evidence was presented against defendants who were members of AIM. In US -v- Banks and Means the US District Court, D. South Dakota, W.D. held that:

> "It is unnecessary for this court to decide whether the prosecutor's conduct in offering and failing to correct obviously false testimony was deliberate or only the result of negligence. Neither is it necessary to decide whether this particular instance of misconduct standing alone is sufficient to warrant dismissal. The question is whether the totality of the prosecutor's conduct was

sufficiently offensive to our traditional notions of justice to demand exercise of the supervisory power."

(383 F. Supp. 389, 394, 1974)

Richard Marshall's lawyers said in the appellant's brief in the South Dakota Supreme Court (Case No. 12982 April 1980) that:

"On February 19, 1976, [the] FBI . . . took the first of three false affidavits from Myrtle Poor Bear . . . The agents placed her in a motel room for three days thereafter, in an apparent effort to get more from her. They took a second affidavit on February 23, 1976. On February 24, 1976, they presented her to another agent for an interview without mentioning her prior contradictory affidavits or any of her history.

"Prior to and during this time, the agents talked to Myrtle Poor Bear about Richard Marshall.

"On March 19, 20 and 21, Myrtle again spent three days with the FBI agents in a motel. On March 22, 1976, the agents produced her to Sheriff Phillips at the Federal Building in Rapid City.

"Myrtle stayed in State custody thereafter until some time after she testified in the Marshall case, being housed in motels in Belle Fouche, Sturgis and Rapid City.

"On March 31, 1976, Myrtle gave her third affidavit . . . describing the shooting of the two FBI agents at Oglala by Leonard Peltier in great detail . . . Two days later on April 2, 1976, Myrtle testified in the Marshall case." (pages 66-67).

On page 52 the lawyers said that:

"All of Myrtle Poor Bear's testimony concerned the alleged murderous and violent criminal behavior of members of the American Indian Movement. Indeed, the involvement of the FBI was apparently based upon the 'Predication for Investigation of Members and Supporters of AIM'. (Pet. Ex. 14) and Myrtle's alleged information concerning Rebellion or Insurrection or Seditious Conspiracy (Pet. Ex. 13). (See also, Pet. Ex. 22). The court's ruling on documents and permission to the witness to limit their answers to questions prevented counsel from going into the question of other uses the FBI was making of Myrtle Poor Bear. See, for example, the heavily excised documents Pet. Ex. 13, 14, 16, 18, 19, 20, 21 and 22, and Post-Conviction Transcript (P.C.) 12, 23, 26, 98, 104, 108, 109, 110, 155, 160 et seq. Generally all of P.C. 3 to 83, 89 to 134, and 155 to 181."

In note 21, page 43, the lawyers said that:

"Because of the trial court's rulings, we do not know all of the use being made of Myrtle Poor Bear by the FBI. We do know that there were other matters on which Myrtle was being used, and evidently none of them resulted in any charges. See Pet. Ex. 13 and 14, and P.C. 23, 26. The witness was apparently also the source for various tales involving Rebellion, Insurrection, and Seditious Conspiracy, all involving AIM."

81. See the case of Elmer (Geronimo) Pratt. Chapter II, part Two, (for example).

82. ibid. A (v). But note the argument used by the State of California in the case that an FBI document dated December 1968 showed that the FBI was speculating as to who "Geronimo" was. They argued that "this speculation . . . in effect repudiates petitioner's contention that he was under surveillance by the FBI prior to 1969". (See Opposition to Petition for Writ of Habeas Corpus, 23rd May 1980, State Court of Appeal, 2nd Civ. 35754 pages 40-41). cf. Chapter II, text to notes 112-114.

83. The majority in Elmer Pratt's Court of Appeal decision (see note 6 supra) said:

"For the sole and limited purpose of showing the violent nature of the group infiltrated by FBI informants in the instant case . . . we take judicial notice of the opinion of this court in the case of People -v- Elmer G. Pratt and Willie Stafford (Apr. 22, 1974) 2 Crim. 21638 (super. ct. No. A253348 consolidated with Nos. A253349 and A254028). The foregoing opinion heretofore unpublished is attached hereto as APPENDIX D."

(pages 82-83)

The conduct of domestic intelligence investigations changed in 1976. See Chapter III, text to notes 35-47. See also op. cit. note 12 supra, pages 116-117.

"The law of conspiracy as interpreted by the federal courts allows the use of political expression, otherwise protected by the First Amendment, as evidence of a conspiracy. Moreover, the federal civil rights conspiracy statute can be interpreted to authorize sweeping investigations of criminal conduct ordinarily handled by local police and prosecutors. The Justice Department's Civil Rights Division seldom authorizes FBI criminal investigations for the prosecution of individuals under this statute. But the Attorney General's 1976 guidelines could be interpreted as permitting domestic security investigations of private activities involving violations of the civil rights conspiracy law.

83. continued

"The breadth of this policy is enormous. Potentially, any act of politically motivated violence could justify a domestic security investigation, because it deprives someone of his civil rights. The constitutional framework of federalism, which divides law enforcement power among federal, state, and local governments, would become meaningless. Despite protests to the contrary, the FBI would be a national police force investigating any violent crimes or preparation to commit such crimes."

84. See Church, III, page 13.

"Although all COINTELPROs were officially terminated 'for security reasons' on April 27, 1971, the documents discontinuing the program provided:

'In exceptional circumstances where it is considered counter-intelligence action is warranted, recommendations should be submitted to the Bureau under the individual case caption to which it pertains. These recommendations will be considered on an individual basis'

(citing memorandum from Charles D. Brennan to William C. Sullivan, 4/27/71 Hearings Vol. 6, Exhibit 55-3)

"The Committee requested that the Bureau provide it with a list of any 'COINTELPRO-type' actions since April 28 1971. The Bureau first advised the Committee that a review failed to develop any information indicating post-termination COINTELPRO activity. Subsequently, the Bureau located and furnished to the Committee two instances of COINTELPRO-type operations. The Committee has discovered a third instance; four months after COINTELPRO was terminated, information on an attorney's political background was furnished to friendly newspaper sources under the so-called 'Mass Media Program,' intended to discredit both the attorney and his client.

"The Committee has not been able to determine with any greater precision the extent to which COINTELPRO may be continuing. Any proposals to initiate COINTELPRO-type action would be filed under the individual case caption. The Bureau has over 500,000 case files and each one would have to be searched. In this context, it should be noted that a Bureau search of all field office COINTELPRO files revealed the existence of five operations in addition to those known to the Petersen committee. A search of all investigative files might be similarly productive."

(citing letter from Attorney-General Levi to Senate Select Committee 5/23/75)

84. continued

It is perhaps worth recalling the statement appearing in Church, II, on page 15:

"The Adverse Impact of Improper Intelligence Activity

Many of the illegal or improper disruptive efforts directed against American citizens and domestic organizations succeeded in injuring their targets. Although it is sometimes difficult to prove that a target's misfortunes were caused by a counter-intelligence program directed against him, the possibility that an arm of the United States Government intended to cause the harm and might have been responsible is itself abhorrent." (Emphasis added.)

In any event, "the Bureau's titles for its [covert action programs] should not be accepted uncritically. They imply a precision of definition and of targeting which did not exist." (Church, III, page 4)

And as was said in Church, III, page 12:

"If COINTELPRO had been a short-lived aberration, the thorny problems of motivation, techniques, and control presented might be safely relegated to history. However, COINTELPRO existed for years on an 'ad hoc' basis before the formal programs were instituted, and more significantly, COINTELPRO-type activities may continue today under the rubric of 'investigation'."

The question whether COINTELPRO-type activity has been directed at AIM was raised in both the Richard Marshall case and the Leonard Peltier case. An FBI teletype (Exhibit GGG in the Butler-Robideau case) had said that "Dog Soldiers" who were "pro-AIM members" would kill in order to promote AIM objectives; one alleged plot was to assassinate the Governor of South Dakota. The teletype was circulated by the FBI to, among others, the US Department of Justice and, it appears likely, state police. The FBI Director, giving evidence in the Butler-Robideau trial, was asked: "With the exception of that source that is mentioned [see below], is it not a fact that there is not one shred of evidence of any of this contained in [FBI] files?" He replied: "I know of none. I cannot tell you." See Peltier, appellant's brief in US Court of Appeals, Appendix A, pages 17-19, reproducing the transcript of testimony given in the Butler-Robideau trial on 7 July 1976.

In Richard Marshall's appellant's brief in the State of South Dakota Supreme Court it is said that "the defendant can only speculate on whether or not Myrtle Poor Bear or some other equally unreliable person was the source of the account of AIM

84. continued

'Dog Soldiers' which was widely publicized in the national and local news during the . . . trial of Butler and Robideau." (page 53, note 23)

Amnesty International has been given a copy of the "Dog Soldiers" teletype by Richard Marshall's lawyers. It notes that the source of the information is stated therein to be one "with whom insufficient contact has been made to determine reliability but who is in a position to furnish reliable information advised as follows on May 21, 1976."

85. See Liberty and Justice for All. A report prepared by the South Dakota Advisory Committee to the US Commission on Civil Rights, October 1977. Part Two: Discussion entitled "Harassment and Selective Enforcement" and "The American Indian Movement and Police Officers".

NOTES TO CHAPTER II

1. See "COINTELPRO: The FBI's Covert Action Programs Against American Citizens" in Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans. Book III, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities. 23 April (under authority of the order 14 April) 1976. 94th Congress, 2d. Session Report No. 94-755. USGPO, Washington DC, 1976, page 7.

2. "The breadth of targeting and lack of substantive content in the descriptive titles of the programs reflect the range of motivations for COINTELPRO activity: protecting national security, preventing violence, and maintaining the existing social and political order by 'disrupting' and 'netutralizing' groups and individuals perceived as threats." Church, III, page 5.

3. Church, II, page 17 and pages 290-291.

4. Church, II, page 290 and see pages 291-292.

5. Church, III, page 3.

6. ibid. page 20.

7. ibid. pages 21-22 and page 187 citing FBI memorandum from HQ to all Special Agents-in-Charge (SACs), 3/4/68, pages 3-4. The document continued:

   "Beside these five goals counter-intelligence is a valuable part of our regular investigative program as it often produces positive information."

8. ibid. pages 187-188 citing The New York Times, 9/8/68.

9. ibid. page 188 citing the Select Committee's staff study of Justice Department COINTELPRO "Black Nationalist" summaries prepared by the FBI during the Petersen Committee inquiry into COINTELPRO. (For the Petersen Committee see ibid. pages 553-554). It appears that the BPP ultimately became "the target of 233 of the total 295 authorized 'Black Nationalist' COINTELPRO actions."

10. ibid. page 188 citing a memorandum from Chicago Field Office to FBI HQ 1/13/69.

10A. ibid. citing memorandum from FBI HQ to Baltimore Field Office (and 13 other offices), 11/25/68.

11. ibid. citing memorandum from San Diego Field Office to FBI HQ 1/16/70.

12. ibid. page 189.

13. Although this was earlier denied. See note 107 infra.

14. This document is included as Exhibit I to the Petition for Habeas Corpus, Brief in support of Petition, 10 April 1980, filed on behalf of Elmer Pratt in the Court of Appeal of the State of California, Second Appellate Division.

15. The other two leaders mentioned are Raymond Hewitt and Allen Holmes.

16. ibid. Exhibit J. This memorandum is dated 28 January 1970 on its page 1. Elmer Pratt's lawyers appear to refer to this exhibit as being dated 1 January 1970. (See Brief in support of Petition for Habeas Corpus. (Court of Appeal), page 17.

