

EXHIBIT A

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Bundy defendants interviewed in undercover FBI operation



Rancher Cliven Bundy, currently in federal custody, displays a bouquet of desert foliage, the type his cattle graze on, during a news conference near his Bunkerville ranch in April 2015. (David Becker/Las Vegas Review-Journal)

By JENNY WILSON LAS VEGAS REVIEW-JOURNAL

March 22, 2017 - 7:53 pm



Updated March 23, 2017 - 4:18 pm

Undercover FBI agents posed as documentary filmmakers for a production titled “America Reloaded” to draw statements from the men who rushed to support rancher Cliven Bundy in his 2014 stand against the federal government.

The undercover operation has been alluded to in previous court filings, but it was detailed in federal court Wednesday when FBI Special Agent Charles Johnson testified as a government witness in the trial against six men accused of conspiring to block Bureau of Land Management agents from impounding Bundy’s cattle.

Agents videotaped undercover interviews with, among other people, Scott Drexler and Eric Parker — two of the defendants in the first trial. Federal prosecutors played the videos in court Wednesday during Johnson’s testimony, and in doing so, gave jurors a window into the defendants’ minds.

Drexler told the undercover agent he drove to the Bundy family ranch after reading about the protests online.

“What I was looking for was just a show of support ... it seems as if when there are armed people around a situation, then the authorities have to be a little more civil, have to treat you like a person,” he said. “If nobody is facing any kind of consequences for their actions, they can just do whatever they want.”

When asked what protesters’ objective was on April 12, 2014, when they arrived en masse to the Gold Butte area where federal agents were impounding cattle, Drexler replied: “Basically the objective that I think there was was just a show of force.”

Drexler said he carried his rifle and his pistol. He assumed a position on the Interstate 15 overpass, overlooking the impoundment site. Federal

prosecutors have introduced photos of Drexler pointing his rifle through a crack in the jersey barrier.

“We had the cowboys and Cliven all down below us, and BLM on the other side of the gate,” Drexler said on the footage. He said that when BLM “started moving to the gate with weapons and full combat gear, it started to get a little bit tense.”

The standoff occurred after protesters were told at a morning rally that authorities decided to cease the cattle roundup.

The undercover agent asked what would have happened if “somebody just farted.”

“I don’t think a loud fart woulda put anyone off, but a gunshot sure would have,” Drexler said.

Parker provided a similar narrative. He and Drexler, who are friends from Idaho, drove to the Bundy ranch together.

“I want to stand for the Constitution ... I don’t think you have to be in the militia for that,” Parker said on the video. “The goal was peaceful end.”

Parker said he raised his rifle from the bridge to get a clear vantage point.

“If they started shooting at people in the crowd, I would have been able to lay down cover fire,” Parker said, which he later explained was shots used to distract anyone who might have fired at the unarmed men, women and children in the sandy ditch below him.



Johnson had not finished testifying when court adjourned Wednesday. The government is expected to call one more witness before resting its case.

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DEFENDANT WAS AN INFORMANT

An FBI witness testified on cross-examination Wednesday that defendant Gregory Burleson was a paid FBI informant starting in 2012, two years before the events that led to his indictment as one of Bundy’s co-conspirators.

FBI Special Agent Michael Capato did not disclose the information Burleson provided, but previous testimony has indicated that Burleson was active in Arizona militia groups. It was unclear from testimony when or if Burleson stopped being an informant.

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EXHIBIT B

FBI posed as documentary filmmakers to conduct interviews with Bundy Ranch supporters



In this April 12, 2014, file photo, the Bundy family and their supporters fly the American flag as their cattle is released by the Bureau of Land Management back onto public land outside of Bunkerville, Nev. (AP Photo/Las Vegas Review-Journal, ... more >

By Andrew Blake - *The Washington Times* - Friday, March 24, 2017

Undercover FBI agents disguised as documentary filmmakers were deployed to the Nevada desert in 2014 to speak with supporters of rancher Cliven Bundy amid an armed standoff with the federal government, an agent testified this week.

Testifying on behalf of the government in its case against two of those supporters, FBI Special Agent Charles Johnson told jurors Wednesday how the bureau used a bogus film crew to gather statements during the standoff, the Las Vegas Review-Journal reported.

Footage from the purported film, "America Reloaded," was played in court as jurors prepared to decide the fate of Scott Drexler and Eric Parker — two of six defendants accused of conspiring to keep the U.S. Bureau of Land Management from impounding Mr. Bundy's cattle during the widely reported 2014 row between federal BLM agents and the rancher and his supporters.

Mr. Drexler told the supposed filmmakers that he had traveled from Idaho to the Bunkerville ranch upon reading about protests being waged against the BLM after its agents tried to seize cattle from Mr. Bundy following a lengthy legal dispute.

"What I was looking for was just a show of support ... it seems as if when there are armed people around a situation, then the authorities have to be a little more civil, have to treat you like a person," he said on camera. "If nobody is facing any kind of consequences for their actions, they can just do whatever they want."

The objective of individuals who assembled on Mr. Bundy's behalf "was just a show of force," Mr. Drexler told the interviewers, the newspaper reported.

Mr. Parker, meanwhile, said his own involvement stemmed from his desire "to stand for the Constitution."

"I don't think you have to be in the militia for that," Mr. Parker said on the video. "The goal was peaceful end."

Nonetheless, jurors were showed footage in which Mr. Parker demonstrated precisely how he planned to use his rifle to get a clear vantage point in the event the standoff turned violent.

"If they started shooting at people in the crowd, I would have been able to lay down cover fire," Mr. Parker said on tape.

Prosecutors have charged six men in all with charges stemming from the standoff, including conspiracy, firearm offenses and assault on a federal officer, including Mr. Bundy and two of his sons, Ryan and Ammon.

Dan Hill, Ammon Bundy's defense attorney, previously took aim over the FBI's use of a bogus film crew when details about the practice emerged in earlier court filings, and said then that it was "troublesome that the FBI would sink to that tactic."

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EXHIBIT C

**The
Intercept_**

AMERICA RELOADED

The Bizarre Story Behind the FBI's Fake Documentary About the Bundy Family

Video: Drone footage filmed by the FBI's fake documentary crew



Ryan Devereaux, Trevor Aaronson

May 16 2017, 12:00 p.m.

Ryan Bundy seemed uneasy as he settled into a white leather chair in a private suite at the Bellagio in Las Vegas. As the eldest son of Nevada rancher Cliven Bundy, who had become a national figure for his armed standoff with U.S. government agents in April 2014, Ryan had quite a story to tell.

Eight months had passed since Cliven and hundreds of supporters, including heavily armed militia members, faced off against the federal government in a sandy wash under a highway overpass in the Mojave Desert. Now, here in the comforts of the Bellagio, six documentary filmmakers trained bright lights and high-definition cameras on Ryan. They wanted to ask about the standoff. Wearing a cowboy hat, Ryan fidgeted before the cameras. He had told this story before; that wasn't the reason for his nerves. After all, the Bundy confrontation made national news after armed agents with the Bureau of Land Management seized the Bundy family's cattle following a trespassing dispute and the accumulation of more than \$1 million in unpaid grazing fees. But the Bundys, aid-

ed by their armed supporters, beat back the government, forcing agents to release the cattle and retreat.

Images of armed Bundy supporters with high-powered rifles taking on outgunned BLM agents circulated widely on social media. As a result, the Bundys became a household name, lionized by the right as champions of individual liberty and vilified by the left as anti-government extremists.

But something seemed off to Ryan about this interview in the Bellagio. While the family's newfound fame had attracted fresh supporters to their cause, it had also inspired suspicion. With a federal investigation looming, who among these new faces could they really trust?

Among the more recent figures in the Bundy orbit was this mysterious documentary film crew. The director, Charles Johnson, was middle-aged, with a silver goatee, slicked-back hair, and a thick southern accent. His assistant, who identified herself as Anna, was tall and blond. A website for their company, Longbow Productions, listed an address in Nashville, Tennessee, but the Bundys could find no previous examples of their work.



An excerpt from an interview that the purported Longbow Productions film crew conducted with Ryan Bundy, obtained by The Intercept.

As the cameras recorded, Ryan’s skepticism was plain. At times, his right eye rolled back into his head, the result of a childhood accident that paralyzed half of his face, and his gaze shifted to figures outside the shot. “There’s been a lot of red flags in the community about Longbow Productions,” one of his companions explained to the film crew. “No bullshit, straight talk. ... It’s almost like you’re trying to make us incriminate ourselves.”

With a conspicuously placed copy of the U.S. Constitution poking out of his left breast pocket, Ryan turned his gaze to Johnson.

“We really do want to work with you, if that’s really what’s going on,” he said. But his family needed to know, “Is this just a mole project to garner information that will then be given to the feds?”

Johnson insisted the project was a legitimate endeavor. “I want a truthful documentary.”

“Alrighty,” Ryan said. “Let’s proceed.”

“Quiet on the set,” Johnson told his crew.

Ryan should have trusted his instincts. Johnson and his colleagues were not documentarians. They were undercover FBI agents posing as filmmakers. By the time they sat down with Ryan, Johnson and his team had spent eight months traveling to at least five states to film interviews with nearly two dozen people about the Bundy standoff, all part of an FBI effort to build criminal cases against the Bundys and their supporters.

The story of the FBI’s fake documentary crew, revealed in more than 100 hours of video and audio recordings obtained by The Intercept, offers an unprecedented window into how federal law enforcement agents impersonate journalists to gain access to criminal suspects. The raw material produced by the FBI was presented under seal in the U.S. District Court in Nevada, where Ryan Bundy, his father, Cliven, and his brothers, as well as more than a dozen supporters, were charged with conspiracy, assault, weapons offenses, and other crimes related to their standoff with the government.



An excerpt from an interview with Cliven Bundy, produced by undercover FBI agents posing as filmmakers and obtained by The Intercept.

The Bundys consider themselves true men and women of the American West. Cliven Bundy, a Mormon patriarch with 14 children and at least 60 grandchildren, operates a cattle ranch with his family 80 miles east of Las Vegas that was settled by Cliven's ancestors in the 1880s. "The ranch has been home for me most all my life," Cliven told Johnson and the other undercover FBI agents, believing they were making a documentary about his life and the standoff.

Cliven and his family aren't wealthy ranchers, and their land has only offered a subsistence lifestyle at best. As generations of western ranchers have done, Cliven's family built a home near a water source on private property and then allowed cattle to graze freely on surrounding lands owned by the U.S. government. A dilapidated semi-trailer, broken-down cars, old tires, and wooden shipping pallets litter the dirt road leading into the Bundy property. The ranch is set up like a wagon

wheel, with the Bundy home at the center surrounded by irrigated fields of alfalfa and melons. From there, the ranch then extends out in every direction, covering more than 600,000 acres, counting government land, where Cliven's 400 head of cattle graze.

The Bundy family's dispute with the federal government began nearly 30 years ago, when conservation officials declared the desert tortoise an endangered species, resulting in severe restrictions to grazing rights for ranchers in Clark County, Nevada. Some of Cliven's neighbors fought the government in court, but in time, all but Cliven abandoned their ranches. Cliven took another tack, refusing to renew his permit for grazing rights. He continued to allow his cattle to graze federal lands, damn the consequences. As far as Cliven was concerned, the land was public and no one was using it anyway. The government hauled Bundy into court, and in 1998, a U.S. District Court judge issued an order prohibiting Cliven from using the lands. Cliven refused to comply, and his unpaid grazing fees piled up, reaching more than \$1 million. In July 2013, another District Court judge issued an order demanding that Cliven not trespass on federal lands. And then in April 2014, the Bureau of Land Management, with the help of so-called contract cowboys, began to round up Cliven's trespassing cattle.

The roundup set off a storm of rumors among the Bundys and their local supporters – that the cattle were being mistreated, that they were dying or being killed intentionally, and that the government was burying them in mass graves. On April 9, the Bundys and other locals intercepted a convoy of contract cowboys protected by BLM agents. The crowd stopped the line of trucks in an attempt to see whether they were transporting dead cattle. A confrontation ensued. Cliven's 57-year-old sister was thrown to the ground by a BLM agent. Cliven's son Ammon kicked a BLM dog and was tased twice as result. All of it was captured on camera.

One video in particular, shot by Pete Santilli, blew up online and would later be referenced repeatedly by subjects in the FBI's undercover documentary production. The clip, which has now been seen more than 1.8 million times on YouTube, turned Cliven's story into a cause célèbre among rural conservatives, right-wing groups, and anti-government militias, who viewed the cattle roundup, and the force used during that confrontation, as an abuse of government power. Cliven, who had appeared on Santilli's radio show the day before the clash describing how hundreds of contract cowboys protected by hundreds of armed federal agents were taking over his ranch, won a massive audience of fired-up supporters from around the country. "They have my home surrounded," Cliven said. The news quickly spread through social media, fueled by photographs that appeared to show federal agents aiming sniper rifles from a hilltop. Sean Hannity soon interviewed Cliven on Fox News about the situation.

Cheered by Tea Party conservatives, the Bundys garnered public support from Republican Sens. Rand Paul of Kentucky and Dean Heller of Nevada. That support later faded after Cliven was caught on video making racist comments about "the negro" and suggesting that African-Americans would be "better off as slaves." There was no question that the Bundys energized some devout bigots. Stanley Blaine Hicks, aka Blaine Cooper, a propagandist for the family's cause, once filmed himself smearing a Quran with bacon, setting its pages on fire, then shooting it with a bow and arrow (he boasted about the stunt in a secretly recorded conversation with the FBI). At the same time, however, the family's supporters were not a monolith. For many, the Bundys' high-profile battle with the federal government became symbolic of economic and cultural losses that resonate deeply in western ranching communities.

Hundreds of people, including militia members with assault rifles, began to arrive at the Bundy ranch. "We need guns to protect ourselves from a tyrannical government," said Jim Lordy, from Montana, in an in-

interview with a Las Vegas TV news crew. Local authorities, in a poorly planned attempt to corral protesters into designated areas, set up zones marked by signs that read, “First Amendment Area.” The signs only inflamed perceptions that the government was overstepping its constitutional authority.

The protests grew so large that the Bundys’ supporters blocked a stretch of Interstate 15 between Las Vegas and Salt Lake City. The situation came to a head on April 12, when scores of protesters confronted the BLM in a wash outside the Bundy ranch, as gunmen took up positions on the hillsides and overpasses around them. While the authorities had already [set in motion](#) plans to release the cattle the night before, the presence of so many armed militiamen, armed federal agents, and unarmed civilians escalated tensions dramatically. In its indictment against Cliven and his followers, the government would later describe the standoff as a “massive armed assault.” Fearing for the safety of its agents, and envisioning another violent showdown like the Ruby Ridge incident of 1992, the BLM released Cliven’s cattle that day and withdrew from land near the Bundy ranch on April 21, 2014.

Cliven had beaten the government, or so he thought. What he didn’t realize was that an undercover FBI investigation, intended to build cases against the Bundy patriarch and his supporters for what happened during the standoff, was about to begin.



Ammon Bundy speaks to the media as others look on at the Malheur National Wildlife Refuge near Burns, Oregon, on Jan. 4, 2016. Photo: Rob Kerr/AFP/Getty Images

The FBI office in Las Vegas called on an undercover agent using the name Charles Johnson to take part in an operation that would reveal how the Bundy protests were organized and whether anyone had violated federal law. They came up with the idea of creating a fake documentary production company whose filmmakers would interview Cliven and the protesters.

Johnson would later testify that the plan was “unique” and “a little bit different,” in that instead of seeking to expose a crime that had not yet happened, the fake documentary sought to uncover information “after the fact.”

The agent’s assessment was true, but it was also an understatement. Not only did the FBI’s plan involve detailing events that had already taken place, the events in question were widely documented, as was the in-

involvement of the individuals the bureau ultimately targeted. A quick Google search would reveal hundreds of interviews, photographs, and social media posts chronicling nearly all those individuals' participation in the standoff. What's more, even if the undercover team could coax interviewees into making comments more incriminating than the information already available in the public sphere, any evidence gleaned from the operation would require disclosing in court that the FBI had taken the controversial step of impersonating journalists.

Despite a clear risk that considerable resources would be expended to gather publicly available information, incurring a guaranteed backlash from legitimate members of the news media along the way, Johnson and the FBI pressed on, setting up a fake website for the production company and deploying cameras, lights, sound equipment – everything they needed to appear professional – for the operation. The working title of the FBI's documentary was “America Reloaded.”

While the scale of the operation was unlike anything that has been revealed in recent years, this wasn't the first time FBI agents had impersonated the news media. In June 2007, a 15-year-old high school student near Seattle repeatedly emailed bomb threats to his school, causing daily evacuations of the building. Because the student used proxy servers to hide his location, the FBI was unable to track him. As a result, FBI agents posed as an Associated Press journalist and emailed the student individual links to a fake news article and photographs that surreptitiously installed a tracking program allowing the FBI to determine the student's location.

When the FBI's actions were revealed nearly seven years later, the Associated Press and the Reporters Committee for Freedom of the Press, representing 25 other news organizations, wrote letters to FBI Director James Comey and Attorney General Eric Holder objecting to the practice of impersonating journalists in criminal investigations. In a November

6, 2014, letter to the New York Times, Comey defended the practice.

“That technique was proper and appropriate under Justice Department and FBI guidelines at the time,” he wrote. “Today, the use of such an unusual technique would probably require higher level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate.”

In June 2016, the FBI adopted an interim policy that requires undercover operations involving the impersonation of news media to be approved by the deputy director of the FBI in consultation with the deputy attorney general. Because the FBI’s fake documentary project in Nevada began before this policy was enacted, it’s unclear whether senior leaders at the FBI signed off. The FBI did not respond to questions for this story, including a request for that information. Instead, the bureau released only a prepared statement to The Intercept: “The FBI conducts investigative activity in accordance with the Attorney General’s Guidelines and the Domestic Investigations and Operations Guide. These authorities provide safeguards intended to ensure that FBI employees act in accordance with the law and the Constitution.”



Cattle that belong to rancher Cliven Bundy are released near Bunkerville, Nev., after U.S. officials ended a standoff with hundreds of armed protesters on April 12, 2014. Photo: Jim

Urquhart/Reuters

On the night of June 14, 2014, two months after BLM agents released Cliven Bundy's cattle and retreated from the armed supporters, Johnson placed his first call to the Bundy ranch. The undercover FBI agent had hoped to speak to Cliven, but Cliven's son Ammon took the call. If Johnson and his team had done their research, it was not evident from this first phone call. Despite the fact that Ammon was the most famous member of the Bundy clan after his father, the FBI agent appeared to have no idea who he was.

00:31  

An excerpt from an audio recording of a phone call between undercover FBI agent Charles Johnson and Ammon Bundy.

Johnson laid out the “business opportunities” he envisioned for the Bundy family. “I do a lot of documentary work,” he said. “I’ve kind of been watching this situation unfold, kind of from a distance, and just to be real honest with you, I’m amazed at the support and the actual momentum that your dad has been able to gather. It’s truly impressive to me.” Johnson said his vision for the documentary was to tell the story of Cliven, whom he described as a “folk hero,” and the movement he inspired.

Ammon was not sold on the idea, explaining that his family had received many media and documentary requests since the standoff. “We want to reach a lot of people,” Ammon explained. “But we also can’t do 100 different documentaries.”

01:00  

An excerpt from an audio recording of a phone call between undercover FBI agent Charles Johnson and Ammon Bundy.

Johnson then proposed buying the rights to the Bundy family's story. But Ammon said they weren't interested in money. "I'd be willing to meet and talk with you, but I think you need to get more familiar with the story first and then really see if you want to take on this thing," Ammon said.

It was a rocky start for the undercover FBI operation, but the agents pushed forward. Less than two weeks later, Johnson, Anna, and at least two other undercover agents went to the Bundy ranch. As they rolled up on the property, Anna read into a concealed microphone the license plates of vehicles she saw.



A Go-Pro video, obtained by The Intercept, of undercover FBI agents arriving at the Bundy ranch.

"Someone's walking towards us," she then said. "Here we go."

It was Brian Cavalier, a heavily tattooed supporter from Arizona. Cavalier wore a handgun holstered on his right hip and a hoop earring in one of his ears. Everyone around the Bundy ranch called him “Booda” for his bald head and round, hairless belly covered with a poorly sketched tattoo of the Chinese Buddha. He had joined the Bundys after watching the video of [BLM agents tasing Ammon Bundy](#). He served as the Bundys’ bodyguard and in the months following the standoff became something of a gatekeeper to the family. As the undercover FBI agents arrived on the property, Cavalier informed them that their visit had not been approved, but he allowed them on the ranch anyway.

As they toured the property, Cavalier described his deployments to Iraq and Afghanistan as a U.S. Marine, and his work with the mercenary company Blackwater.

“Did you ever kill anybody?” Anna asked.

“Yeah,” Cavalier said. “I was a United States Marine Corps Scout Sniper.”

(The U.S. Marine Corps has no record of Cavalier having served.)

The FBI team had come to the ranch to interview Cliven Bundy but only managed to interview Cavalier and Cliven’s wife, Carol. Had Cavalier or Carol known anything about filmmaking, the FBI’s on-camera interviews would have blown their cover. Both were interviewed outdoors, the Bundy matriarch in the harsh sunlight and Cavalier near a livestock pen where the winds were so gusty the audio is at times inaudible. They also filmed dubious B-roll of the ranch, with Johnson directing shots at the horizon, while the cameraman repeatedly directed his attention to the license plates of cars parked around the property. This wasn’t *cinéma vérité*; it was amateur hour. The FBI was just lucky no one at the Bundy ranch knew the difference.

Johnson considered the outing a success. “I think what today does is it gives us tremendous credibility,” he told his FBI colleagues in a conversation captured by hidden body microphones the agents wore.

But in the same conversation, Johnson admitted to concerns that they seemed to be documenting history, not investigating active crimes. “Do you think there’s any more stuff to be gotten out here?” Johnson asked one of his colleagues. “The problem is, we’re the last one to the dance.”

But Johnson’s fake documentary crew would get a lucky break. That afternoon, Cavalier, who was prone to running his mouth, offered a tantalizing lead when asked if the Bundys had any help from people in law enforcement. “There’s a finder’s fee,” Anna offered, suggesting the film crew was ready to pay for such information.

“Is the camera off now?” Cavalier asked.

“Can you turn it off?” Anna said to the cameraman. The body mic Anna wore continued to record the conversation.



An excerpt from an interview with Brian "Booda" Cavalier, produced by undercover FBI agents posing as filmmakers and obtained by The Intercept.