17. Amnesty International does not know to what specifically "Operation Number One" refers, although the document refers to leaflets and "the creation of an anonymous paper underground to attack, expose and ridicule the image of the BPP in the community and to foment mistrust and suspicion amongst the current and past membership, through publication and dissemination of information embarrassing to the BPP." (page 1, paragraph 3).

18. ibid. Exhibit K. page C. The document also stated that "in view of Pratt's adamant expression of hatred toward law enforcement personnel in general, no consideration is being given to reinterview Pratt for the purpose of development as a PRI." (Probationary Racial Informant - see note 95 infra.)

19. See appellant's opening brief, 22 May 1973, CA No. 2 Crim. 22504. California Court of Appeal, Second Appellate Division, pages 1-2.

20. California Penal Code Sections 187, 211, 217.

21. See Pratt Transcript, Vol. V, pages 1362-1363. The copy Amnesty International has worked with is the Reporter's Transcript on Appeal from Superior Court of the State of California, Department 108. Case No. A267020. Hon. Kathleen Parker, Judge.

    Court 1. Murder 1. Life imprisonment.
    Court 2. Robbery 1. (with deadly weapon). As law.
    Court 3. Robbery 1. (with deadly weapon). As law.
    Court 4. Assault with intent to commit murder (with deadly weapon). As law.

    All sentences to run concurrently.

    The judgment of conviction was affirmed on appeal by Division 4 of the Court of Appeal of the State of California, Second Appellate District in an unpublished opinion - 2 Crim. No. 22504.

22. See also text to notes 76-80 infra.

23. Church, III, page 517.

24. ibid.

25. The document also mentioned "the absolute necessity for intensive investigative efforts in these matters."

26. ibid. Chosen for investigation, that is. The Church report also states on this page that:

    > "The Key Activist Program, the Black Nationalist Photograph Album, the Agitator Index, and the revised Security Index identified the prime subjects for domestic intelligence investigation. However, the scope of inquiry went far beyond these defined targets."

    The Key Activist Program was expanded "to virtually all field offices in October 1968. The offices were instructed to recommend additional persons for the program and 'to consider if the individual was rendered ineffective would it curtail such [disruptive] activity in his area of influence?'." Church, III, pages 516-517.

    > "In early 1969, the FBI stepped up its Key Activist Program. Reports on Key Activists were to be made every ninety days, and 'particular effort' was to be made to obtain recordings of or reliable witnesses to inflammatory speeches or statements made which may subsequently become subject to criminal proceedings."

    Church, III, page 518, citing memorandum from FBI HQ to all SACs, 3/10/69.

    The document cited in note 18 supra (dated 26 June 1970) indicates that Elmer Pratt appeared in the Black Nationalist Photograph Album. The "Key Black Extremist" (KBE) list for "concentrated investigation and COINTELPRO actions" was drawn up in 1970. (Church, II, page 91). KBEs were defined as "leaders or activists [who] are particularly extreme, agitative, anti-Government and vocal in their calls for terrorism and violence". (Citing FBI memorandum from G.C. Moore to C.D. Brennan, 12 December 1970). Field officers were to put KBEs in the top priority category of the Security Index (defined in Church, II, page 91) and the Black Nationalist Photograph Album, which featured in particular "militant black nationalists who travelled extensively". Elmer Pratt's lawyers have informed Amnesty International that their client's name appeared on a KBE list dated 23 December 1970 and a relevant FBI memorandum dated 18 February 1971 (SAC Los Angeles to Director) which were released to them during FOIA litigation in 1980.

27. See also text to notes 76-80 infra.

28. Although it must be noted that "framing" on criminal charges is not proved by these documents.

29. See text to note 41 infra.

30. See text to note 39 infra.

31. See text to note 45 infra.

32. See Chapter I concerning the "chilling" of First Amendment rights.

33. See part Two of this chapter.

34. The headings to this and succeeding paragraphs are not part of the quotations. They have been inserted by Amnesty International.

35. FBI memorandum dated 9/27/68 from W.C. Sullivan to G.C. Moore re: "Counter-Intelligence Program Black Nationalist Hate Groups Racial Intelligence (Black Panther Party)".

36. Church, III, page 220.

37. ibid. page 222 citing memorandum from Los Angeles Field Office to FBI HQ, 12/1/69.

38. ibid. citing memorandum from San Diego Field Office to FBI HQ, 12/15/69.

39. Emphasis added. Church, III, page 220, note 156:

> "The suggestion of encouraging local police to raid and arrest members of so-called 'Black Nationalist Hate Groups' was first put forward in a February 29, 1968, memorandum to field offices. This memorandum cited as an example of successful use of this technique [the document quoted in the text]."

40. Memorandum dated 8/30/67 from SAC, Philadelphia, to the FBI Director re: "Counter-Intelligence Program Black Nationalist Hate Groups Internal Security". Page 2, paragraphs 4-5. (Deletions as per document obtained).

The memorandum begins:

> "This division during the summer of 1967 has had the opportunity to observe an attempt by an extremist Negro group (RAM) to affect the peace of a city. Some of the steps taken against RAM may be of possible use elsewhere under the current program. It is pointed out that in a fast moving series of situations, the police may have to 'play it by ear', which may reduce Bureau control of the action taken. Actions herein set out were carried out by either the Intelligence Unit or the Civil Disobedience Unit (CDU) of the Philadelphia PD, the largest role being played by the CDU."

41. ibid. paragraph 6.

42. ibid. page 3, paragraphs 1-4. (Deletions as per document obtained.)

43. Memorandum from SAC, San Diego, to Director FBI dated 2/3/69; page 2, paragraphs 1-3.

44. ibid. paragraph 4.

45. Emphasis added. ibid. page 1, paragraphs 1 and 2; page 2, paragraph 6. The original texts have been placed in a different order.

46. See context of text to note 80. It is stressed that this is not a statement referring to prosecutions under the criminal law.

47. Memorandum from FBI dated 9/16/70.

Director to SACs, Baltimore, Detroit, Los Angeles, New Haven, San Francisco and Washington Field re: Counter-Intelligence Program, Black Nationalist Hate Groups Black Panther Party (BPP) Racial matters.

The context of this statement was a proposal for a false, anonymous allegation that a BPP leader was embezzling party funds. The quote continues:

> ". . . The Bureau feels that the skimming of money is such a sensitive issue that disruption can be accomplished without facts to back it up."

48. See text to note 18.

49. See Pratt Transcript, testimony of Julius Butler in Vol. II, page 390, (lines 14-28) and page 391 (lines 1-4); Vol. V, 1246 (lines 5-19); Vol. V, 1263 (line 23) - 1265 (line 13); Vol. V, page 1261 (lines 3-11) and page 1262 (lines 1-4); and testimony of Sgt. Duwayne Rice who in the summer of 1969 was working with the LAPD in the Community Relations Administration, Vol. V, page 1221 (lines 9-28) and page 1222 (lines 2-10).

See also, inter alia, Petition for Writ of Habeas Corpus, 1474 Penal Code (criminal), Superior Court of the State of California for the County of Los Angeles, dated 11 November 1979, pages 64-70.

Opposition to Petition for Writ of Habeas Corpus dated 23 May 1980, pages 15-38.

50. Pratt Transcript, Vol. II, page 352, lines 17-22.

51. The presence of informants in the defence camp was not known about at the time of trial. See Exhibit A-1, brief in support of Petition for Writ of Habeas Corpus, California Court of Appeal, Second Appellate District. Statement of California Deputy Attorney-General, pages 3-4, especially page 4, lines 7-9.

52. See Decision of California Court of Appeal, Second Appellate District, Division One, 2 Crim. No. 37534, filed 3 December 1980, page 129, footnote 45, referring to a LAPD intelligence report dated 28 March 1971 "which had been sealed at the defense request". See also Pratt's petition for rehearing, Court of Appeal, 18 December 1980: "The document in question was under protective order pursuant to a request of the LAPD, not Petitioner, as the record in Pratt -v- Rees, C-1069 (N.D. Cal.) plainly reflects." (page 28).

53. ibid. dissenting opinion of Dunn J., pages 16-17.

54. See appeal brief in support of Petition for Writ of Habeas Corpus, pages 28-31.

55. ibid. exhibits D1 and D2.

56. See Superior Court habeas corpus petition pages 71-74. Especially page 73 (line 23) to page 74 (line 4):

> "Mr Olsen filled out a form in which he positively identified [a Mr] Perkins as one of the gunmen on 12/18/68. Mr Olsen stated at the time: 'The voice did it'.
>
> "It should be noted at this time that neither the police report of 12/24/69, nor the card filled out by Mr Olsen at the line-up on 12/24/69, were ever given to petitioner's defence counsel prior to or at the time of trial."

This earlier identification was mentioned on 28 August 1972 following the jury's verdict. Pratt Transcript, Vol. V, page 1342. The defence said that it had received a telephone call from a "Deputy Public Defender for the County of Los Angeles, and the Court has before it [his] affidavit under penalty of perjury . . . indicating he was present at a line-up on December 24 1969 [and] that he kept very careful notes . . ." (lines 8-12)

The government replied (page 1349, lines 10-16) that the defence was required to show at this stage that the motion for a new trial "required that there be a showing by affidavit that the defendant could not with reasonable diligence have produced the evidence that he now contends should have been produced." They continued:

> "The affidavit . . . of course is material and relevant, and in conformance with the Penal Code. However, it really doesn't change the way the case was tried. It is really not newly discovered evidence, and could easily have been discovered with reasonable diligence . . . Counsel is an experienced criminal lawyer who must have known that either the defendant was advised of his rights or a lawyer was present with the defendant in the line-up. The fact of the line-up was present in the police report that counsel had, so there was no misunderstanding. It could have easily been discovered if somebody was at the line-up, but apparently nobody was ever asked."
>
> (page 1351, line 24 to page 1352, line 7.)

57. See Chapter I.

58. Stating on the cover page that:

> "1) Petitioner has discovered new evidence which, if it had been known by his jury, probably have led to a different result; (sic)
>
> "2) the government suppressed/withheld exculpatory evidence relevant to his innocence and to the credibility of a key prosecution witness;
>
> "3) false evidence was presented at his trial. (Petitioner hereby incorporates by reference the extensive discussion of these legal issues and supporting facts detailed in his attached brief.)"

59. On pages 14-15 of its majority opinion filed 3 December 1980, the Court of Appeal stated that:

> "We also note that the file reflects that an attempt was made to coerce Judge Parker and that she was subjected to a flood of letters apparently from individuals connected with an organization called 'the National Task Force for COINTELPRO Litigation and Research' and 'Committee for the Suit against Government Misconduct' demanding that she immediately release Elmer 'Geronimo' Pratt from prison . . .
>
> ". . . In addition a cable from Amnesty's international headquarters in London urged defendant Pratt be granted a new trial because Pratt was the target of COINTELPRO which was unknown at the time of the trial."

The International Secretariat of Amnesty International sent no cable to Judge Parker. It is believed that the Court of Appeals was referring to the cable which had been sent by Amnesty International to Elmer Pratt's lawyers in December 1979:

> "Amnesty International has studied the case of Elmer Geronimo Pratt very closely over a period of some years and believes that in the light of the new evidence that Mr Pratt was a target of COINTELPRO, which was not available at the time of his trial, there are serious doubts about the validity of the charges against him and of his conviction on these charges. Amnesty International feels that the interests of justice can only be served by granting Mr Pratt a retrial."