"The information I can give you is very, very sensitive," Cavalier said. "I can tell you this much, just to give you a taste: Every three days, Mr. Bundy's name is ran through a database to check for any wants or warrants, because if they're going to come down here and serve warrants or do anything stupid, they're going to come that way first." As for compensation, Cavalier added, it was on the film crew to make an offer. "It's gonna cost you something, because my ass is on the line and I don't put my ass on the line for nobody," he said.

Less than a week later, Johnson and his crew met Cavalier in a Las Vegas hotel room. They filmed the bodyguard in disguise. The lights were turned down. With a green scarf over his face, Cavalier made claims about the Bundys' penetration of law enforcement, saying they had sources at the BLM and the FBI. Cavalier said that he regularly contacted law enforcement during the standoff to run background checks on individuals showing up at the ranch.

"We definitely ran you guys and found out that you're not related to FBI, BLM, or ATF," Cavalier told the undercover agents.



The Bundy family and their supporters fly the American flag as their cattle are released by the Bureau of Land Management back onto public land outside of Bunkerville, Nev., on April 12, 2014. Photo: Jason Bean/Las Vegas Review-Journal/AP

Whether Cavalier's claims about government sources were true is unclear. What is clear, however, is that questions surrounding law enforcement support for the Bundys became part of a broader script the FBI deployed throughout the summer of 2014 in phone conversations and sit-down interviews conducted with individuals present during the standoff.

Anna coordinated the interviews. The undercover agent would call subjects with a general framing of the documentary, enthusiastically describing the Bundy standoff as the American people's first victory in standing up to the U.S. government in 200 years. Then, presenting herself as a scatterbrained journalist with zero understanding of the Bundys or militia movements in general, Anna would ask interviewees if they feared for their lives during the standoff, if they were willing to

die for their cause, and if they were prepared to take a life for the movement.

Despite a deep-seated distrust of the U.S. government, often rooted in right-wing conspiracy theories, a majority of the people Anna contacted were more than willing to describe their views and participation in the events that day with what appeared to be a somewhat clueless member of the press.

On August 4, 2014, Anna called a Bundy supporter named Greg Burleson, who claimed to have spent more than a decade among Arizona's right-wing extremists, for a time taking part in vigilante border patrols with J.T. Ready, a neo-Nazi who murdered his girlfriend and members of her family before killing himself in 2012. "I am a freaking wild man," Burleson told Anna during their second conversation.

Burleson appeared to be exactly the type of character the FBI was hoping to find. He was hardly in hiding, though. Both before and after the Bundy standoff, Burleson posted Facebook status updates threatening to kill members of law enforcement and asserting that he had pointed his weapon at BLM agents in Nevada. And if the FBI team wanted further information on him, they could have called their colleagues in Arizona, where Burleson had worked as a paid FBI informant.

Over the years, Burleson had provided information to agents in Phoenix, and in 2013, his FBI handler transferred him to Special Agent Adam Nixon, who later participated in the investigations of the Bundys. For reasons that have not been disclosed, Nixon closed Burleson as an informant. By the time Anna called, Burleson was off the FBI books.



Eric Parker aims his weapon from a bridge as protesters gather by the Bureau of Land Management base camp, where cattle seized from rancher Cliven Bundy were being held, near Bunkerville, Nev., on April 12, 2014. Photo: Jim Urquhart/Reuters

Burleson's eccentricities and paranoia were evident from the beginning. During one call with Anna, he answered the phone with a fake accent. "I do that because I've got people targeting me now," he explained. Burleson later claimed to have access to sensitive law enforcement documents proving he was being watched.

The Longbow Productions team interviewed Burleson on camera on October 28, 2014, at the FireSky Resort and Spa in Scottsdale, Arizona. A rangy man with a ponytail and a thick mustache, Burleson wore a pistol to the taping and said his AK was in the car.

"Would you like something to drink?" Johnson asked him.

Burleson asked for bourbon. "No chaser," he added.

Hidden cameras recorded as the FBI agents got acquainted with their interview subject. They reviewed a map of the area around the Bundy ranch, with Burleson describing where he had been positioned during the standoff. Once the lights were on and his interview began, Burleson, bourbon in hand, described his bloodlust for federal agents. “I literally went there to put them six feet under,” he said.



An excerpt from an interview with Greg Burleson, produced by undercover FBI agents posing as filmmakers.

Burleson told the crew that he had taken aim at specific people that day – “I leveled off and I sighted-in the people that I was targeting” – with the hope that the situation would turn violent. “A lot of people say, ‘Thank god it wasn’t bloody,’” Burleson added. “I’m saying, ‘Damn, I’m disappointed.’”

While it was the FBI’s former informant who expressed the greatest desire for violence to the fake documentary crew, the bureau’s own recordings show the Arizona militiaman’s eagerness to do battle with

the federal government was not shared by many of the Bundy standoff participants.

Eric Parker, who was featured in an iconic image of the standoff pointing his rifle in the direction of federal agents, made it clear to the undercover FBI team that he had no interest in bloodshed. An electrician from Idaho, Parker was hesitant to meet with the filmmakers and expressed his concerns that discussing the events that day could leave him legally exposed. At the same time, Parker was deeply frustrated with how the story had been presented. “We were all pinged as right-wing extremists and gun nuts,” he said during his first call with Anna. Still, he said, his lawyer had given him strict guidance on talking to the press.

“This is not about getting people in trouble,” Anna assured him. “This is about spreading your message.”

Parker eventually agreed to take part in the project. On August 17, 2014, the Longbow crew traveled to a lodge in Montana, where Parker and his family, along with his friend and fellow standoff participant Scott Drexler, were planning a relaxing weekend of fishing in the mountains. Parker took a seat on a porch outside.



An excerpt from an interview with Eric Parker, produced by undercover FBI agents posing as filmmakers.

In the two-hour interview, Parker explained that his motivation for traveling to Nevada was twofold. First, he saw the video depicting the BLM tasing Cliven's son and throwing his sister to the ground as part of a broader trend of police brutality. Second, he viewed the establishment of the free speech zones, coupled with the presence of well-armed federal agents, as an attack on the First Amendment. By traveling to Nevada with weapons, Parker explained, he and his friends hoped to prevent what they viewed as unlawful arrests or use of force against protesters.

"They got 200 armed men with body armor rolling around," he said. "We need 200 armed men with body armor rolling around." Far from the coordinated operation government prosecutors would later allege, Parker said the actual confrontation was disorganized and ultimately terrifying. "I thought we would be there, armed, of course, and stand our ground and make sure the protesters don't get pepper-sprayed and

make sure that the illegal arrests stopped,” he explained. “I wouldn’t have thought in 100 years we would be on a bridge staring down federal agents.”

When he took his position on the pavement, the moment when the famous photo was taken, Parker said his hands were shaking.

“How do you acquire your target?” Johnson asked him.

“There’s no picking the target,” Parker answered. “I wasn’t chambered, and my finger wasn’t on the trigger. ... Nobody wanted to die.”



Ryan Bundy speaks to members of the media in front of the Malheur National Wildlife Refuge headquarters near Burns, Ore., on Jan. 6, 2016. Photo: Justin Sullivan/Getty Images

On November 14, 2014, Anna called Ryan Bundy. She told Ryan she was with Longbow Productions and reminded him that they had filmed at the ranch in June. Anna then asked if they could set up a time during the first week of December to interview Ryan, his father, and his broth-

ers Ammon and Melvin in a hotel room in Las Vegas. She even offered tickets to the Wrangler National Finals Rodeo in Las Vegas that week.

“I’d go for that,” Ryan said with excitement. “It’s been a few years since I’ve got to go to the NFR. So I’d go for that.”



An excerpt from an audio recording of a phone call between an undercover FBI agent and Ryan Bundy.

After talking for a few more minutes, Ryan asked Anna about the documentary: What would it be about? When would it be released?

“We want the American citizens to know that for the first time in almost 200 years, normal, average citizens, hardworking Americans, stood up, and they stood up against, you know, the tyrannical government, and they were able to get the government to back down,” Anna explained. It was a line she had used many times.

“So who’s your audience?” Ryan asked.

“I’d like to get it out to all America,” Anna answered.

Ryan told Anna he’d check with his father and brothers about coordinating interviews, but he remained suspicious and began to investigate Longbow Productions. Three days later, Anna called again.

“I just want to be straight forward with you,” Ryan told her. “With your company, there’s been a bunch of red flags go up in our mind. And that hasn’t happened with a lot of other companies.”

“OK,” Anna said.

“Now, we looked up your address, and it looks like your business is being run out of a federal building,” Ryan said. “Is that correct?”

“What?” Anna said, her voice rising.

“Is your address to your main company a federal building in Nashville, Tennessee?”

“No,” Anna said, giving Ryan an address to an office building about a mile from Vanderbilt University.

“But that’s not a federal building?” Ryan asked.

“No,” Anna insisted.



An excerpt from an audio recording of a phone call between an undercover FBI agent and Ryan Bundy.

It’s unclear why Ryan thought the government owned the building. In fact, it’s a [BlueCross BlueShield corporate building](#). But Ryan was indeed onto something; he just didn’t fully understand what. Ryan explained that he was concerned after hearing from other interviewees that the filmmakers had been asking questions about guns and ammo. “We deem those questions to be inappropriate,” Ryan said. “The Second Amendment gives us the right to keep and bear arms, and it doesn’t matter whether we have a BB gun or something bigger.” He also expressed concern that his family couldn’t find previous examples of Longbow’s work. Ryan said he suspected the filmmakers could be government spies.

“I’m not a liar,” Anna replied.

But Anna was a liar, and a good one, skilled enough to undercut Ryan's suspicions and persuade him, his father, and his brothers to sit for interviews. Three weeks after this phone call, Cliven Bundy arrived at the Bellagio in Las Vegas.

Cliven, dressed in a tan hat and a black leather vest, sat in the same white leather chair. The framing for the shot was sloppy: A white piece of trim molding can be seen running vertically across the left side of frame. The corner of a large, generic piece of floral hotel artwork dominated the right side of the frame. No professional cinematographer would have approved the shot.

Johnson, conducting the interview, asked Cliven about the militias, appearing to probe whether Cliven was coordinating their actions at the standoff. But Cliven maintained the armed groups just showed up; he had nothing to do with it. "The ranch was out of control," Cliven said. "The feds had total control of everything there."

"People either look at you as a folk hero or kind of a — that you were the one who instigated it, because if you were just doing what was right, why did you need all those people? How would you respond to that?" Johnson asked.

"I mean, you know, I gotta face this," Cliven said. "And the militia steps up there, and they do a service for me. Now as far as I can say, all I can say is that I'm thankful for that service."

What's extraordinary about Cliven's interview is that, despite spending nearly a year trying to get the rancher before the camera, the FBI couldn't get him to say anything that he wouldn't otherwise gladly say to legitimate radio and TV stations. Cliven even alluded to this in his interview. "Almost every day I have an opportunity to talk to people, just like I'm talking to you," he said. "Every day I have that opportunity. Today, I've already did a couple of interviews. I interviewed with a maga-

zine, a newspaper. I know three interviews with radio on my board there I haven't taken care of." To Cliven, Johnson and the undercover FBI agents were just another group of journalists.

About two months later, Johnson and his crew traveled to Arizona, where they filmed Ammon in a similarly unrevealing interview, despite Johnson's repeated attempts to goad Ammon into talking about the potential for violence at the standoff.

"If this escalated and was not peaceful, did you think you might have to take a life?" Johnson asked at one point.

"I never did once think I'd have to take a life, because I knew that my stand would be one where someone would take my life and they would do it with me standing against them but not threatening their life," Ammon told the undercover FBI agents.