The Court of Appeal's decision is reported in the law reports under In Re Pratt 112 Cal. App. 3d. 795; - Cal. Rptr. - (Crim. No. 37534. Second Dist., Div. One. 3 December 1980 - as modified on 8 December 1980). The final printed version was not in Amnesty International's possession when this research was undertaken. References are therefore to the original opinion as "certified for publication".

60. See Chapter I.

61. Following a four-day hearing. An evidentiary hearing is, as a rule, one in which the court considers any available proof of the allegations at issue between the parties (after having made appropriate orders that certain documents be produced).

62. Court of Appeal decision of 3 December 1980, hereafter referred to as "majority", page 13.

63. ibid.

64. Asking that the court:

> "1. Grant the Petition for Writ of Habeas Corpus; or, in the alternative;
>
> "2. Order an evidentiary hearing before a Court-appointed referee who can provide appropriate discovery;
>
> "3. Set reasonable bail pending determination of the Petition, if an evidentiary hearing is granted; and
>
> "4. Order any and all further relief which this Court deems fair and just."

65. Hanson (Thaxton) J.; Lillie Acting P.J. concurring.

66. Dunn J. Dissenting opinion, page 1.

67. Majority opinion pages 125-126, footnote 45.

68. ibid. page 126, footnote 45.

68A. Order Denying Writ of Habeas Corpus. (Criminal No. 21826) California Supreme Court In Bank. 1 April 1981.

69. See text to note 7 supra.

70. See text to notes 17 and 18 supra.

71. See text to note 27 supra.
Elmer Pratt has alleged that the conspiracy against him included the LAPD's Criminal Conspiracy Section. (Superior Court, habeas corpus Petition, dated 17 November 1979, page 1).

72. Emphasis added. Majority, page 120. For a pertinent example of state-federal action apparently relevant to this discussion, see note 78 infra.

73. ibid.

74. See Church, III, pages 57-59 and text to notes 34-47 supra.

75. And therefore the only reason why they are mentioned in this context.

76. op. cit. note 74 supra, page 57.

77. Referring to ibid. a memorandum from FBI HQ to all SACs 10/9/68.

78. ibid. 57. One example given in the Church report was of an FBI attempt "to have a Democratic Party fund raiser raided by the state Alcoholic Beverage Control Commission". (Memoranda from FBI HQ to San Francisco Field Office dated 10/21/66 and 11/14/66).

The other example was said by Church to "appear to rebut the Bureau's contention that turning over evidence of violations to local authorities was not really COINTELPRO at all, but just part of its job". (ibid. page 58). The target was a "Communist with a history of homosexuality . . . The Bureau requested that the local police have him arrested . . . to 'embarass the party'. Interestingly, the Bureau withdrew its request when the target stopped working actively for the Party because it would no longer cause the intended disruption." ibid. referring to memorandum from New York Field Office to FBI HQ 2/23/60; memorandum from FBI HQ to New York Field Office, 3/11/60; memorandum from New York Field Office to FBI HQ 11/10/60; memorandum from FBI HQ to New York Field Office, 11/17/60.

These examples of COINTELPRO activity appear to have occurred in 1960 and 1966. They are included here as indications that FBI abuse of the ciminal process did involve the cooperation of state agencies.

79. ibid. page 58.

80. See note 46 supra.

81. See Declaration of Deputy State Attorney-General Nash. Exhibit A-1 to Appeal Brief in support of habeas corpus Petition. (10 April 1980); and Opposition thereto, page 46.

> "On December 13, 1979, representatives of the United States Department of Justice and Federal Bureau of Investigation met with representatives from [the State Attorney-General's] office. A similar meeting had been held with members of the Los Angeles District Attorney's Office on December 12 1979. At these two meetings, information was disclosed by the FBI for the first time to these agencies . . .
>
> "The instant case involves an FBI agent totally unconnected with the prosecution in any way, shape or form. The FBI informant was obviously present under the auspices of the

81. continued

> federal government to serve its interests. The informant was unconnected to the prosecutors of the state violation, and unknown to the prosecutors who had no contact whatsoever with the FBI concerning petitioner. (ibid. page 54)
>
> "Further, although the Court indicated that there are difficult problems of proof for the defendant, the instant case is one wherein the facts indicate that the intrusion by the FBI was unknown to the state prosecutors and not revealed until recently. There is not one shred of evidence to indicate a connection between the FBI and the prosecution in this case." (Emphasis added. ibid. page 59)

Amnesty International notes the evidence of Michael Pennewell in Pratt Transcript Vol. IV, page 985 (line 19) to page 986 (line 27) re a visit he says he received from the FBI:

> "I had a visit by the FBI, and that was when the trial of the Thirteen was, the Panther Thirteen was going on, and FBI told me that they was, you know, charging G with a murder.
>
> Q. [By Prosecution] What FBI agent came to you and told you that?
>
> A. I don't know their name. I don't recall their name.
>
> Q. They didn't come and tell you that, did they?
>
> A. Yes, they did.
>
> Q. The FBI's never been involved in this case, and you know it.
>
> A. Well, I . . .
>
> Defence Counsel: Object to him testifying.
>
> The Court: Sustained.
>
> Q. [By Prosecution] The first time you remember anything about the events of December 1968 was when some people you think were the FBI came to you?
>
> A. I saw their identification, sir.
>
> Q. Okay. They came to you in July of 1969 . . . '71, excuse me. Is that correct?
>
> A. No, I didn't say I saw them in July. I said shortly afterwards.

81. continued

> Q. Okay. When?
>
> A. Let's see. I got out the 19th. Probably in August. Most likely August.
>
> Q. At that time did you know . . . Let me go back. It was headlines in the newspaper in February 1971, wasn't it, Mr Pennewell, that Mr Pratt had been formally charged with this murder, isn't that a fact, and you knew it?
>
> A. Well, I didn't read it. It may have been a fact.
>
> Q. It was all over the papers, wasn't it?
>
> A. I wasn't in the Party at that time, sir.
>
> Q. It was all over the streets, wasn't it?
>
> A. I don't know, sir.
>
> Q. You mean it wasn't common knowledge among people who had been in the Party, who had known Mr Pratt?
>
> A. I haven't had any affiliation with anybody in the Party since that time."

82. See "majority", pages 69-70, note 27.

83. ibid. page 71. But Amnesty International understands from Elmer Pratt's lawyers that they objected to in camera proceedings as inappropriate, and asked the court instead for an order requiring the FBI to hand over the new documents to their client and the Attorney-General.

84. ibid.

85. ibid. Appendix C, reproducing Exhibit E which was before the court. This FBI letter, and enclosure, is dated 10 March 1980.

86. ibid. page 8.

86. ibid. pages 8-9.

87. "majority", page 127, footnote 45; in its reply to the dissenting judgment.

88. ibid.

89. "majority", pages 84-85.

90. ibid. page 91.

91. Dissenting opinion of Dunn, J. (Hereafter referred to as "dissent"), page 3.

92. ibid. pages 3 and 4. See also Chapter I.

93. See Chapter I.

94. See Chapter I.

95. The FBI review ("majority", Appendix C) with its covering letter dated 10 March 1980, stated on page 6 that:

> "There has been some confusion about whether Julius Butler was an FBI informant. This confusion is understandable in light of the contrast between the broad dictionary definition of informant and the precise law enforcement usage of that term. These semantic differences - briefly addressed below - should not divert attention from the primary issue, which is whether Pratt is entitled to a new trial because the jury was unaware that Butler supplied information to the FBI.
>
> "Webster's New Collegiate Dictionary (1977) defines 'informant' as 'one who gives information'. Of course, under that broad definition Butler would be considered an informant, for he supplied information to the FBI.
>
> "In FBI manuals, however, 'informant' does not merely mean 'one who gives information'. Rather, 'informant' is one of several kinds of person 'who gives information' to the FBI. The 'informant' label refers to reliable persons actively engaged in obtaining and furnishing information to the FBI. Traditionally, 'informants' are assigned symbol numbers; ordinarily, they are paid. Butler was not assigned a symbol number or paid, and he was not considered an 'informant'. The FBI regularly receives, on a confidential basis, information from individuals who are not considered informants.
>
> "Bureau documents show that Butler was considered a 'probationary (racial) informant'. This term refers to a person being cultivated as an informant, but whose reliability and willingness to cooperate are not yet established."

96. See Chapter I.

97. Emphasis added. Pratt Transcript, Vol. V, page 1167, (lines 6-25).

98. See text to note 102 infra.

99. The details of Julius Butler's connections with the FBI were not supplied to the defence at the trial.

99. continued

Evidence at the trial was given by Julius Butler as follows:

> "Q. Now, Mr Butler, you were at some time past a sheriff's deputy; is that correct?
>
> A. That's correct.
>
> Q. And when you were working for the Black Panther Party, were you also working for law enforcement at the same time?
>
> A. No.
>
> Q. You had severed any ties you had with law enforcement?
>
> A. That's correct.
>
> Q. Have you at any time since leaving the Sheriff's Department worked for the FBI or the CIA?
>
> A. No.
>
> Q. Are you now working for the FBI and the CIA?
>
> A. No.
>
> Q. Your sole employment is as a beauty stylist now; is that correct?
>
> A. Exclusively.
>
> Q. And it is your testimony that was your sole employment at the time of your membership in the Black Panther Party?
>
> A. That's correct.
>
> Q. How long had you been an officer in the Sheriff's Department before you became a member of the Black Panther Party?
>
> A. I resigned in April, '60.
>
> Q. April of 1960?
>
> A. Yes.
>
> Q. You joined the Black Panther Party in '68, is that correct?
>
> A. Yes."

Pratt Transcript Vol. II, page 390 (line 9) to page 391 (line 13).

99. continued

Bearing in mind the above, Amnesty International has compiled the following chronology of the relationship between Julius Butler and the FBI. The information is taken from documents available to Amnesty International in January 1981.

1. In January 1969 the FBI opened a "Substantive Case File" on Julius Butler.

   Source: An FBI Factual Summary dated 11/9/79 attached to the Declaration by California Deputy Attorney-General dated 18 December 1979. Exhibit A-1 Appeal Brief in support of Petition for Habeas Corpus.

2. A Los Angeles FBI document summarizing surveillance of Elmer Pratt from 29 January 1969 to 23 May 1969 bears the handwritten name "Julius".

   Source: "dissent", pages 9-10 and letter dated 16 January 1980 from Acting Director of FBI to California State Attorney-General stating, among other things:

   > "In response to the question as to the reason 'Julius' appears at the top of page 13 of a Los Angeles report dated June 2, 1969, on Pratt, which was furnished to you by Congressman McCloskey, the name appears for FBI indexing purposes. The meeting referred to on page 13 of this report was held at the residence of Julius Butler early in 1969, and while he was not the source of the information contained on this page of the report, his name was marked for indexing at FBI Headquarters as 'Julius Carl Butler'. However, in the Xeroxing process only 'Julius' remained on the copy furnished to you."

3. On 10 August 1969, Julius Butler wrote a letter implicating Elmer Pratt in the murder.

   Source: Appendix A of Court of Appeal Decision filed 3 December 1980.

4. Shortly thereafter Julius Butler gave the letter to Duwayne Rice as an "insurance policy"; "In the event I am killed or if I die for some reason, I want you to take this, open it, read it and give it to my mother."

   Source: Pratt Transcript, Vol. II, page 296 (lines 17-19).

5. On 13 August 1969 Julius Butler told the FBI that Geronimo and Blue had indirectly implied that he was going to be killed and that the Panthers would do it "when time is right".

99. continued

5. continued

   Source: Appeal Brief in support of Habeas Corpus Petition. Exhibit C. Page 5. (See also "majority", pages 57-58. The FBI report is dated 14 August.)

6. On 19 August 1969 Julius Butler was picked up at a street corner by the FBI and interviewed. He is reported to have wanted to think it over when asked to go voluntarily to the FBI office for further questioning. He was reported also to be wanting "to talk to a friend to determine best course of action". The FBI said they would contact him again.

7. An FBI document of 7 November 1969 says that ". . . Butler was extensively interviewed on 11/4/69 . . . at which time he stated he was willing to provide information to the FBI on a confidential basis. Results of the interview will not be disseminated at this time, as additional contact will be made with Butler to determine his potential as a PRI. The Bureau will be appropriately advised of pertinent information provided by Butler and, where and if feasible, counter-intelligence proposals will be made."

   Source: Memorandum from SAC, Los Angeles, to FBI Director, of 7 November 1969.

8. After August 1969 Julius Butler was said by the FBI to have contacted them on several occasions regarding the BPP but having supplied no information on Elmer Pratt or the murder, with which he (Pratt) was later charged.

   Source: FBI Factual Summary Sheet attached to Declaration cited in 1 supra. See also "majority", pages 101-102.

9. FBI document dated 26 November 1969 shows that Julius Butler did in fact supply information relating to Elmer Geronimo Pratt.

   Source: Document dated 26 November 1969: Exhibit C of petition cited in 1 supra.

10. The FBI document dated 10 December 1969 showed that Julius Butler did in fact supply information on Elmer Geronimo Pratt. The document related to events the previous day in Los Angeles.

    Source: Exhibit C of petition cited in 1 supra.

11. Memorandum from SAC, Los Angeles, to SAC, San Francisco, dated 2/4/70, shows that "For the information of San Francisco Division, the captioned individual, an admitted ex-member of the Black Panther Party (BPP) in Los Angeles, is furnishing information to the Los Angeles Division on a confidential basis." Julius Butler was the individual in question.

99. continued

12. Julius Butler files regular monthly reports in 1970 (except perhaps November) to FBI re general propensity for racial unrest and violence. Coverage both "ghetto" and "racial".

Source: Exhibit C to petition cited in 1 above.

13. On 20 October 1970 (or thereabouts) the contents of Julius Butler's letter disclosed to LAPD Criminal Conspiracy Section.

Source: Pratt Transcript Vol. II, pages 302-303.

14. In January 1971 an FBI document (about a telephone call to them from Julius Butler on 1 January 1971) says that he said that "he had furnished information implicating Elmer Pratt in a murder at Santa Monica, California, in 1968, and thought he was going to be called to testify against Pratt in the matter."

15. Julius Butler's file was closed in May 1972 "because of the lack of productivity".

Source: FBI Factual Summary referred to in 1 supra and "majority", pages 101-102.

[On 1 June 1972 the Elmer Pratt trial opened. Julius Butler was first called to the stand on 19 June and completed all his testimony (after being called on rebuttal) on 11 July.]

16. On 14 November 1979 Julius Butler stated that he was never an FBI informant nor ever aware that he was being evaluated as PRI.

Source: FBI Factual Summary cited in 1 supra. and "majority", page 102.

* * * *

These facts were known to the Court of Appeal when they refused Elmer Pratt's petition for habeas corpus on 3 December 1980. They concluded that:

> ". . . both the cross-examining defense counsel and witness Butler may well have referred to the words 'working' in the common vernacular as meaning a 'sustained physical or mental effort . . . labor, task, or duty that affords one his accustomed means of livelihood' and as being synonymous or equivalent to 'employment' which 'stresses activity that fills one's time'. (See Webster's New Collegiate Dict., 7th ed. 1972, page 1029, 271,(which we note was published the same

99. continued

> year in which the instant trial took place).) Thus it is reasonable to conclude that witness Butler either did not give perjured testimony at all or believed that his answers were truthful within the framwork of the above line of questions."
>
> ("majority", page 98)

See also Chapter I.

100. "Majority", page 109.

101. ibid. pages 109-110.

102. "Dissent", page 10, paragraph 2 and page 11, paragraph 2. Julius Butler's "status as determined at an appropriate evidentiary hearing would be relevant as to his interest in testifying truthfully or falsely."

103. See note 99, supra.

104. See the conclusion to this chapter.

104A. supra and "majority", page 109, paragraph 2.

105. See Chapter I.

106. See appeal brief in support of Habeas Corpus petition 1, page 29, paragraph 5.

107. See Exhibit 8 to Supplemental Submission based on recent FBI Disclosures of New Materials; Brief in Support of Supplemental Submissions. Court of Appeal; 22 July 1980. This exhibit is a copy of a letter dated 12 July 1979 from the FBI Director to Congressman Paul N. McCloskey:

> "In conclusion, I would like to reemphasize the following points:
>
> 1. The FBI possesses no information in its files pertaining to Pratt dating prior to January, 1969.
>
> 2. Pratt was not the target of the FBI's COINTELPRO.
>
> 3. The FBI did not frame Pratt for the murder for which he was convicted or plan his escape from any jail.
>
> 4. . . .
>
> 5. The FBI could locate no information that would tend to exonerate Pratt of the crime for which he was convicted.

107. continued

It is hoped that our explanations adequately satisfy you that the FBI has not abused or otherwise infringed upon the rights of Pratt under the FOIA and has not been involved in any miscarriage of justice. It we had been able to retrieve evidence from our records that might exonerate Pratt, we would have made such evidence available not only as a matter of law, but also as a matter of professional obligation. Unfortunately for Pratt, such evidence just does not exist in our files."

(pages 5-6)

108. "Majority", page 112, paragraph 1.

109. ibid. paragraph 4, citing In Re Weber, 11 Cal. 3d. 703; In Re Wright 78 Cal. App. 3d. 788.

110. ibid. pages 112-114.

111. ibid. page 114.

112. "Dissent", page 18. The murder took place in Santa Monica on 18 December 1968. Elmer Pratt testified at his trial that he went to the San Francisco Bay Area "either on 13th, 14th, 15th December" (Pratt Transcript, Vol. IV, page 1057); and that he stayed there until "the day after Christmas". (Vol. IV, page 1064).

A prosecution witness identified Elmer Pratt in the area of the murder before it happened (see Pratt Transcript, Vol. I, pages 19-20) and see discussion below of eye-witness evidence.

The Court of Appeal stressed the importance of the evidence that Elmer Pratt was in the vicinity of the murder. ("Majority", pages 20-26, 113 and 122, note 41.)

Elmer Pratt's lawyers say that the court's "highly selective rendition of [this evidence] appears designed to impute to [the witness] a credibility that upon examination of the record, is manifestly lacking."

(Appeal Petition for Rehearing, dated 18 December 1980, page 6).

113. ibid. "The memoranda have been released with the usual deletions which render the information contained therein practically unintelligible."

114. ibid. pages 18-19.

115. "Majority", page 116.

116. See note 56 supra.

117. The defence relied on the declaration under penalty of perjury of Lawrence E. Rivetz dated 25 August 1972 (see Exhibit 52 to Superior Court Habeas Corpus application, Exhibit 3 to Appeal Petition for Rehearing), to the effect that:

"Mr Olsen filled out a form, which he positively picked number four as one of the gunmen of December 18, 1969. Mr Olsen stated at the time, 'the voice did it', a quote which I wrote down at the time he stated it. For various other reasons, involving confidential communication between myself and my client, Mr Perkins, Mr Olsen's statement about the voice stayed in my mind as well as being recorded at the time."

This document appeared also as Exhibit 3 to Elmer Pratt's Supplemental Submission to the Appeal Court based on FBI Disclosures of New Materials, 22 July 1980.

118. See Pratt Transcript, Vol. II, page 145 (lines 9-19) and Vol. II, pages 173 and 174 (lines 6-15).

119. Lawyers for Elmer Pratt have explained their argument to Amnesty International as follows:

"Indisputably, Kenneth Olsen was a key prosecution witness. He was the only eyewitness to the shooting. He testified that he was able to make a positive identification of Pratt as the shorter of the two men who had shot him and his wife. He claimed that, even though 3½ years had passed since the incident, he was capable of making this identification of Pratt positively."

Indeed Amnesty International notes the following evidence in Vol. II, page 151:

"Q. Is there any doubt in your mind at this time that Elmer Pratt, the defendant in this case, was one of the two men on the tennis court in Santa Monica on December 18 1968? . . .

Olsen: 'There is no doubt.'"

Elmer Pratt's lawyers continue:

"The jury was faced with the task of evaluating the credibility of Mr Olsen's 'positive' identification of Pratt. This identification was one of the two critical pieces of prosecution evidence, the other being the testimony of Julius Butler. It is very likely that, had the jury been presented with evidence that Mr Olsen had already positively identified one innocent man long before he first positively identified Pratt, they would have concluded that Mr Olsen was incapable of making the identification of which he claimed to be so certain."

120. See note 117 supra.

121. According to the Rivetz declaration.

122. This may be of primary concern to state rather than federal authorities.

123. "Dissent", page 15.

124. ibid. page 16. Emphasis added.

125. See Supplemental Submission by Elmer Pratt's lawyers to the Court of Appeal based on Recent FBI Disclosures of New Material; Brief in Support of Supplemental Submissions, 22 July 1980; Application for an Order Requiring the LAPD and the FBI to turn over to the Petitioner files pertaining to the second suspect, 15 August 1980.

See also "dissent", pages 16-17; "majority", pages 129-130, footnote 45; Petition for Rehearing before the Court of Appeal, 18 December 1980, pages 28-30.

126. Exhibit 5 of the Petition for Rehearing (PR) is a document which Amnesty International understands was released from an FBI file. (See PR, page 28). It reads:

> "Following the receipt of information to the effect that [deleted] was the second person involved in the tennis court murders [deleted], this information was disseminated to the LAPD on 3/29/71."

Exhibit 6 is a "declaration under penalty of perjury" by Johnnie L. Cochran, Jr., one of Elmer Pratt's defence lawyers at trial. The document, dated 18 July 1980, states:

> "That prior to trial, in the matter of People -v- Pratt, my co-counsel, Charles Hollopeter, told me that he had been informed by Deputy District Attorney Richard Kalustian, the prosecutor in the case, that all discovery pertaining to the investigation by the Los Angeles Police Department and Los Angeles County District Attorney's office of the crimes with which Mr Pratt was charged in A-267020 had been provided to the defense.
>
> "That no information pertaining to the investigation as to the identity of the second suspect was ever provided to myself or Mr Hollopeter.
>
> "That on the basis of the representations made to the defense by Mr Kalustian, Mr Hollopeter and myself believed there to be no information concerning the identity of the second suspect, and we tried the case accordingly."

127. The date the FBI obtained the information is not known to Amnesty International.

128. As shown by the document in question.

129. As shown clearly by the terms of the document in question.

130. The importance of which was explained to Amnesty International by Elmer Pratt's lawyers thus:

> "Pratt maintains that he is innocent. If this is true, it follows that a 'second suspect', if guilty, would know of his own knowledge that Pratt was not the first suspect. The apprehension of such an individual could potentially have proven Pratt's innocence. Conversely, if Pratt were guilty, convincing testimony to that effect could have been provided by the second suspect."