A drone video taken during the anniversary of the standoff at the Bundy ranch.

Then, in April 2015, the Longbow Productions crew returned to the Bundy ranch for the anniversary of the standoff. The Bundys had set up a small makeshift stage below the overpass where the standoff occurred. About 100 white folding chairs were set up in front of the stage.

Anna, wearing a body mic, once again walked around the ranch and read aloud the license plates of cars parked there. The FBI agents brought a quadcopter drone with them. In the afternoon, as people of all ages milled about the stage, setting up for the event, the agents flew the drone high above to capture the scene. As it came down to land, the highway overpass visible in the background, a young girl ran over in bare feet, looking at the drone in amazement.

The drone then took off again, and down below, Bundy supporters could be seen staring up at the flying camera – unaware that they were being filmed as part of a U.S. government production.



Supporters of rancher Cliven Bundy listen to speakers at an event in Bunkerville, Nev., on April 10, 2015. Photo: John Locher/AP

The Bundy family describes their standoff with the government and the people from around the country who came to their aid as a movement. It's a strong word for what occurred, but not entirely inaccurate. Proof of that came a few months after the FBI shuttered its fake documentary operation, when Ammon Bundy began to publicize on social media the criminal cases of two Oregon ranchers.

Like Cliven Bundy, Dwight Lincoln Hammond and his son Steven Dwight Hammond had a decadeslong antagonistic relationship with the Bureau of Land Management. The two Oregon ranchers were convicted at trial in 2012 of setting fire to federal lands on which the Hammonds had grazing rights for cattle. The Hammonds argued that the five-year mandatory minimum sentence that came with the charges was unconstitutional, and a U.S. District Court judge agreed, sentencing Dwight to three months in prison and Steven to one year and a day. They served those sentences, but an appeals court vacated them, and another federal judge sentenced the pair to the mandatory minimum of five years.

Ammon and Ryan Bundy saw similarities in their own family's struggles with the government. They traveled to Oregon in late 2015 to help the Hammonds, who declined the offer of assistance. So the Bundy brothers, accompanied by three dozen supporters, including Cavalier and several others from the Nevada standoff, took over a U.S. government building at the Malheur National Wildlife Refuge in Harney County, Oregon. Ammon, naming his group the Citizens for Constitutional Freedom, then posted videos to social media calling on militants to join them in Oregon. Local police and federal officials surrounded the government building. The Bundy family was again at the center of a national story.

For more than a month, the Bundys and their supporters holed up in the building while federal agents, concerned about a gunfight that could leave dozens dead, waited them out. On January 26, 2016, a Jeep and a Dodge Ram pickup left the wildlife refuge. Ammon and Cavalier

were in the Jeep. Inside the pickup were Ryan Bundy and four supporters, including Robert “LaVoy” Finicum. FBI and Oregon police vehicles pulled over the Jeep. Ammon and Cavalier surrendered, but the pickup, driven by Finicum, took off at high speed. As he approached a roadblock, Finicum’s truck plowed into a snowbank. He exited the vehicle, and the FBI and Oregon police opened fire, killing Finicum and wounding Ryan Bundy. (FBI agents are under investigation for alleged misconduct in the shooting.)

The shootout and the arrests were followed by federal indictments against 38 people, charging the group members with various crimes related to the standoffs at the Bundy ranch and Malheur National Wildlife Refuge. So far, the government’s record in prosecuting the Bundys and their supporters has been mixed. Three supporters have pleaded guilty and another six, including former FBI informant Greg Burleson, have been convicted at trial. But seven have been acquitted, and a trial in Nevada last month resulted in a hung jury for four defendants, including Eric Parker. The stakes will be raised in Las Vegas on June 26, when the trial of Cliven Bundy and his sons is scheduled to begin. Federal prosecutors plan to play clips from “America Reloaded.”

Terrance Jackson, Burleson’s attorney, plans to appeal his client’s conviction. Burleson is facing a minimum of 57 years in prison. “I think the FBI used their resources to go after the people that are the least culpable,” Jackson told *The Intercept*, adding, “They used methods that need to be carefully scrutinized.” Jess Marchese, Eric Parker’s attorney, said a number of the jurors he spoke to were turned off by the government’s presentation of the Longbow evidence.

Beyond its implications in the Bundy case specifically, the FBI’s decision to create a fake media company raises critical questions about the federal government’s practice of impersonating the press. Following the 2014 revelations that it had been impersonated by the FBI, the Associated

Press, along with the Reporters Committee for Freedom of the Press, filed a lawsuit demanding more detail on the FBI's practice of posing as journalists, arguing that "the practice endangers the media's credibility and undermines its independence." In February, a federal judge ruled that the FBI has said enough about the matter. To date, it is unclear how many times, or how often, the bureau has deployed agents under the guise of newsgathering.

Following the flurry of arrests last year, several of the targets of the Longbow investigation were interviewed by federal agents. Summaries of their conversations were written up in FBI reports obtained by The Intercept. Brian Cavalier, the Bundy bodyguard who first allowed the crew onto the ranch, reportedly "felt that the weight of the world had been lifted off his shoulders when he was arrested," telling the FBI that he never believed in the Oregon occupation and that several of the individuals there "did not want the occupation to end peacefully." Greg Burleson, for all his tough talk about killing federal agents, was arrested without incident outside his apartment in Phoenix – he has lost his vision in the months since he traveled to Nevada and now uses a wheelchair. While he stood by his decision to take part in the standoff, Burleson reportedly told the FBI that "if he had it to do all over again, he would do a little more research."

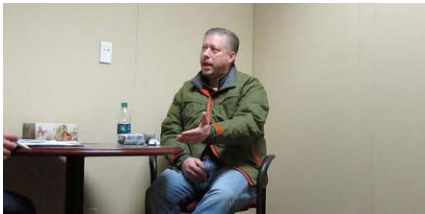
Eric Parker, the man from the famed sniper photo, was arrested on March 3, 2016. In a 10-page account of his conversation with his arresting agents, Parker said he had been contacted by at least two organizations "offering to put armed security at his house to shoot it out with the FBI when they arrived." Parker said he declined because he "does not want to see any violent confrontation with the FBI." Parker was the only standoff participant who mentioned his brush with a suspicious documentary film crew.

“A media company called Longbow Productions later interviewed Parker for a documentary about the Bundy situation, but the movie has never been released,” Parker’s arresting agent noted. “Parker believes the documentary film crew must be associated with the FBI.”

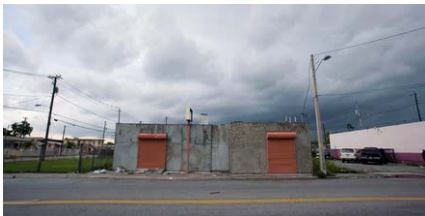


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Undercover FBI Agents Swarm the Internet Seeking Contact With Terrorists

EXHIBIT D

The New York Times

EDITORIAL

Deceptions of the F.B.I.

By **The Editorial Board**

Oct. 31, 2014

If your Internet service goes down and you call a technician, can you be certain that the person who arrives at your door is actually there to restore service? What if he is a law enforcement agent in disguise who has disabled the service so he can enter your home to look around for evidence of a crime?

Americans should not have to worry about scenarios like this, but F.B.I. agents used this ruse during a gambling investigation in Las Vegas in July. Most disturbing of all, the Justice Department is now defending the agents' actions in court.

During the 2014 World Cup, the agents suspected that an illegal gambling ring was operating out of several hotel rooms at Caesar's Palace in Las Vegas, but they apparently did not have enough evidence to get a court-issued warrant. So they enlisted the hotel's assistance in shutting off the Internet to those rooms, prompting the rooms' occupants to call for help. Undercover agents disguised as repairmen appeared at the door, and the occupants let them in. While pretending to fix the service, the agents saw men watching soccer matches and looking at betting odds on their computers.

There is nothing illegal about visiting sports-betting websites, but the agents relied primarily on that evidence to get their search warrant. What they failed to tell the judge was that they had turned off the Internet service themselves.

Of course, law enforcement authorities regularly rely on sting operations and other deceptive tactics, and courts usually allow them if the authorities reasonably believe they will find evidence of a crime. Without that suspicion, the Constitution prohibits warrantless searches of peoples' residences, including hotel rooms. The authorities can jump that hurdle if a home's occupant consents to let them enter, as when an undercover officer is invited into a home to buy drugs.

The Las Vegas case fails on both counts, according to a lawyer for the defendants. Although one of the defendants in the case, Wei Seng Phua, a Malaysian citizen, had been arrested in Macau earlier this year for running an illegal sports-gambling business, the agents did not have probable cause to believe anything illegal was happening in two of the rooms they searched. And a federal prosecutor had initially warned the agents not to use trickery because of the "consent issue." In fact, a previous ruse by the agents had failed when a person in one of the rooms refused to let them in.

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In a separate case out of Seattle, F.B.I. agents pretended to be journalists in a 2007 investigation of high school bomb threats, according to documents recently uncovered by the Electronic Frontier Foundation. Agents there concocted a fake online news article by The Associated Press about the threats. They sent a link to the Myspace page of a student they suspected of making the threats, and when he opened the link, it downloaded malware that enabled the agents to track him down and arrest him. The A.P. is rightly outraged and has protested the F.B.I.'s misappropriation of its name as undermining "the most fundamental component of a free press — its independence."

The F.B.I. has a history of pushing the limits that protect Americans' civil liberties. And it has continued to broaden agents' investigative powers in troubling ways. The deceptive tactics used in Las Vegas and Seattle, if not prohibited by the agency or blocked by

courts, risk opening the door to constitutional abuses on a much wider scale.

A version of this article appears in print on Nov. 1, 2014, on Page A24 of the New York edition with the headline: Deceptions of the F.B.I.

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EXHIBIT E

The New York Times

LETTER

To Catch a Crook: The F.B.I.'s Use of Deception

Nov. 6, 2014

To the Editor:

In **“Deceptions of the F.B.I.”** (editorial, Nov. 1), you use a 2007 Seattle bomb threat investigation and a 2014 defense lawyer’s characterization of an unrelated Las Vegas illegal gambling investigation to express concern about the prospect of the Federal Bureau of Investigation’s “deceptive tactics ... opening the door to constitutional abuses on a much wider scale.”

We do use deception at times to catch crooks, but we are acting responsibly and legally.

In 2007, to solve a series of bomb threats and cyberattacks directed at a Seattle-area high school, an F.B.I. agent communicated online with the anonymous suspect. Relying on an agency behavioral assessment that the anonymous suspect was a narcissist, the online undercover officer portrayed himself as an employee of The Associated Press, and asked if the suspect would be willing to review a draft article about the threats and attacks, to be sure that the anonymous suspect was portrayed fairly.

The suspect agreed and clicked on a link relating to the draft “story,” which then deployed court-authorized tools to find him, and the case was solved. No actual story was published, and no one except the suspect interacted with the undercover “A.P.” employee or saw the fake draft story. Only the suspect was fooled, and it led to his arrest and the end of a frightening period for a high school.

That technique was proper and appropriate under Justice Department and F.B.I. guidelines at the time. Today, the use of such an unusual technique would probably require higher level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate.

The Las Vegas case is still in litigation, so there is little we can say, but it would have been better to wait for the government's response and a court decision before concluding that the F.B.I. engaged in abusive conduct.

Every undercover operation involves "deception," which has long been a critical tool in fighting crime. The F.B.I.'s use of such techniques is subject to close oversight, both internally and by the courts that review our work.