131. Application for Order (note 125 supra), page 2.

132. ibid. paragraph 2.

133. ibid. paragraph 3.

134. ibid. pages 2-3.

NOTES TO CHAPTER III

1. Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans. Book III. Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, United States Senate, 23 April (under authority of the order of 14 April) 1976. 94th Congress. 2nd Session. Report No. 94-755. (Hereafter referred to as Church, III,) page 549, citing the FBI summary of its "guidelines" then submitted to the Acting US Attorney-General.

2. ibid.

3. ibid.

4. ibid. page 511. This refers to the "Rabble Rouser Index" then kept by the FBI, the standards for which were broadened in November 1967 to include people with "a propensity for fomenting" disorders which might affect internal security.

5. Church, II, (Intelligence Activities and the Rights of Americans), page 10; referring to COINTELPRO.

6. Church, III, page 513. This refers to the criteria for inclusion in the FBI's former Security Index of inter alia, "leading activists". (See page 512.)

7. See Chapter I.

8. Church, III, page 513. Citing SAC Letter No. 68-21, 4/2/68.

9. This refers to names included on the FBI's former "Administrative Index" (ADEX). Church, III, page 551.

10. The basic standard for the revised ADEX was:

> "Individuals, whether affiliated with organized groups or not, who have shown a willingness and capability of engaging in treason, rebellion, or insurrection, seditious conspiracy, sabotage, espionage, terrorism, guerilla warfare, assassination of Government officials or leaders, or other such acts which would result in interference with or a threat to the survival and effective operation of national, state or local government."

Church, III, page 551, footnote 639, citing a memorandum dated 9/18/72.

11. Church, III, page 551, see footnote 638 which cites a memorandum dated 8/29/72.

12. The letter from which this quotation is taken was presented as defence exhibit MMM in the case of United States -v- Darrelle Butler and Eugene Robideau. The case was heard in the United States District Court N.D. of Iowa, Cedar Rapids Division, before Hon. Edward J. McManus, Judge, and a jury. The defendants were acquitted of murder.

The letter was obtained in response to a Freedom of Information Act and Privacy Act request dated 15 August 1975.

On 7 July 1976 the then Director of the FBI, who signed the letter, stated in evidence in the above case that files relevant to the type of intelligence records in question were kept both in field offices and in Washington DC. (Transcript of testimony, Vol. XVII, page 2657, lines 4-7.

Amnesty International notes that the letter refers to "a search of our central records". After COINTELPRO was disclosed, "an instruction was sent out to all offices [by FBI HQ] to review their files and let us know of any such activity." (ibid. Vol. XVII, page 2664, lines 14-16.)

13. Minneapolis Tribune, Wednesday 21 March 1979. Correspondence columns.

14. These changes were made by a change in the FBI Manual. See Church, III, page 552. The text of the statute reads:

> 2383 Rebellion or insurrection
>
> "Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."

15. ibid. The text of the statute reads:

> 2384 Seditious conspiracy
>
> "If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $20,000 or imprisoned not more than twenty years, or both."

16. ibid. The text of the statute reads:

2385 Advocating overthrow of Government

"Whoever knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof -

"Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

"If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

"As used in this section, the terms "organizes" and "organize", with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons."

Church, III, page 264, footnote 203 reads: "For subversive intelligence investigations, the principal statutes are 18 U.S.C. 2383-85 . . . The same statutes are involved in extremist investigations as well as the Civil Rights Act, 18 U.S.C. 241."

17. See The Reform of FBI Intelligence Operations. John T. Elliff. Princeton University Press, Princeton, New Jersey 1979. Chapter III. (The Development of Guidelines) page 45. This book was written under the auspices of The Police Foundation.

18. ibid.

19. ibid.

20. ibid.

21. Church, III, page 552.

22. Emphasis added. op. cit. Elliff, page 46 citing interviews with FBI field supervisors, January 1975 and Executive Conference Memorandum, 29 October 1970; Church Committee Hearings Vol. 2, Exhibits 41-43, 317-27.

23. Petitioner's Exhibit 14 in the case of Richard Marshall -v- State of South Dakota in the Circuit Court of Pennington County, South Dakota Seventh Judicial District. The Hon. Merton B. Tice Jr, Presiding Judge.

    This case, which was heard on 12/13 March 1979, was observed by a lawyer sent from London by Amnesty International.

24. Petitioner's Exhibit 13.

25. A copy of this document is kept in Amnesty International's files.

26. Petitioner's Exhibit 13 is dated 2 March 1975.

27. FBI document (MP 157-1458) page 4. See petitioner's Exhibit 16. See also appellant's brief page 27, note 17, where it is said that 20 arrests took place "on the day following" the predication document. The FBI document refers also to an article in The Minneapolis Star, 3 March 1975, where an attorney for AIM is quoted "as stating the arrests a coordinated an [sic] effort to attack the American Indian Movement". Richard Marshall's lawyers have informed Amnesty International that the arrests were for criminal syndicalism, possession of explosives, firearms offences and, in Colorado, possession of marijuana. Convictions for offences including "felon in possession of a gun" resulted. Sentences of imprisonment of four years, three years and 18 months were passed. The marijuana offences were not proceeded with, nor were all those arrested prosecuted.

28. Evidence of Clarence Kelley, Director of the FBI. US -v- Butler and Robideau: Transcript of Testimony, Vol. XVII, page 2614.

29. ibid. page 2646, lines 16-18.

30. ibid. page 2647, lines 10-11.

31. ibid. page 2648, lines 15-16.

32. AIM appears in the Domestic Terrorist Digest in "Volume 7, Roman Number, No. 3" page 2 of 18 June 1976. (See Butler, Robideau transcript page 2646, lines 22-23 and page 2648, line 5.)

    It appears that the Minneapolis Division of the FBI has been "active in coverage of the American Indian Movement". See transcript page 2639, lines 23-25 and Butler, Robideau Defence Exhibit FFF.

33. Amnesty International makes no judgment on this issue. But see text to Chapter IV, notes 103, 104.

34. op. cit. Elliff page 109.

34A. op. cit. Elliff page 110.

35. Attorney-General's Guidelines for FBI Domestic Security Investigations. 10 March 1976. Guideline II.I.

36. ibid.

37. See Guideline I.A. 1 for full text.

38. See Guideline I.A. 3(a) and I.A. 3(b) for full text.

39. Guidelines I.A. 4.

40. Guideline II.B. It is also relevant that according to Guideline II.I. the following factors must be considered when deciding whether a full investigation should be undertaken:

    (i) The magnitude of the threatened harm;
    (ii) The likelihood that it will occur;
    (iii) The immediacy of the threat; and
    (iv) The danger to privacy and free expression posed by a full investigation.

41. See Guideline IIC, IID and IIE for preliminary investigations; Guidelines IIF, IIG and IIH for limited investigations.

    According to Guideline IIH preliminary and limited investigations are to be closed within 90 days from the date when the preliminary investigation was initiated. FBI HQ "may authorize in writing extension of a preliminary or limited investigation for periods of not more than 90 days when facts or information obtained in the original period justify such an extension. The authorization shall include a statement of the circumstances justifying the extension." (Emphasis added.)

42. Or those who have engaged in activities suggesting that they are likely to use force or violence in violation of federal law. op. cit. Elliff, page 92. Citing Prepared Statement of FBI Director Clarence M. Kelley before the sub-committee on Intelligence and the Rights of Americans, Select Committee on Intelligence, United States Senate, 22 September 1976. It is possible that membership alone could be a basis for preliminary investigation.

43. op. cit. Elliff page 93.

44. ibid.

45. ibid.

46. Church, II, page 263, note 60, citing an FBI memorandum dated 27 January 1976.

47. See note 13 above.

48. Four American Indians were indicted upon two counts of first degree murder of two FBI Special Agents. Darrelle Butler and Robert Robideau were acquitted; Leonard Peltier was convicted in a separate trial and the indictment against Jimmy Eagle was not proceeded with. (See text to note 65 supra.)

49. See Evidence, Proof and Probability, Sir Richard Eggleston. Weidenfeld and Nicholson, London, 1978. Chapter 6, (Probability, Relevance and Admissibility), page 68; citing Sir James Stephen's A Digest of the Law of Evidence, 5th edition (London 1899) article 1, page 2. The text here should not be taken as a legal definition necessarily applied in the courts mentioned in this report. It is included as general guidance for readers.

50. This point was taken by defence lawyers in both the Leonard Peltier and Richard Marshall cases.

51. A clear statement of this argument can be found in the appellee's brief (for the government) in US -v- Peltier. The case was before the US Court of Appeals for the Eighth Circuit, on appeal from US District Court for the District of North Dakota. See especially pages 25-26.

52. This term was used by Leonard Peltier's lawyers in a discussion in April 1978 with a representative of Amnesty International who observed the appeal hearing in St Louis, Missouri.

53. Criticism of defence lawyers in political trials may frequently be based on such allegations.

53A. See also Political Trials in the Legal Order: A Political Scientist's Perspective. Nathan Hakman. Vol. 21. Journal of Public Law (later Emory Law Journal), 1972, page 73. Published by Emory University Law School, Atlanta, Georgia.

54. The extradition proceedings took place in April and May 1976 in Vancouver, BC, before Schultz, J. An appeal was taken by Leonard Peltier to the Canadian Federal Court of Appeal in October 1976. It was unsuccessful.

55. The submission to the Minister of Justice was on the following grounds:

"(a) The alleged offence was of a 'political character';
(b) The conduct of the US Government in suppressing vital evidence amounted to an abuse of process."

(See Halprin -v- Sun Publishing Co. Supreme Court of British Columbia. No. C 771952, 3 May 1978, Vancouver Registry.)

56. Judge Ross of the US Court of Appeals for the Eighth Circuit said this during oral argument on 12 April 1978. Excerpts from this argument, transcribed from magnetic tape, appear as Appendix C to the Petition for the Writ of Certiorari (No. 78-893) filed in the US Supreme Court on behalf of Leonard Peltier on 4 December 1978. See pages 49a-50a.

57. The government characterized her as "not a competent witness" (Peltier Transcript, afternoon session, 13 April 1977, Vol. XXI, pages 4605-6). Case was heard in the US District Court for the District of North Dakota, South Eastern Division, in Fargo, North Dakota, before Hon. Paul Benson, and a jury. This statement was made in the absence of the jury.

58. op. cit. note 56 supra, page 6.

59. See Peltier Transcript, morning session, 7 April 1977, Vol. XVII, pages 3458-3459.

60. This is the wording of the US Court of Appeals. See US -v- Peltier 585 F.2d. 314, 331 (1978).

Myrtle Poor Bear's evidence appears in Peltier Transcript, Vol. XXI. Direct evidence starts on page 4584; cross-examination on page 4629 and redirect on page 4648.

The defence sought to introduce the Myrtle Poor Bear (and other) evidence, and have it heard by the jury "so we rebut by circumstantial evidence certain specific key pieces of evidence which have been introduced against Leonard Peltier and we also offer it to show a pattern of conduct on the part of certain agents of the FBI . . ." (Vol. XXI, page 4653).

The government accused the defence of "attempting to set up a strawman and knock the strawman down and suppose to (sic), and to argue then that that proves something . . . .This is nothing more than an attempt to put the FBI in general on trial for some supposed misdeeds that the paranoid defence team has brought up." (Vol. XXI, pages 4653-4654).

61. The court held that that was "irrelevant . . . , that the witness was not a believable witness." Her testimony was related to a "collateral matter". Peltier Transcript, Vol. XXI, page 4665.

The court also said the following (Peltier Transcript, Vol. XXI, pages 4658-9):

"The Court noticed that this witness was under obvious great mental stress. She, her testimony was interrupted at least three times by an emotional reaction of some kind.

"The Court is also aware of the extreme difficulty that was encountered in attempting to bring her back into this Court at the request of the defendant.

"The Court observed that she had a complete lapse of memory on cross-examination relating to recent events.

"The Court also is taking into consideration the fact that this witness was not used in the presentation of the Government's case which defense seeks to impeach by her testimony the three FBI agents who interviewed her were not used in the presentation of the Government's case . . .

"And the Court concludes the credibility of this witness for any purpose is so suspect that to permit her testimony to go to the jury would be confusing the issues, may mislead the jury and could be highly prejudicial."

The court later explained its ruling:

"The offer of proof related to a collateral matter and under the Rules of Evidence is therefore inadmissible. If [Myrtle Poor Bear] as she testified yesterday were to be a believable witness the Court would have seriously considered allowing her testimony to go to the jury on the grounds that if believed by the jury the facts she testified to were such that they would shock the conscience of the Court and in the interests of justice should be considered by the jury."

(Peltier Transcript, morning session, 14 April 1977, Vol. XXI, pages 4707-4708.)

62. Emphasis added. op. cit. note 56 supra. page 51a.

63. These arguments have been shortened and simplified so as to highlight the main points relevant to this discussion. In any event, the government arguments made considerable reference to the decision of the Court of Appeals, which is considered in some detail elsewhere in this chapter. The full arguments are set out in the Brief for the United States in Opposition to Leonard Peltier's petition to the US Supreme Court. The brief is dated February 1979. See pages 4-13 (especially note 8 on page 13).

See also note 61 supra.

64. ibid. page 10. The FBI agents did appear in the absence of the jury.

65. See US -v- Peltier 585 F.2d. 314, 331 (1978). Peltier Transcript, Vol. XIX, page 3961. See also Vol. XIX, pages 3979-3980.

66. 585 F.2d. 314, 331 (1978); and see also Peltier Transcript Vol. XIX page 4027.

67. 585 F.2d. 314, 331 (1978); and see Peltier appellee's brief in US Court of Appeals, page 28.

68. See Peltier Transcript, Vol. XIX, pages 3982-3987.

69. 585 F.2d. 314, 331 (1978). See defence submission in Peltier Transcript Vol. XIX, page 3974: "FBI agents . . . were seeking wilfully or recklessly statements of people who purported to be eyewitnesses without verifying them."

    On page 3976: "What we are exploring here are the tactics by the FBI which were employed in creating witnesses who had no knowledge of the subject matter." (Defence submission). But compare this with appellee's brief (by government) page 33 re Myrtle Poor Bear.

70. Peltier, appellee's brief (by government) page 28.

71. All three witnesses were young American Indians.

72. This statement is taken from the decision of the US Court of Appeals. 585 F.2d. 314, 328-329 (1978). Amnesty International makes reference to Peltier Transcript Vol. V, page 841, re Anderson's evidence of threats; and Peltier Transcript Vol. XXII, page 4801, re Brown's evidence of refusal to allow contact with a lawyer.

    The prosecution described this evidence as follows:

    > "In substance, however, their testimony indicated only that they were treated roughly and threatened with prosecution or, in the case of Michael Anderson, physical abuse, if they did not make a statement at all."

    Peltier, appellee's brief (by government) page 32. (See also Appeal Court's ruling in this case re truth of evidence.)

73. 585 F.2d. 314, 329 (1978). See note 12 where the court said:

    > "Brown also stated that he lied to the grand jury. However, he affirmed, after his testimony regarding lying to the grand jury, that his testimony at trial was the truth."

    See also Peltier Transcript, Vol. XXII, pages 4812 and 4819.

74. Emphasis added. 585 F.2d. 314, 332 [22] (1978).

75. ibid.

76. Emphasis added. 585 F.2d. 314, 332 [23,24] (1978). See, for example, Peltier Transcript, Vol. VI, page 1116.

77. Emphasis added. 585 F.2d. 314, 332 [25] (1978).

78. 585 F.2d. 314, 332-333 [25] (1978). This was at a time when the defence believed that Myrtle Poor Bear might be a government witness.

79. 585 F.2d. 314, 333 [25] (1978).

79A. ibid. note 15.

80. 585 F.2d. 314, 333 [25] (1978). See evidence in Peltier Transcript, Vol. XIX, pages 4124-4170; Vol. XIX, pages 4060-4112 and Vol. XX, pages 4409-4436.

81. 585 F.2d. 314, 333 [25] (1978). See paragraphs ii.c. and ii.d.

82. 585 F.2d. 314, 333 [25] (1978).

83. Petition for Writ of Certiorari (No. 78-893), dated 4 December 1978, pages 6 and 15-16. (On behalf of Leonard Peltier in the US Supreme Court).

84. Brief for the US in opposition to petition for certiorari, dated February 1979, page 12.

    The brief continued:

    > "In short, what petitioner characterizes as the 'government's knowledge of the merits of the entire case' is simply not a relevant issue concerning which the jury should have been permitted to hear evidence."

85. This trial took place in March and April 1976 in the Circuit Court of Pennington County, South Dakota Seventh Judicial District before the Hon. Marshall Young, Judge, and a jury. In March 1979 a petition for post-conviction relief was heard by The Hon. Merton B. Tice, Jr., Judge. At the time of writing (January 1981) the Supreme Court of South Dakota has yet to pronounce on the petition for post-conviction relief. It had affirmed the original conviction on 12 April 1978. See 264 NW 2d. 911 (file 11906).

86. Myrtle Poor Bear's trial evidence was presented on 2 April 1976. It is reported in Marshall trial transcript, pages 99-125.

87. Decision of Judge Tice (75-72), dated 17 July 1979 (denying post-conviction relief to Richard Marshall), page 2.

88. ibid.

89. See petition for post-conviction relief (75-72) dated 12 June 1978, filed on 15 June 1978 in Circuit Court; Section VA, page 5.

90. ibid. Technically called a "Motion to Endorse the Name of Myrtle Poor Bear on the Information".

91. ibid.

92. op. cit. note 87 supra, page 3. Judge Tice's opinion states that Myrtle Poor Bear was "put up" by FBI agents for "the three days immediately prior to their disclosing to the Pennington County Sheriff's office that Myrtle had information bearing upon the Marshall trial." He also says in relation to her second Leonard Peltier affidavit that "on February 23 1976 Myrtle prepared a second affidavit identical to the first, save for a statement that she was in fact present during the shooting of the agents. On February 24, 1976, after Myrtle had been kept in a motel room for three days . . . [she was taken to another FBI agent] for an interview."

93. See appellant's brief (on Richard Marshall's behalf) in the Supreme Court of South Dakota, April 1980, pages 66-67.

94. op. cit. note 87 supra.

95. ibid. page 6, paragraph 2 and page 8, paragraph 2, taken together.

96. ibid. page 2, paragraph 3 and page 3, paragraph 1, taken together.

97. Emphasis added. ibid. page 3, paragraph 1.

98. ibid. page 4. The statement in question was an expression of agreement on the part of the US attorney who prosecuted Leonard Peltier, when, on 12 April 1978 a judge of the US Court of Appeals said that the FBI conduct over the affidavits indicated that "they must be willing to fabricate other evidence". (See text to note 62 supra.)

The judge also mentioned an obligation not to "give the appearance of manufacturing evidence by interrogating incompetent witnesses". op. cit. note 83 supra, page 51a.

The US attorney had said earlier that Myrtle Poor Bear was "incompetent in the utter, utter, utter ultimate sense of incompetency as recognised by defense counsel on more than one occasion." op. cit. note 83, supra, page 50a.

99. See text to note 82 supra and Chapter I.

100. See text to note 97 supra and Chapter I.

100a. South Dakota Supreme Court. Opinion dated 20 May 1981 (12982-a-JF).

Richard Marshall -v- State of South Dakota. (Argued 9 September 1980), pages 9-10.

100b. See especially Marshall - post-conviction appellant's brief, pages 34-40.

100c. op. cit. note 100a supra, pages 10-11.

100d. ibid. page 12. Wollman, Chief Justice (dissenting).

100e. ibid. page 17.

100f. ibid.

100g. ibid. page 18.

100h. ibid.

100i. ibid. page 19.

100j. ibid.

100k. ibid. page 12.

1001. ibid. page 22.

100m. ibid. page 21.

100n. ibid. page 22.

101. See Church, III, pages 225-271, "The Use of Informants in FBI Intelligence Investigations"; and the discussion in op. cit. Elliff, note 17 supra, pages 120-127, "Informants and Covert Infiltration".

102. See Chapter I.

103. See Chapter I, and compare the case of Elmer Pratt in Chapter II, part Two.

104. The former Director of the FBI, Clarence Kelley, testified in the Butler, Robideau trial in the following terms. (Butler, Robideau transcript, Vol. XVII, pages 2615-2616). The evidence given on 7 July 1976 is reprinted on page 9 of Appendix A of Leonard Peltier's appellant's brief in the US Court of Appeals for the Eighth Circuit:

> "Yes. I am sure that we have informants and possibly have paid informants but I don't know how many who do, on occasion, concern themselves with some members. Nor to

104. continued

> get into the whole organization and to, for example, inform on the entire membership . . . I am actually unaware of them having - I am speaking of informants now - attended meetings. They could very well have done so. I don't know. I have never heard of agents attending meetings, but I just don't know."

Church, III, pages 234-235 contains the following passage:

> "Extremist informants are those used in the investigation of 'extremist' activities, defined in Section 122 of the FBI Manual in the same way as subversive activities but also including 'denying the rights of individuals, under the constitution'. [FBI Manual of Instruction, Sec. 122A (1-e).] In practice, 'extremist' investigations have concerned violence-prone groups composed of members of one or another race. Section 122 is intended to cover what the Bureau calls 'White Hate' groups, such as the Ku Klux Klan, and 'Black Nationalist Hate' groups, such as the Black Panther Party and the Nation of Islam. It also applies to some American Indian groups such as the American Indiam Movement, as well as a variety of terrorist organizations engaged in 'urban guerrilla warfare'. (FBI Manual of Instruction, Sec. 122A)."

The up-to-date rules relating to informants are considered in the Appendix.

Church reported that Sec. 130A (i) of the FBI Manual of Instruction defined an extremist informant in the following way:

> "An individual whose identity must be protected and who is actively engaged in obtaining and furnishing current information on extremist matters exclusively to the Bureau. Extremist informants include any individual:
>
> "(a) Who is a member of or attends meetings of an extremist group (white, black or Indian) which has a propensity for violence or which strives to deny individuals certain constitutional rights through the use of force, violence or intimidation;
>
> "(b) Who is in a position to obtain and provide current information of value concerning such organizations;
>
> "(c) Or who furnishes information on extremists who may or may not be members of extremist groups but are engaged in planning or carrying out any type of guerrilla warfare against established institutions, which may be in violation of local, state, or federal laws." (Emphasis added).

105. The New York Times, Thursday 13 March 1975.

106. Plus a $1,000 bonus at one point. The Washington Post, 14 March 1975; Chicago Tribune, 13 and 14 March; Chicago Daily News, 13 March; and Chicago Sun Times, 14 March, reported similar figures for Douglas Durham's monthly income from the FBI. The Des Moines Sunday Register, 27 April, reported him as saying, "That's a lot of smoke."