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JAMES B. COMEY

Director

Federal Bureau of Investigation

Washington, Nov. 5, 2014

A version of this article appears in print on Nov. 7, 2014, on Page A30 of the New York edition with the headline: To Catch a Crook: The F.B.I.'s Use of Deception

EXHIBIT F



Office of the Inspector General
U.S. Department of Justice



A Review of the FBI's Impersonation of a Journalist in a Criminal Investigation

Revised September 2016

EXECUTIVE SUMMARY

Over the course of 1 week in June 2007, a 15-year old high school student e-mailed a series of bomb threats to administrators and staff at Timberline High School, near Seattle, Washington. The threats caused daily school evacuations. The individual used "proxy servers" to e-mail the bomb threats in order to hide his location. When local law enforcement officials were unable to identify or locate the individual, they requested assistance from a cybercrime task force supervised by the Federal Bureau of Investigation's (FBI) Seattle Field Division.

FBI agents on the task force, working with FBI technology and behavioral experts at Headquarters (FBIHQ), developed a plan to surreptitiously insert a computer program into the individual's computer that would identify his location. An FBI undercover agent posed as an editor for the Associated Press (AP) and attempted to contact the individual through e-mail. During subsequent online communications, the undercover agent sent the individual links to a fake news article and photographs that had the computer program concealed within them. The individual activated the computer program when he clicked on the link to the photographs, thereby revealing his location to the FBI. FBI and local law enforcement agents subsequently arrested the individual and he confessed to e-mailing the bomb threats.

The FBI did not publicize the assistance its agents provided local law enforcement. However, on July 18, 2007, 2 days after the individual pleaded guilty, an online technology news website published an article that detailed the method by which the FBI identified the individual. Seven years later, in October 2014, *The Seattle Times* published an article that disclosed the fact that an FBI employee posed as a member of the news media when it contacted and then identified the subject as the author of the bomb threats. Later that same month the AP sent a letter to then-Attorney General Eric Holder protesting the FBI's impersonation of a member of the news media in connection with the FBI's investigation of the bomb threats. In addition, several newspapers wrote articles questioning the tactics the FBI used to identify and arrest the subject who sent the threats.

One week later, on November 6, 2014, FBI Director James Comey wrote a letter to the editor of *The New York Times* defending the FBI's actions. In particular, Comey stated that the "technique [the FBI used to identify and apprehend the individual who sent the threats] was proper and appropriate under Justice Department and F.B.I. guidelines at the time" and that "[t]oday, the use of such an unusual technique would probably require higher level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate."

That same day, the Reporters Committee for Freedom of the Press, on behalf of 25 other news organizations, wrote a letter to Comey and Holder voicing its objection to the practice of FBI agents impersonating journalists, saying the practice endangers the media's credibility and undermines its independence, and that it appeared to violate FBI guidelines for when such tactics were permissible.

We initiated this review to examine whether under Department of Justice and FBI policies in effect at the time of the 2007 investigation, agents obtained the appropriate approval for the undercover activities the FBI conducted to locate the individual e-mailing the bomb threats. We also examined whether the undercover activities in 2007 would require a higher level of approval if conducted today under current Department and FBI policies.

As described in our full report, we concluded that FBI policies in 2007 did not expressly address the tactic of agents impersonating journalists. We further found that the FBI's undercover policies then in effect provided some relevant guidance, but were less than clear. As a result, we believe that the judgments agents made about aspects of the planned undercover activity in 2007 to pose as an editor for the AP did not violate the undercover policies in place at the time. We also determined that once the undercover plan was launched, certain investigative decisions were made concerning communications the undercover agent sent to the individual suspected of making the bomb threats that could have increased the level of approval required under FBI policy, a possibility the investigative team did not appear to fully consider.

As we were finalizing this report, the FBI adopted a new interim policy in June 2016 that provides guidance to FBI employees regarding their impersonation of members of the news media during undercover activity or an undercover operation (defined as a series of related undercover activities over a period of time). We found that prior to the adoption of this new interim policy, FBI policy would not have prohibited FBI employees from engaging in the undercover activities agents conducted during the 2007 Timberline investigation. The new interim policy, however, clearly prohibits FBI employees from engaging in undercover activity in which they represent, pose, or claim to be members of the news media, unless the activity is authorized as part of an undercover operation. In order for such an operation to be authorized, an application must first be approved by the head of the FBI field office submitting the application to FBIHQ, reviewed by the Undercover Review Committee at FBIHQ, and approved by the Deputy Director, after consultation with the Deputy Attorney General.

We believe the FBI's new interim policy is a significant improvement to policies that existed in 2007 during the Timberline investigation, as well as to those policies that would have governed similar undercover activities prior to June 2016. The new interim policy also is an important extension of policies the Department of Justice has previously implemented to regulate certain law enforcement activities that affect members of the news media, such as obtaining information from or about members of the news media in criminal and civil investigations. The FBI should move expeditiously to update its undercover policy guide to incorporate this new interim policy, and widely inform and educate FBI employees about the policy's existence and application.

Based upon our review, we made three recommendations to help ensure that FBI policies governing certain undercover activities and operations are well known, clear, and understood. The FBI concurred with the recommendations.

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I. Introduction

On Sunday, June 3, 2007 an unknown subject, later identified by the Federal Bureau of Investigation (FBI) as 15-year old high school student Charles Jenkins, sent an e-mail containing a bomb threat to numerous teachers and administrators of Timberline High School, near Seattle, Washington.¹ The high school was evacuated the next day. Jenkins e-mailed bomb threats to the school every day of the next week, causing daily evacuations.

Jenkins used "proxy servers" located in Europe to send his e-mails in a manner that would hide his true location. As a result, local law enforcement officials were not able to identify or locate Jenkins and they requested assistance from the Northwest Cybercrime Task Force, which was supervised by the FBI's Seattle Division. The FBI immediately opened an investigation.

FBI agents developed a plan to surreptitiously insert a computer program into Jenkins's computer that would identify his true location. An FBI undercover agent posed as an editor for the Associated Press (AP) and contacted Jenkins through e-mail. During subsequent online communications, the undercover agent sent Jenkins links to a fake news article and photographs that had the computer program embedded within them. Jenkins activated the computer program when he clicked on the link to the photographs, thereby revealing Jenkins's true location to the FBI.

FBI and local law enforcement agents subsequently arrested Jenkins and he confessed to e-mailing the bomb threats. On July 16, 2007 Jenkins pleaded guilty as a juvenile to several state felony offenses and was sentenced to 90 days of juvenile detention, 2 years of supervised release, 2 years of mental health counseling, and 2 years of probation with restrictions on internet and computer usage. Jenkins was also expelled from school.

The FBI did not publicize the assistance its agents provided local law enforcement. However, on July 18, 2007, 2 days after Jenkins pleaded guilty, the online technology news website Wired.Com released an article entitled "FBI's Secret Spyware Tracks Down Teen Who Made Bomb Threats" that detailed the method by which the FBI identified Jenkins. Seven years later, on October 27, 2014, *The Seattle Times* released an article based upon e-mails obtained by the Electronic Frontier Foundation through a Freedom of Information Act request to the FBI. Those e-mails disclosed the fact that the FBI posed as a member of the news media when it contacted and then identified Jenkins as the author of the bomb threats.

On October 30, 2014, the AP sent a letter to then-Attorney General Eric Holder protesting the FBI's impersonation of a member of the news media in connection with its investigation of the bomb threats. In addition, several

¹ Charles Jenkins is a pseudonym.

newspapers wrote articles questioning the tactics the FBI used to identify and arrest Jenkins.

One week later, on November 6, 2014, FBI Director James Comey wrote a letter to the editor of *The New York Times* defending the FBI's actions. In particular, Comey stated that the "technique [the FBI used to identify and apprehend Jenkins] was proper and appropriate under Justice Department and F.B.I. guidelines at the time" and that "[t]oday, the use of such an unusual technique would probably require higher level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate."

The same day, the Reporters Committee for Freedom of the Press (RCFP), on behalf of 25 other news organizations, wrote a letter to Comey and then-Attorney General Eric Holder voicing its objection to the practice of FBI agents impersonating journalists, saying the practice endangers the media's credibility and undermines its independence, and that it appeared to violate FBI guidelines for when such tactics are permissible.²

We initiated this review to examine whether under Department of Justice (DOJ or Department) and FBI policies in effect at the time of the 2007 investigation, agents obtained the appropriate approval for the undercover activities the FBI conducted to locate Jenkins. We also examined whether the undercover activities in 2007 would require a higher level of approval if conducted today under current Department and FBI policies.

We concluded that FBI policies in 2007 did not expressly address the tactic of agents impersonating journalists. We further found that the FBI's undercover policies then in effect provided some guidance, but were less than clear. As a result, we believe that the judgments agents made about aspects of the planned undercover activity in 2007 did not violate the undercover policies in place at the time. We also determined that once the undercover plan was launched, certain investigative decisions were made that could have increased the level of approval required, a possibility the investigative team did not appear to fully consider.

On June 8, 2016, as we were finalizing this report, the FBI adopted a new interim policy that provides guidance to FBI employees regarding their impersonation of members of the news media during undercover activity or an undercover operation (defined as a series of related undercover activities over a period of time). Under this new policy, FBI agents may only represent, pose, or claim to be members of the news media when authorized by the FBI Deputy

² The RCFP also urged the FBI to publicly disclose when and under what circumstances they have digitally impersonated the news media in the past. The RCFP and the AP also filed a request for such records under the Freedom of Information Act (FOIA). When no records were provided, on August 27, 2015, the two media organizations filed a civil action against the FBI and Department of Justice under FOIA seeking an order requiring the agencies to comply with the FOIA request. The FBI subsequently released responsive documents to RCFP and AP in February and March 2016. In the still ongoing litigation, RCFP and the AP are seeking release of the documents the FBI withheld from disclosure pursuant to certain FOIA exemptions.

Director, after consultation with the Deputy Attorney General, as part of an undercover operation reviewed by the Undercover Review Committee (UCRC). The policy expressly prohibits FBI employees from engaging in such activity if it is not part of an undercover operation. Therefore, the undercover activities in 2007 would be prohibited today unless they were part of an undercover operation reviewed by the UCRC and authorized by the FBI Deputy Director, after consultation with the Deputy Attorney General.³

Based upon our review, we made three recommendations to help ensure that FBI policies governing certain undercover activities and operations are well known, clear, and understood. The FBI concurred with the recommendations.

II. Methodology of the OIG's Review and Organization of Report

In undertaking this review, the OIG examined approximately 2000 documents, including the FBI's investigative case file, applicable Department and FBI policies and guidelines, and a 2014 briefing paper prepared by FBI staff for Director Comey detailing the events surrounding the 2007 investigation and the applicable investigative standards currently in effect, including the new interim policy adopted by the FBI on June 8, 2016. We also interviewed FBI employees and a federal prosecutor who participated in the 2007 investigation and an FBI attorney who helped draft the 2014 briefing paper. In addition, we reviewed correspondence from the news media raising concerns regarding the undercover operation and the comments of Director Comey.

In Section III of this report, we identify the applicable Department and FBI policies and guidelines. In Section IV, we describe the facts and circumstances of the FBI's investigation of the 2007 Timberline bomb threats and the media's response to the FBI ruse to identify Jenkins. In Section V, we analyze whether the case agents followed the applicable guidelines in 2007 and whether different or additional approvals would be required under current Department and FBI policies.