107. The Wounded Knee trial lasted eight and a half months. The charges were dismissed on 16 September 1974. The figures appearing in the text to footnote 108 were taken from an FBI deposition dated 2.10.75.

108. Church, III, page 261 citing:

> "(a) FBI Manual of Instruction Sec. 107, I (2a);
>
> (b) FBI Manual of Instruction Sec. 107, L (3);
>
> (c) FBI deposition, 2.10.75, page 6;
> Cook, 12.2.75, Hearings, Vol. 6, page 12."

109. See US -v- Banks and Means

> 374. F. Supp. 321 (SD 1974)
> 368. F. Supp. 1245 (SD 1974)
> 383. F. Supp. 368 (SD 1974)
> 383. F. Supp. 389 (SD 1974) affirmed.
> 513. F. 2d. 1329

The trial was before Chief Judge Nichol in the United States District Court, D. South Dakota, W.D.

110. See Chapter I.

111. This would accord with the rules.

112. See Banks, Means Transcript, Vol. 45, pages 8675-8704.

113. See pages 8683 and 8704. (Emphasis added).

114. Amnesty International understands that there was a court order to this effect.

115. Amnesty International has not seen the lists.

116. Banks, Means Transcript, Vol. 52, page 10,172.

117. The New York Times article cited above reported that Douglas Durham's "cover was broken on Friday . . . when, after some members of the group became suspicious, he was confronted with law enforcement documents that proved his role as an informer."

118. US -v- Dodge, Escamilla, Alvarado and Williams, Cooper, Fleury, Wesaw and Johns. Opinion of US Court of Appeals for the Eighth Circuit. Appeal from the United States District Court for the District of Nebraska. (Submitted 17 October 1975. Filed 15 July 1976.) 75-1173; 75-1398; 75-1483; 75-1485; 75-1498. Consolidated appeals.

119. ibid. pages 14 and 15.

120. Text withdrawn.

121. 339 F. Supp. 228 (N. Dist, Iowa 1975).

122. ibid. page 237.

123. 397 F. Supp. 277 (1975).

124. ibid. page 281. The opinion also states that Douglas Durham "was under explicit instruction not to report any defence strategy and did not do so". (In this case). This should be compared with a report in The New York Times, 14 March 1975, (citing United Press International) that Judge Nichol, who had heard the Banks and Means case, disqualified himself from presiding over any other cases arising from the incident. The government requested him to do so and apparently alleged that he was prejudiced and biased. "Prior to his announcement Judge Nichol had said that he had been shocked by reports that . . . Durham . . . was a paid informer for the FBI. Judge Nichol said he believed the Government knew of Mr Durham's connection during last year's trial: 'I believe I was deliberately misled . . .', he said."

125. Emphasis added. 397 F. Supp. 277, 284 [1, 2] (1975).

126. Hence the Douglas Durham issue.

127. op. cit. note 118 supra.

128. ibid. pages 12 and 13. When the FBI do not obey the rules, it creates a climate of distrust among those who are the victims of the harassment. The result can be a diminution of confidence in judicial opinions which, quite rightly, stress the exact terms of what is on the court record. See Chapter I.

129. 532 F. 2d. 1182 (1976).

130. ibid. pages 1197, 1198. Citing US -v- Cooper 397 F. Supp. 277, 285 (D. Neb. 1975).

131. See text to note 12 supra.

132. See text to note 62 supra.

133. See text to note 13 supra.

134. Emphasis added. See text to note 97 supra.

NOTES TO CHAPTER IV

1. Amnesty International Statute: Article 1a.

2. Amnesty International Statute: Article 1b.

3. See Chapter II.

4. See, for example, 21 Am. Jur. 2d. (Criminal Law) paragraph 231 (Discriminatory enforcement), and cases cited there and in the Cumulative Supplement (June 1979).

5. US -v- Banks et al. 368 F. Supp. 1245 (1973) US District Court D. South Dakota, WD. See page 1251.

6. ibid.

7. See Chapter I.

8. But see cases discussed in this chapter.

9. A court would probably take most of these matters into consideration. See op. cit. note 5 supra, pages 1252-1253 [13].

10. See, for example, op. cit. note 5 supra, page 1253 [12].

11. ibid. pages 1251-1252 [12]. This applied apparently in the case of those who had given up their draft cards.

12. This consideration is based on whether, in Amnesty International's opinion, there is any likelihood that a pattern of misconduct may exist, and if so, whether correctly or incorrectly, this is not being revealed in court.

12A. See text to notes 43-45 in Chapter II.

12B. See Chapter I. This evidence was given by the US Attorney for the District of South Dakota and corroborated by the then US Attorney-General. op. cit. note 5 supra, page 1252 [12].

13. op. cit. note 5 supra. (Defence motion to dismiss). See also 383 F. Supp. 368, 371-372.

14. The difficulty of proving selective enforcement of the law lies in the need to identify the motive underlying a normally secret government decision. Selective law enforcement under COINTELPRO is discussed briefly in Church, III, pages 57-58. See also the discussion in Church, III, pages 58 and 59 on "Interference with the Judicial Process".

15. op. cit. note 5 supra (defence motion to dismiss). See also 383 F. Supp. 368, 371-372.

16. The order of Chief Judge McManus in US District Court, N.D. Iowa, Cedar Rapids Division, 4 August 1975 is used as a basic text here. See 399 F. Supp. 228, 234-238. (1975). The US Court of Appeals for the Eighth Circuit affirmed the order 532 F.2d. 1182 (1976). See especially pages 1195-1196 [23-25]. The original order is contained also in the appendices to a certiorari petition (pages 42a-70a) filed on Leonard Crow Dog's behalf in the US Supreme Court.

17. Allegations of selective enforcement or frame-ups are periodically received at Amnesty's International Secretariat in London.

18. Crow Dog 399 F. Supp. 228, 236 [8] (1975); Banks and Means 368 F. Supp. 1245, 1252 (1973).

19. Crow Dog 399 F. Supp. 228, 235 [8] (1975); Banks and Means 368 F. Supp. 1245, 1252 [13] (1973).

20. ibid.

21. Banks, Means, 368 F. Supp. 1245, 1252 (1973).

22. ibid. page 1253.

23. 399 F. Supp. 228, 234 [1-4] (1975).

24. ibid. The text continues:

> "They further argue that the misconduct of the government associated with these prosecutions evinces bad faith on the part of the government, that is, a motive to harass and intimidate rather than an honest attempt to bring criminals to justice. The bad faith, it is urged, indicates that the selectiveness in prosecution was purposeful and intentional, with the goal of suppressing the First Amendment rights of Indians to associate freely with AIM and to adopt the views espoused by that organization."

25. 532 F.2d. 1182, 1196 [23] (1976) citing US -v- Falk 479 F.2d. 616, 620 (7th Circuit 1973) (en banc).

26. US -v- Wiley 503 F.2d. 106, 107 (8th Circuit 1974).

27. US -v- Alarik 439 F.2d. 1349 (8th Circuit 1971).

28. See note 24 supra.

29. 399 F. Supp. 228, 235 [6] (1975) and see 532 F.2d. 1182, 1196 [25] 1976.

30. ibid.

31. 399 F. Supp. 228, 235 [7] 1975.

32. The evidence was adduced both in Crow Dog and Banks, Means. 399 F. Supp. 228, 235 [8] 1975.

33. ibid. [6].

34. ibid.

35. ibid. [7]

36. ibid.

37. ibid.

38. ibid. [8].

39. See note 9 supra.

40. This is not a question on which Amnesty International has hitherto expressed any view. But see Justice in the American South, Anthony Lester, published by Amnesty International, London, 1965, pages 22-25, "Southern Juries".

41. See Amnesty International Statute: Article 1a.

42. This part of the chapter does not claim to resolve the issues raised; it merely suggests further inquiry. (See Chapter I). Nor is it to be taken as an account of the applicable law or all the issues involved.

43. Practice varies considerably.

44. 409 F. Supp. 115 (1976).

45. The order in response to this motion, dated 3 March 1976, was by Judge van Sickle sitting in the United States District Court, D. North Dakota, Southwestern Division.

46. 409. F. Supp. 115, 116 (1976). The court also said that "only one of the witnesses - a court reporter in the state court - had ever observed the selection of a jury or followed a trial to its conclusion. And the court reporter had never observed the selection of a jury in Federal Court . . . It was apparent that, contrary to the common experience of those who participate in trials, none of the witnesses, including the survey expert, felt that jurors could recognize and discipline their prejudices, and make factual judgments from the evidence before them."

47. ibid. page 116.

48. ibid.

49. 409 F. Supp. 115, 117 [2, 3] (1976).

50. ibid. Emphasis added.

51. ibid. [4].

52. ibid. A.

53. ibid. B1.

54. ibid. 118. B.3. With the prosecution to have six peremptory challenges.

55. This definition is taken from Swain -v- Alabama 380. US 202, 220 (1965). It is given as explanation for the non-lawyer and is not meant to state the exact terms of South Dakota law.

56. See 409 F. Supp. 115, 118 [4]. B.4 (1976).

57. State of South Dakota -v- Wabun Nuwi Nini (11671); Al Cooper (11673); John Concannon (11672); Lois Tiger (11675 and 11676) and Bobi Jo Tiger (11674).

    In Circuit Court, Second Judicial Circuit, State of South Dakota, County of Minnehaha. Court order by Hon. Richard Braithwaite, Circuit Judge, Sioux Falls, South Dakota, 5 May 1975. Appeal by State to South Dakota Supreme Court argued 9 June 1977, opinion filed 14 February 1978, dismissed for want of jurisdiction.

58. Memorandum decision of Judge Braithwaite, page 1.

59. The first motion was filed in December 1974. A second motion was filed shortly before the trial began; it was also denied. The third motion was filed on 2 April 1975.

60. Memorandum decision pages 1-2.

61. ibid. pages 4, 5 and 6.

62. ibid. page 3, paragraph 1, lines 8-10.

63. ibid. paragraph 2.

64. Page 5, lines 4-5.

65. ibid. pages 5-6 citing Ham -v- South Carolina, 409 US 524, 35 L. Ed. 2nd 46.

66. ibid. page 6, lines 6-7.

67. ibid. page 6, paragraph 2.

68. ibid. page 6, paragraph 3 citing the South Dakota Supreme Court Decision: In re Nelson, 19 S.D. 214.

69. ibid. page 7, lines 3-4.

70. ibid. lines 7-10.

71. Amnesty International can express no opinion on this.

72. The State of South Dakota would dispute this. The following points are taken in its appellant's brief in the State Supreme Court:

    "1. The Trial Court abused its discretion in ordering dismissal of criminal actions against the five defendants at the voir dire state (sic), purportedly 'on account of the inability of the defendants to obtain a fair trial'."