III. Applicable Department and FBI Policies and Guidelines

A. Policies and Guidelines in Effect at Time of 2007 Investigation

1. Undercover Activity and Undercover Operations

In June 2007, the applicable FBI policies for online undercover criminal investigations were contained in the Manual of Investigative Operations & Guidelines, Part 2 (MIOG 2), Section 10-18; and the FBI's Field Guide for

³ The FBI is in the process of incorporating the new interim policy into the Undercover Policy Guide, one of several policy implementation guides incorporated by reference into the FBI's Domestic Investigations and Operations Guide (DIOG). The DIOG sets forth FBI policies and procedures for all investigative activities and intelligence collection activities conducted by the FBI within the United States.

Undercover and Sensitive Operations (FGUSO). The MIOG 2 and the FGUSO incorporated the Attorney General's Guidelines on FBI Undercover Operations (AGG-UCO), and specifically with respect to online undercover investigations, also incorporated principles detailed in the Department's "Online Investigative Principles for Federal Law Enforcement Agents" (the Online Principles).⁴ As we discuss later, both the MIOG 2 and the FGUSO were superseded by the FBI guidelines that are in effect today.

Section 10-18.5(a) of MIOG 2 permitted FBI employees to communicate online using false names or cover-identities and stated that undercover activity was governed by the FGUSO. While an FBI employee's use of another person's "online identity" in undercover online communications without that person's knowledge or consent required FBI Headquarters (FBIHQ) approval, FBI policy did not require special approval to use the identity of an organization or business in undercover online communications or in other undercover activities. MIOG § 10-8.5(4).⁵ The FGUSO defined "undercover activities" as "any investigative activity involving the use of an assumed name or cover-identity by an employee of the FBI or another Federal, state, or local law enforcement organization working with the FBI." Undercover activity in which an undercover employee planned to meet with a subject required the approval of a Supervisory Special Agent (SSA).

The FGUSO differentiated between "undercover activity" and an "undercover operation." It defined an "undercover operation" as "an investigation involving a series of related undercover activities over a period of time by an undercover employee." According to the FGUSO, this "generally consists of more than three separate substantive contacts by an undercover employee with the individual(s) under investigation." Undercover operations had to be approved by the Special Agent-in-Charge (SAC) of the field office conducting the operation, in consultation with the Chief Division Counsel for the field office.

In regard to online undercover operations, the FGUSO specifically defined such operations as being "any investigation involving a series of related online covert contacts over a period of time by an Online Covert Employee (OCE)." According to the Online Principles, "[t]he nature of online communications makes counting undercover 'contacts' much more difficult than in the physical world. Generally, a physical-world contact consists of a single communication or conversation, either face-to-face or over the telephone, naturally circumscribed in time." The Principles state that "[c]ommunicating in cyberspace is different"

⁴ The FGUSO was last updated on July 25, 2003. The current AGG-UCO was issued on May 30, 2002 and was modified on March 5, 2008, November 26, 2008, and November 22, 2015.

⁵ Further, "untrue representations by a person participating in the undercover operation concerning the activities or involvement of any third person" without that person's knowledge or consent were considered "sensitive circumstances" under FBI policy and required FBIHQ approval. FGUSO § 3.2(F)(13). The undercover agent who communicated with Jenkins did not use the "online identity" of a person who was a member of the media, nor did he make untrue representations about any third person. Rather, the agent used the identity of a third party – the AP – without that party's knowledge or consent.

because the online conversation between the OCE and the subject is broken up by the send/receipt nature of online communications.

The FGUSO provided guidance to FBI agents about how to count online communications for purposes of undercover activities. The FGUSO stated that agents should count a discrete online "conversation" as one contact and identified numerous factors that agents should consider when deciding how to group distinct online transmissions into a single conversation. The FGUSO, quoting the AGG-UCO, stated that:

In the context of online communications, such as e-mail and Internet Relay Chat (IRC), multiple transmissions or e-mail messages can constitute one contact, much like a series of verbal exchanges can comprise a single conversation. Factors to be considered in determining whether multiple online transmissions constitute a single contact or multiple contacts include the time between transmissions, the number of transmissions, the number of interruptions, topical transitions, and the media by which the communications are exchanged (i.e., e-mail versus IRC).

If based on these factors, an agent determined the undercover activity was expected to involve three or fewer "contacts," it was sufficient to obtain approval from the agent's supervisor. If the agent determined the activity was expected to involve more than three "contacts," the activity would constitute an "undercover operation" and required SAC approval. As discussed below, regardless of the number of contacts, if undercover activity or an undercover operation involved "sensitive circumstances," the field office was required to obtain FBIHQ approval.

2. Sensitive Circumstances

Under the FGUSO, undercover activity that involved "sensitive circumstances" constituted an undercover operation regardless of the number of contacts involved. Among the categories of "sensitive circumstances" identified in the FGUSO were "privileged relationships" in which:

there [was] a reasonable expectation that the undercover operation [would] involve . . . [a] significant risk that a third party [would] enter into a professional or confidential relationship with a person participating in an undercover operation who [was] acting as an attorney, physician, clergyman, or *member of the news media*.

(Emphasis added) According to commentary included in the FGUSO regarding this provision, the professional or confidential relationships are listed in order to identify potential operational scenarios, including those in which "a relationship with a subject is established which the subject believes to be privileged." The commentary further states that while "[i]t is often the case in these scenarios that

these apparent problems never actually materialize or that, if they do, measures can be taken to mitigate them . . . their existence alone is a sensitive matter. . . .”⁶

The FGUSO required that in all undercover operations involving any sensitive circumstances, including online undercover operations, the SAC had to submit an application to FBIHQ seeking approval to begin the undercover operation. This application would then be reviewed by appropriate supervisory personnel at FBIHQ and, if favorably recommended, sent to the Criminal Undercover Operations Review Committee (CUORC) for consideration. The application would then be forwarded to the Director or a designated Assistant Director to approve or disapprove.

In regard to online undercover operations, Section 7.3 of the FGUSO permitted a SAC, or a designated Assistant Special Agent-in-Charge (ASAC), to grant interim authority for online undercover contacts involving sensitive circumstances. The interim authority, which must have been documented in writing, could be granted for up to 30 days and had to be followed by a report explaining the reason for granting the authority “as soon as practical.”

3. Limitations on Online Undercover Activity

Section 10-18.3(1)(d) of MIOG 2 prohibited FBI agents from hacking into computers, including those belonging to subjects of FBI investigations, without legal authorization. Section 10-18.3 stated that “[s]oftware tools cannot be used to defeat the security system of [a] targeted electronic facility or access areas that are not already publicly viewable by general users of the system or the public absent a search warrant or other legal authorization.” As an example, the provision identified Internet Protocol addresses as information that could not be obtained through software tools without legal authorization.

B. Applicable Policies and Guidelines Currently in Effect

In 2008, the FBI replaced the MIOG 2 with the Domestic Investigations and Operations Guide (DIOG). The DIOG was updated in October 2011.⁷ In August

⁶ Another category of “sensitive circumstances” under the FGUSO was “third party liability” and included:

Untrue representations by a person participating in the [undercover operation] concerning the activities or involvement of any third person without that individual’s knowledge or consent; [and]

. . .

Activities which create a realistic potential for significant claims against the United States arising in tort, contract, or for compensation for the “taking” of property, or a realistic potential for significant claims against individual government employees alleging Constitutional torts.

AGG-UCO, Section IV(C)(2)(o); FGUSO, Section 3.2(F). We did not find these provisions applicable to the undercover activities at issue in the Jenkins investigation: the undercover agent did not make untrue representations to Jenkins about any third person, and we do not believe the FBI’s activities created a “realistic potential for significant claims against the United States” as contemplated by the FGUSO.

2011, the FBI replaced the FGUSO with the Undercover and Sensitive Operations Policy Implementation Guide (USOPIG). The DIOG and the USOPIG, like the FGUSO, incorporate the AGG-UCO. As such the USOPIG retained many of the provisions of the FGUSO, including the provisions relating to “sensitive circumstances,” and is the FBI policy currently in effect regarding undercover activities and operations.⁸ While these revised FBI policies included an additional provision that might have caused a field office to seek FBIHQ approval before an employee acted in an undercover capacity as a member of the media, the revised undercover policies did not require such a step.

On June 8, 2016, the FBI adopted an interim policy – referred to as Policy Notice (PN) 0907N, “Undercover Activities and Operations – Posing as a Member of the News Media or a Documentary Film Crew” – specifically governing situations in which FBI employees represent, pose, or claim to be members of the news media. The new policy sets forth the approval required to engage in such activity.⁹ In essence it created an additional “sensitive circumstance” for undercover activity and is the operative policy currently in effect for purposes of our review.¹⁰

The new interim policy incorporates the DIOG’s definitions of “undercover activity” and “undercover operation,” which mirror the definitions contained in the FGUSO, as described earlier. In short, “undercover activity” is any investigative activity involving the use of an assumed identity by an undercover employee; an “undercover operation” is one that involves a “series of related undercover activities” – defined as five or more substantive contacts by an undercover employee with the individuals under investigation – over a period of time. However, under the new interim policy, the number of substantive contacts with an investigative subject is not a relevant factor in determining the level of approval required when posing as a member of the news media. This is because the policy expressly prohibits FBI employees from engaging in any undercover activity in which they represent, pose, or claim to be members of the news media, unless the activity is authorized at FBIHQ as part of an undercover operation. DIOG § 8.1.3.1. and 11.9.1.

⁷ All references to the DIOG in this section of the report are referring to the 2011 edition.

⁸ The USOPIG and the DIOG include provisions that expressly address an FBI employee’s use of another person’s “online identity” in undercover online communications and the use of “untrue representations . . . concerning the activities or involvement of any third person” without that person’s knowledge or consent. See DIOG 2, Appendix L; USOPIG § 3.2.6. However, similar to the FGUSO and the MIOG 2, neither the DIOG nor the USOPIG includes provisions that require special approval to use the identity of an organization or business in undercover online communications or in other undercover activities.

⁹ The phrase “member of the news media” is defined as a person who “gathers, reports, or publishes news through the news media;” the phrase “news media” is defined as an entity that is “organized and operated for the purpose of gathering, reporting, or publishing news.” DIOG § 10.1.2.2.5.

¹⁰ As indicated by its title, the new interim policy applies to FBI employees posing as members of the news media or a documentary film crew. Our review addresses the policy only as it relates to employees posing as members of the news media.

Similar to undercover operations involving any of the “sensitive circumstances” delineated in the DIOG and USOPIG, the approval process for an undercover operation that involves an FBI employee posing as a member of the media requires the relevant FBI field office to submit an application to the Undercover Review Committee at FBIHQ for review. *Id.* § 8.2.2.1. In addition, the application can only be approved by the FBI Deputy Director, after consultation with the Deputy Attorney General. The FBI Deputy Director’s approval cannot be delegated. *Id.* § 8.2.2.1.3. The involvement of the Deputy Attorney General and the nondelegable nature of the FBI Deputy Director’s authority are unique to applications for undercover operations involving FBI employees posing as members of the news media or a documentary film crew.¹¹

C. Summary of Approval Requirements

The chart below summarizes the approval requirements for FBI undercover activities and operations, as well as the definition of “sensitive circumstances.” Until recently, the approval requirements had remained essentially unchanged since 2007, when the Timberline bomb threat investigation was conducted. However, in November 2015, the Attorney General approved revisions to the AGG-UCO that included, among other changes, the requirement that a Department of Justice prosecutor and FBIHQ approve undercover activities that involve sensitive circumstances. None of those revisions impact this review. The more significant change for purposes of our review occurred in June 2016, when the FBI adopted interim policy, PN 0907N. This new policy prohibits FBI employees from posing as members of the news media, except as part of an undercover operation that is approved by the FBI Deputy Director after consultation with the Deputy Attorney General. The chart below reflects these changes in FBI policy.

¹¹ The new interim policy also includes procedures for authorizing undercover operations involving employees posing as members of the media under emergency circumstances, such as an immediate or grave threat to life or property, a threat to the national security, or the loss of a significant investigative opportunity. See DIOG §§ 8.2.4. to 8.2.4.2.

Type of Undercover Event	Current Review & Approval Requirements
Undercover Activity (not involving FBI employees posing as members of news media)	Supervisory Special Agent
Undercover Operation without sensitive circumstances ¹²	Head of Field Office (Assistant Director in Charge or Special Agent in Charge)
Undercover Activity with Sensitive Circumstance(s)	Federal Prosecutor and FBIHQ
Undercover Operation with Sensitive Circumstance(s)	Review by Criminal Undercover Operations Review Committee and FBIHQ Approval
Undercover Operation involving FBI employees posing as members of the news media (not applicable in 2007)	Undercover Review Committee review and Deputy Director approval, after consultation with Deputy Attorney General

IV. OIG Factual Findings

A. The Timberline High School Investigation

On May 30, 2007 Timberline High School in Lacey, Washington was evacuated after a handwritten note containing a bomb threat was discovered at the school. On Sunday, June 3, 2007 an unknown subject, ultimately identified by the FBI as Timberline High School student Charles Jenkins, used a Gmail account to send an e-mail containing a bomb threat to numerous Timberline High School teachers and administrators. In the same e-mail, Jenkins threatened a "Distributed Denial of Service" (DDoS) attack on the school's computer network. The next day, school administrators evacuated the high school as a result of the threat and Jenkins launched his DDOS attack causing the school's networks to receive 24 million hits within a 24-hour period.¹³

¹² As noted above, in 2007, an undercover operation occurred when there were more than three substantive undercover communications. Under current policies, an undercover operation occurs where there are more than five substantive undercover communications.

¹³ In a denial-of-service (DoS) attack, an individual attempts to prevent legitimate users from accessing information or services – such as on a website or in e-mail – by, for example, overloading the server that hosts the information or services with requests. In a DDoS attack, an individual uses multiple computers, sometimes thousands, to launch a DoS attack. See <https://www.us-cert.gov/ncas/tips/ST04-015>.

On June 5, 2007 Jenkins sent another e-mail containing a bomb threat from a different Gmail account to the high school principal and other high school staff. School administrators again evacuated Timberline High School as a result of this threat. That same day, and using a third Gmail account, Jenkins sent a fourth bomb threat to Timberline High School staff in which he taunted school officials, stating:

Maybe you should hire Bill Gates to tell you that [this e-mail] is coming from Italy. HAHAHA Oh wait I already told you that. So stop pretending to be "tracing it" because I have already told you it's coming from Italy. That is where any trace will stop so just stop trying. Oh and this email will be behind a proxy behind the Italy server.¹⁴

The Lacey Police Department investigated the bomb threats by interviewing persons of interest and identifying the Internet Protocol (IP) addresses that were the source of the e-mails.¹⁵ Investigators were able to establish that Jenkins was using two IP addresses based in Italy and one based in the Czech Republic. The investigators believed that these IP addresses were proxies and did not indicate Jenkins's true location.

On June 6, 2007 Jenkins used a fourth Gmail account to send an e-mail to Timberline High School's principal stating, "ENJOY YOUR LIFE ENDING." In another e-mail, from the same Gmail account, Jenkins sent a bomb threat to Timberline High School teachers in which he again taunted authorities' efforts to identify him. School administrators evacuated Timberline High School as a result of this threat.

That same day, officers from the Lacey Police Department contacted the Northwest Cybercrime Task Force (NWCTF), which was supervised by SSA Lucas Johnson of the FBI's Seattle Division, and requested assistance in identifying and apprehending Jenkins.¹⁶ The FBI opened its investigation immediately and confirmed that the IP addresses being used to send the bomb threats were based in Grumello Del Monte, Italy and the Czech Republic. The FBI agents also contacted Assistant U.S. Attorney (AUSA) Chloe Watson for assistance, which she provided by working with agents to prepare the court documents in the case, as discussed below.¹⁷

Also on June 6, 2007 Detective Tyler Dawson of the NWCTF sent an e-mail to the FBI's Legal Attaché in Rome, Italy, requesting his assistance in working with the

¹⁴ A "proxy" is a server that functions as a relay between the user and a destination website. A proxy hides the IP address of the user's machine from the website.

¹⁵ An "IP Address" is a code made up of a unique set of numbers that identifies a computer on the Internet.

¹⁶ Lucas Johnson is a pseudonym.

¹⁷ Chloe Watson is a pseudonym.

Italian government to identify Jenkins.¹⁸ In his request, Dawson included all of the potentially identifying information contained in the bomb threats made by Jenkins, including known IP addresses.

The next day, June 7, 2007, Jenkins sent another bomb threat from the e-mail address thisisfromitaly@gmail.com. School administrators again evacuated Timberline High School. Jenkins also posted three threatening messages in the comments section of the "theolympian," the online version of a Washington state newspaper, *The Olympian*.

That same day, Jenkins created a profile on the social networking site, Myspace.com, entitled "Timberlinebombinfo" and invited 33 Timberline High School students to post a link to the Myspace page. Jenkins also threatened at least one student by telling her that if she failed to post the link, her name would be associated with future bomb threats. Two of the students who received the request to link to Jenkins's Myspace.com page reported the request to local police.

On June 7, 2007 law enforcement officials from the Lacey Police Department met with Johnson, FBI Special Agent Mason Grant, Detective Dawson, other FBI officials, and Watson.¹⁹ During the meeting, the FBI agents agreed that they would seek a court order authorizing the use of a trap and trace device for the phone of a suspect, and request the FBI's Behavioral Analysis Unit to develop a behavioral assessment of Jenkins.²⁰ The agents also agreed to pursue court authorization to utilize a Computer & Internet Protocol Address Verifier (CIPAV) that would allow the FBI to "identify the computer and/or user of the computer that [were] involved in" making the bomb threats against Timberline High School. According to FBI documents, "[t]he deployment of the CIPAV would require an undercover scenario to entice [Jenkins] to download the code concealing the CIPAV." The same day as the meeting of law enforcement officials, Grant began drafting the affidavit in support of a warrant seeking authority to surreptitiously install a CIPAV.

On June 8, 2007 the school district received two additional bomb threats that resulted in the evacuation of Timberline High School. That same day, Johnson contacted SSA Keith Pratt, a certified behavioral analyst with an FBI Behavioral Analysis Unit, to obtain Pratt's help developing a behavioral assessment of Jenkins.²¹

On June 10, 2007 Grant submitted a "Notification of SAC/ASAC Authority Granted for Use of Telephonic and/or Nontelephonic Consensual Monitoring Equipment in Criminal Matters" (the Notification) to ASAC Mike Higgins seeking

¹⁸ Tyler Dawson is a pseudonym.

¹⁹ Mason Grant is a pseudonym.

²⁰ On June 8, 2014, Watson filed under seal the application to use the pen register device. The U.S. District Court for the Western District of Washington approved the application that same day. The FBI determined that the suspect for whom they obtained the pen register was not the individual e-mailing the bomb threats.

²¹ Keith Pratt is a pseudonym.

approval to use the CIPAV.²² Among other things, the Notification required Grant to provide a synopsis of the case and to identify the individual whose communications would be consensually monitored. The Notification form listed six specific situations that required written DOJ approval prior to proceeding with the consensual monitoring, none of which applied to the bomb threat investigation.²³ The Notification did not describe how the agents intended to deploy the CIPAV. Although not required, the request did not include any mention that agents intended to pose as a journalist in order to facilitate the successful use of the CIPAV. Higgins approved Grant's request to use the CIPAV the same day it was submitted.

The Seattle Division requested a CIPAV from the FBI's Operational Technology Division/Cryptologic and Electronic Analysis Unit (OTD/CEAU) on June 11. The agents from OTD/CEAU were responsible for creating the CIPAV that would be used to locate Jenkins. Johnson and Grant also spoke with Pratt, the certified behavioral analyst who conducted the behavioral assessment of Jenkins. Pratt told us that Jenkins appeared to be very narcissistic and was feeding off of the attention he was receiving as a result of the bomb threats. Pratt stated that he recommended that the agents use that narcissism to override any suspicions that Jenkins might have about clicking on the link that would deploy the CIPAV, and suggested the link could have "some type of story or media report about him." Watson told us that she did not recall participating in a conference call with Pratt, but that Grant might have told her about the consultation with the Behavioral Analysis Unit and about Pratt's recommendation that the FBI use a media approach to deploy the CIPAV.

²² Mike Higgins is a pseudonym.

²³ The six situations identified on the form as requiring Department approval were the following:

1. Monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above, or a person who has served in such capacity within the previous 2 years;

2. Monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any state or territory, or a judge or justice of the highest court of any State or Territory, & the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his/her official duties;

3. Consenting/nonconsenting party is a member of the diplomatic corps of a foreign country;

4. Consenting/nonconsenting party is or has been a member of the Witness Security Program & that fact is known to the agency involved or its officers;

5. Consenting/nonconsenting party is in the custody of the Bureau of Prisons or the U.S. Marshals Service; and

6. Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General for the Criminal Division, or the U.S. Attorney in the district where an investigation is being conducted has requested the investigating agency to obtain prior written consent for making a consensual interception in a specific investigation.

Johnson told us that his investigative team had spent some time discussing the possible scenario proposed by Pratt. He stated that he believed that posing as a reporter could be problematic because a reporter's name could be easily verified. For this reason, the team decided to use a publisher or editor's name because it would not be readily identifiable by Jenkins. On the subject of whether the scenario would qualify as a "sensitive circumstance," Grant told us that he could not recall anyone considering that. However, Johnson told us that he consulted the FGUSO to assess this issue and concluded that the scenario was not a sensitive circumstance. Johnson said that even though the undercover employee would pose as a member of the news media, the contact would be limited to building the credibility necessary to convince Jenkins to click on the link and activate the CIPAV. Johnson also said they had no intention to publish anything or contact a third party.

Johnson told us that while he was not aware of a legally-recognized "reporter-source" privilege, he believed that a person acting as a source of information for a reporter could enter into a privileged relationship with that reporter. Asked whether he had any concerns that Jenkins would enter into or believe he was entering into a privileged relationship with the undercover agent, Johnson told us that he did not. Johnson also said it was his responsibility to research the applicable FBI policies and make the "judgment call" that the proposed undercover contact was not a sensitive circumstance.

AUSA Watson told us that she did not recall anyone telling her about a plan to impersonate a member of the news media to deploy the CIPAV. She told us that she was not involved in the operational aspect of the undercover activities and that the agents did not need her approval for how they would deploy the CIPAV. Consistent with Watson's recollection, we found no FBI documents which reflect or suggest knowledge or approval by Watson of the ruse to impersonate a journalist. Based on our investigation, we found no evidence that any other attorney at the U.S. Attorney's Office or the FBI was asked to consider whether such a tactic was appropriate.