    "A. The Trial Court abused its discretion in ordering dismissal of criminal charges against the five defendants, rather than requiring defendants to exhaust available alternatives which could have minimized the impact of pre-trial publicity and the alleged community bias on the jury selection process." (pages 7-16)

    "B. The Trial Court abused its discretion in going beyond the totality of voir dire in seeking justification for dismissals." (pages 16-21)

    "C. The Trial Court abused its discretion by ordering dismissal of criminal charges against the five defendants based on an erroneous finding that community bias against the American Indian Movement would make it impossible to select an impartial jury." (pages 21-25)

    "D. The Trial Court erred in considering the need for judicial economy as a partial basis for dismissal. Particularly in light of the fact that the court could have imposed reasonable limits on the scope of voir dire." (pages 25-28)

73. State of South Dakota -v- Adolph Plenty Horse. 184 N.W. 2d. 654.

74. Conviction without a jury in the Circuit Court of Minnehaha County, South Dakota Second Judicial Circuit, 15 December 1975. On 31 December 1975 Means was sentenced to four years' imprisonment in the South Dakota Penitentiary, credit being given for time spent in jail awaiting trial.

75. See the argument advanced on behalf of Means on page 51 of his appellant's brief in the Supreme Court of South Dakota, (No. 11826). "Courts have long recognised that a fair trial cannot be had where the disparity of resources between the State and the accused is so great as to deprive the adversary process of any real meaning."

76. ibid. page 54. "Investigative work, and the testimony of expert and other witnesses, are integral to the adequate presentation of the defense; they are not mere niceties or luxuries."

77. ibid. page 3.

78. ibid.

79. ibid. page 2. et. seq. "Summary of the Nature and Procedural History of the Case". (On page 1 of the state's respondent's brief in the Supreme Court it was said that the defendant's summary of the procedural history was accepted.) This describes in brief the jury selection process including voir dire, motions, affidavits and arguments.

80. ibid. page 6. Referring to Settled Record 352; referring to voir dire transcript 26, pages 4743-4754.

81. See appellant's brief in the Supreme Court of South Dakota, (on appeal from the Circuit Court of Minnehaha County. South Dakota Second Judicial Circuit) Sup. Ct. No. 11826. Page 24. paragraph 4 citing Settled Record 766-767; 768-769; 772. Stare Decisis may be understood in lay terms as the legal doctrine of precedent whereby judges may be bound to follow the decisions in earlier cases.

82. ibid.

83. ibid. paragraph 3 citing Settled Record 766.

84. Respondent's brief (by the State) in Supreme Court, page 15.

84A. Memorandum in Support of Petition for Writ of Habeas Corpus. No. CIV. 78-4075. US District Court, District of South Dakota, Southern Division. USA ex rel. Russell C. Means -v- Hon. Herman Solem, Warden South Dakota Penitentiary, Sioux Falls, South Dakota.

> "The defendant claims that because of the considerable publicity prior to trial, it should be assumed without further proof that the prospective jurors from Minnehaha County were in fact prejudiced. In other words, the defendant is urging this court to adopt what is referred to in some jurisdictions as the 'inherent prejudice' theory. Pamplin -v- Mason, 364 F.2d. 1 (5th Cir. 1966). US -v- Denno, 313 F.2d. 364 (2d. Cir. 1963). Courts holding this view have declared that evidence of pervasive community bias and prejudice is sufficient for reversal, even without the showing of a clear nexus between community feeling and jury feeling.
>
> "This court rejects 'inherent prejudice' theory and instead reaffirms what by statute is required, namely, that a clear nexus between community feeling and the jury feeling must be shown in order to justify reversal of the case (Slip. op. pages 11 and 12)."
>
> This rule was challenged by lawyers for Russell Means.

85. But note the state's argument on page 23 of its respondent's brief:

> "Finally the finding of community bias by the trial judge in Wabun Nuwi Nini is refuted by several cases involving AIM defendants which were successfully tried in the Second Judicial Circuit Court after the date of the trial court's decision."
>
> CR. 74-99, State -v- Edgar Bear Runner - not guilty.
> CR. 74-111 State -v- Russell Means - not guilty.

86. See Chapter I.

87. Respondent's brief pages 17 and 18:

> "The State vigorously urges that a defendant who actively seeks out pre-trial publicity, as did Mr Means, should be stopped from asserting that prejudice which was generated by his own actions. It seems somewhat peculiar that the defendant now asserts that pre-trial publicity was so significant as to prevent him from receiving a fair trial, when the publicity was to a certain extent the product of his own efforts.
>
> "To demonstrate the pervasiveness of pre-trial publicity and the inability of the defendant to secure a fair and impartial jury, the defendant points to the results of a public opinion survey which was conducted by Professor Shulman before the 'courthouse riot cases' came to trial.
>
> "The State believes that the Shulman study was implemented to establish the existence of community bias; and not to determine whether such bias in fact existed. The 'motivated' interviewers were ardent supporters of AIM, affiliated with the Wounded Knee Offense-Defense Committee. The surveys were conducted before the courthouse incident occurred [the offence in question was a riot in the courthouse], in other areas of the state, in connection with other crimes, involving other defendants."

88. See text to note 109 infra.

89. See Chapter I.

90. This is the same case as is referred to in text to note 74 supra.

91. State -v- Russell Means 257 NW 2d. 595, 596. There were nine conditions of bail in all. See page 604 and 440 F. Supp. 544, 546 (1977).

92. ibid.

93. ibid. page 597 [1].

94. ibid. page 597 [1] and 598 paragraph 3, taken together. See also page 602.

95. ibid. pages 597 and 598

96. ibid. page 601 [6].

> "We say this not to prejudge defendant's guilt or innocence in the instant case, but to recognize that the trial court had a rational basis upon which to impose as a condition of bond on appeal a prohibition against defendant's participation in any American Indian Movement activities except fund raising and activities within the courts. Thus we find no infringement of defendant's rights to freedom of association, speech and travel under condition 4."

97. ibid. page 603 citing the "cold record" of the referee's finding that the bail condition had been broken.

98. ibid.

99. ibid. Emphasis added.

100. ibid. pages 604-606. Justice Morgan, concurring in part and dissenting in part.

101. On 6 February 1973 a demonstration was mounted in Custer, South Dakota, by American Indians who felt aggrieved because charges of second degree manslaughter had been preferred against a white man who had killed an Indian. They believed that a more serious charge would have been proper in the circumstances. A riot ensued and buildings were set on fire. The Indians alleged that the cause of the riot was an overreaction by law enforcement personnel. Twenty-eight people were arrested and charged variously with riot where arson was committed, arson, assault, burglary and injury to a public building.

102. This incident arose from the refusal of a group of American Indians to stand up in court for a judge whose rulings in a particular case they believed to have been racially biased. The judge ordered the court to be cleared and a police "tactical squad" some 25 officers strong came in to do the job. A fight developed with each side later accusing the other of having started it. A number of American Indians who were waiting outside the courthouse heard the noise from within and tried to enter the building, causing damage to windows and doors in the process. Amnesty International was informed of 13 arrests.

103. Emphasis added.

104. 257 NW 2d. 595, 605-606.

105. United States ex rel. Means -v- Solem 440 F. Supp. 544 (1977)

Herman Solem was the respondent due to his position as Warden of the South Dakota State Penitentiary, Sioux Falls, SD. The application was for a writ of habeas corpus on the ground that the imprisonment of Russell Means by the State of South Dakota, was a violation of the Federal Constitution.

106. Chief Judge Nichol, US District Court, D. South Dakota, SD.

107. See Chapter III, note 28 and text thereto.
Compare with Revolutionary Activities within the United States. The American Indian Movement. Report of the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, United States Senate, 94th Congress, 2nd. Session September 1976. (Committee Print, USGPO, Washington 1976).

108. 440 F. Supp. 553, 549-552. [8], [9], [12], 1977.

109. 440 F. Supp. 553, 549 [8] 1977. Note also that dissenting Justice Morgan in the Supreme Court of South Dakota said that Russell Means' "name is practically synonymous with AIM. When he opens his mouth to speak the audience hears the voice of AIM." (257 NW 2d. 595, 606.)

NOTES TO APPENDIX

1. See The Use of Informants in FBI Domestic Intelligence Investigations, Church, III, pages 225-270, for the position up to 1976.

2. See text to note 21 in Chapter III.

3. Church, III, page 263, citing GAO study, page 27.

4. ibid. pages 263 and 264.

> "Under current standards, full domestic intelligence investigations may be opened on groups and individuals - and thus informants may be recruited and targeted against them - if (1) they have, or allegedly have, violated certain statutes; (2) they are 'engaged in activities which may result in' a violation of these statutes; (3) they advocate activities which may result in a violation of these statutes."

Page 264, footnote 204 says that:

> "FBI Manual of Instruction, Section 87, A (1) (4); Section 122. A. (1) (2). Section 87.A. (1) dealing with subversive investigations, provides for example: 'Investigations conducted under this section are to be directed to the gathering of material pertinent to a determination whether or not the subject has violated or is engaged in activities which may result in a violation of (certain statutes) or in fulfilment of Departmental instructions. [Emphasis added]
>
> "The manual further provides that 'subversive organization' or 'subversive movement' denotes a (FBI. MOI Sec. 107,A (4)) group 'which is known to . . . advocate subversive activities'. [Emphasis added]. Subversive activities are defined in terms of activities which violate or may violate relevant statutes. (FBI. MOI Sec. 107, A (1).)"

5. 15 December 1976. Some of the policy issues debated before the new guidelines are considered in The Reform of FBI Intelligence Operations, John T. Elliff (see note 17 to Chapter III), pages 120-127. See also "Policy and Constitutional Issues Raised by the Use of Intelligence Informants", Church, III, pages 230 and 231.

   Before the Guidelines, the standards for intelligence informants were contained in internal FBI directives. They were capable of being changed by FBI officials as no specific statutes or published government regulations applied. Church, III, pages 262 and 263.

   See both publications cited in this note for the influence exercised by successive Attorneys-General in this area.

6. Emphasis added. op. cit. Elliff, page 215, re informants as other than FBI employees. See Chapter II, notes 95 and 99.

7. ibid. page 216.

8. See the Pratt case (Chapter II, Part Two).

9. Informant Guidelines: A1.

10. ibid.

11. ibid.

12. ibid. A2.

13. ibid. A3. As well as past or potential involvement in the matter under investigation or related criminal activity, his or her proven reliability and the means, if any, to verify the information provided.

14. ibid. A4.

15. ibid. A5.

16. ibid. B1.

17. ibid. B2.

18. ibid. B3.

19. ibid. B4.

20. ibid.

21. See Chapter II.

22. Informant Guidelines Section C.

23. Church, III, page 264. Intelligence informants are not limited to reporting on the planning or commission of criminal acts or violence.

24. op. cit. Elliff, page 93 and see text to notes 43-46 in Chapter III.

25. op. cit. Elliff, page 102, citing the statement of Attorney-General Griffin Bell before the Committee on the Judiciary, United States Senate, 20 April 1978.

26. ibid.

27. ibid.

28. ibid.

29. Church, III, page 265.

30. ibid. citing FBI Manual of Instruction, Section 107, A (12).

31. ibid. citing FBI. MOI, Sec. 107, F (12e).

32. Church, III, page 265.

33. ibid. but note that "defense plans or strategy" appears to have been undefined in the FBI manual. See text to note 88 in Chapter II.

34. See Church, III, pages 266-270. "Limits on an Informant's Conduct and Behavior".

35. Church, III, page 266, citing FBI. MOI, Sec. 107, F (4) (7).

36. See Church, III, page 232, footnote 20, where the case of White -v- Davis, 533 Pac. Rep. 2d. 222, 232 (California Supreme Court 1975) is referred to.

37. See Church, III, page 231, where the cases of Hoffa -v- United States, 385 US 293 (1966) and Lewis -v- United States, 385, US 206 (1966) are referred to.

38. Emphasis added. Church, III, page 232.

39. See Chapter III.

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