Also on June 11, 2007 SSA Johnson briefed ASAC Higgins "on the facts of the investigation and the need to engage in limited on-line [undercover] communication with [Jenkins] for the purpose of deploying the CIPAV." According to an FBI document describing the briefing, the investigative team did not anticipate more than three substantive contacts with Jenkins and there was no expectation that there would be a face-to-face meeting between an undercover agent and Jenkins. The document did not reflect the plan to pose as a member of the media, but Johnson told us that he discussed at the briefing the fact that the undercover agent would attempt to get Jenkins to click on a link that would deploy the CIPAV by posing as a member of the media. Johnson also said that he believes he would have given Higgins his opinion, based on his review of FBI policy, that the undercover activities did not involve sensitive circumstances.

Higgins told us that it was common for Johnson to brief him on matters for cases that required approval above Johnson's level, especially for matters involving electronic eavesdropping requests, which required approval before applications

could be submitted to the court. However, Higgins told us that he had no "independent recollection" of the Timberline High School bomb threat investigation.

On June 12, 2007 the investigative team drafted a fake news article with an Associated Press (AP) byline entitled "Bomb threat at high school downplayed by local police department." Grant attached the fake news article to a draft e-mail that he proposed to send to Jenkins. The proposed e-mail contained a hyperlink to the fake news article that read: "http://seattletimes.nwsourc.com/html/nationworld/2003743231_webteensex11.html" and included advertisements relating to *The Seattle Times*. He forwarded the proposed e-mail and fake news article to the special agents in OTD/CEAU who were creating the CIPAV, and to Johnson. The assigned OTD/CEAU agent responded to Grant that he would be able to use the fake article to deploy the CIPAV into Jenkins's computer.

That same day, AUSA Watson filed an application with the U.S. District Court for the Western District of Washington in Seattle that requested permission for the FBI to use the CIPAV to target "any computer accessing electronic message(s) directed to administrator(s) of myspace account 'timberlinebombinfo' and opening message(s) delivered to that account by the government, without notice to the owner/operator of that computer." Watson filed an affidavit with the application that was written and affirmed by Grant. The affidavit did not provide specific details about the contents of the FBI's message that would be sent to the unknown subject or advise the judge that agents intended to impersonate a journalist as part of their ruse.

Watson told us that while she did not write the affidavit, it was her practice to review first drafts of affidavits and communicate with agents regarding any questions relating to probable cause. In the affidavit, Grant described the facts and circumstances of the investigation and explained how the CIPAV worked. The affidavit stated that a communication containing the CIPAV would be delivered to the unknown subject's computer "through an electronic messaging program from an account controlled by the FBI" that would be "directed to the administrator(s) of the 'Timberlinebombinfo' account." The affidavit also stated that "[o]nce the CIPAV is successfully deployed, [the CIPAV] will conduct a one-time search of the activating computer and capture" the computer's IP address and other information, which would then be sent to a computer controlled by the FBI.²⁴ The Court approved the government's application the same day it was filed.²⁵

Grant told us that he did not include in the affidavit the information about how the FBI intended to deliver the CIPAV, including the fact that they intended to

²⁴ At no time did the FBI file a Title III wiretap application as some news organizations had reported.

²⁵ The application and Sander's supporting affidavit were reviewed by AUSA Watson and an attorney from the Office of General Counsel for OTD prior to being filed with the Court. Although there was no requirement that they do so, neither document mentioned the existence of the FBI's plan to impersonate a journalist.

pose as a member of the media, because it was not needed to secure the court order. He stated further that law enforcement agencies typically do not want to expose details of undercover techniques in case they need to use the techniques in future investigations. Watson told us that information regarding how the FBI would execute a search warrant was not typically included in the affidavit supporting the search warrant because information was not needed to obtain the Court's approval. She also said that she could not recall any search warrant she had ever worked on that described how the warrant "would be affected."

That evening, at 5:38 p.m., Grant used an undercover e-mail account to send an e-mail containing a link to the fake news article containing the CIPAV to the Myspace page, "Timberlinebombinfo." Jenkins did not respond to this e-mail. The next day, at 2:51 p.m. on June 13, 2007, Grant used the same undercover e-mail account to send a second e-mail with the link to the fake news article containing the CIPAV to "timberlinebombinfo."²⁶ Grant's e-mail stated:

Disappointed that I did not get a response from my "anonymous" interview request. The article was not published in today's papers, but my Staff Writer drafted an updated version and we left blanks if you would like to comment. . . .

Grant identified himself in the e-mail as "Norm Weatherill," an "AP Staff Publisher."

At 2:55 p.m. Jenkins responded, "leave me alone." Grant replied at 3:21 p.m.:

I respect that you do not want to be bothered by the Press. Please let me explain my actions. I am not trying to find out your true identity. As a member of the Press, I would rather not know who you are as writers are not allowed to reveal their sources.

The school has continually requested that the Press NOT cover this story. After the School Meeting last night, it is obvious to me that this needs coverage.

Readers find this type of story fascinating. People don't understand your actions and we are left to guess what message you are trying to send. . . .

According to Grant, this message was intended to get Jenkins to click the link to the fake news story. He said the entire investigative team was present during this and the other communications with Jenkins, and consulted together about what to say before the message was sent. According to Johnson, the 3:21 p.m. reply to Jenkins drew upon the recommendation of the Behavioral Analysis Unit to play on Jenkins's ego and to build rapport. Johnson said the investigative team was trying to take

²⁶ The agents identified the link to the unknown subject as "news article." The hyperlink, which was not visible Glazebrook, was:
"http://reporting.homeip.net:81/private/596169732/articlestuff.exe."

advantage of the desire for attention Jenkins demonstrated with his online activity, while also assuring Jenkins that he was only being asked for his side of the story, and not to disclose his identity.

Jenkins responded to Grant's message 2 minutes later by inquiring, "how can i (sic) help." Grant responded by asking Jenkins if the article and pictures were accurate. At approximately 3:30 p.m., Jenkins clicked on the link to the fake news article with the embedded CIPAV. However, because of certain settings on Jenkins's computer, the CIPAV did not deploy. At 3:47 p.m. Jenkins e-mailed Grant and asked him to engage in a live chat on Gmail. The two began their conversation at 3:48 p.m. Among other things, Jenkins asked Grant what organization he was with. Grant responded that he was with the "Associated Press," and added that "AP [articles] can be found in [the] NY Times, Seattle Times, Washington Post, US[A] Today or even local papers – such as the Olympian."

At 5:07 p.m., Jenkins contacted Grant through live chat on Gmail asking if he had "any news yet." At 5:50 p.m., Grant responded via e-mail that "they are crunching the article now," and sent him the link to some photographs related to the article that were embedded with a CIPAV. Jenkins clicked on the link to the photographs and e-mailed Grant at 5:53 p.m. stating, "dont (sic) care about which pics you use." This time, when Jenkins clicked on the link to the photographs, the CIPAV deployed properly and the FBI obtained his true IP address.

Using the true IP address, the FBI was able to locate and then identify Jenkins, a 10th grade student at Timberline High School, as the individual who had been e-mailing the bomb threats to the school. At approximately 2:00 a.m. on June 14, 2007, the Lacey Police Department executed an arrest warrant on Jenkins and arrested him at his parents' house. Upon arrest, Jenkins immediately confessed to sending multiple bomb threats to the Timberline School District. Two additional draft bomb threats were found on his computer at the time of his arrest.

That same day, Johnson drafted and submitted an "FBI Urgent Report" addressed to then-FBI Director Robert Mueller and other FBI divisions. The report, entitled "Other Matter Warranting the Immediate Attention of FBIHQ Executives," included a synopsis of the FBI's investigation of Jenkins and specifically stated that the "CIPAV was deployed through an undercover electronic message session between Seattle undercover employees and Jenkins." The report did not describe the tactic of impersonating a journalist.

The State of Washington prosecuted Jenkins after the U.S. Attorney's Office declined prosecution because Jenkins was a juvenile. On July 16, 2007 Jenkins pleaded guilty to three counts of identity theft (Class C Felony), two counts of Threat to Bomb or Injure Property (Class B Felony), and one count of Felony Harassment (Class B Felony). He was sentenced that same day to 90 days of juvenile detention, 2 years of supervised release, 2 years of mental health counseling, and 2 years of probation with restrictions on internet and computer usage. Jenkins was also expelled from the Timberline School District.

B. Media Response to the FBI's Investigation of Jenkins

The FBI did not publicize the assistance its agents provided to the Lacey Police Department during the investigation of Jenkins's bomb threats. However, on July 18, 2007, 2 days after Jenkins pleaded guilty, the online technology news website, Wired.Com, released an article entitled "FBI's Secret Spyware Tracks Down Teen Who Made Bomb Threats." The article explained how the CIPAV worked and how the FBI used it to locate Jenkins. The article did not reference the fact that the FBI had impersonated a member of the news media.

Seven years later, on October 27, 2014, *The Seattle Times* released an article based upon e-mails obtained by the Electronic Frontier Foundation (EFF) through a Freedom of Information Act request. The e-mails obtained by the EFF disclosed the fact that the FBI posed as a member of the press when it contacted and then identified Jenkins as the author of the bomb threats.

On October 30, 2014, the AP sent a letter to then-Attorney General Eric Holder protesting the FBI's use of a fake AP news story in connection with its investigation of the bomb threats. In its letter, the AP's General Counsel, Karen Kaiser, complained that the AP learned, "more than seven years after the incident occurred," that "the FBI both misappropriated the trusted name of the Associated Press and created a situation where our credibility could have been undermined on a large scale." Kaiser added, "It is improper and inconsistent with a free press for government personnel to masquerade as The Associated Press or any other news organization." She said the FBI's actions "undermined the most fundamental component of a free press – its independence." In addition, several newspapers wrote articles questioning the tactics the FBI used to identify and arrest Jenkins.

In response to these news articles in 2014, FBI employees in the Cyber Division worked with attorneys in the FBI's Office of General Counsel (OGC), Cyber Law Unit, to draft a "Situation Action Background" (SAB) report that described the facts and circumstances surrounding the FBI's investigation and identification of Jenkins. The OGC attorney primarily responsible for drafting the SAB told us that the document was created to inform FBI executive leadership about the FBI's actions to identify and apprehend Jenkins. The SAB also included OGC's analysis of the applicable Department and FBI policies in effect at the time of the investigation, as well as OGC's analysis of the applicable Department and FBI policies currently in effect.

One week later, on November 6, 2014, FBI Director James Comey wrote a letter to the editor of *The New York Times* defending the FBI's investigation. Consistent with OGC's analysis in the SAB, Comey stated that the "technique [the FBI used to identify and apprehend Jenkins] was proper and appropriate under Justice Department and F.B.I. guidelines at the time" and that "[t]oday, the use of such an unusual technique would probably require higher level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate."

The same day, the Reporters Committee for Freedom of the Press (RCFP), on behalf of 25 other news organizations, wrote a letter to Holder and Comey voicing

its objection to the FBI impersonating journalists. In the letter, the RCFP complained, “[t]he utilization of news media as a cover for delivery of electronic surveillance software is unacceptable. This practice endangers the media’s credibility and creates the appearance that it is not independent of the government. It undermines media organizations’ ability to independently report on law enforcement. It lends itself to the appearance that media organizations are compelled to speak on behalf of the government.” The RCFP urged “the Attorney General and FBI to clarify that impersonation of the media is unacceptable. . . .” The letter further asserted that the operation “should have been subjected to heightened review and scrutiny, disclosed to OGC and the magistrate judge, and evaluated for what it was – an investigation that involved significant First Amendment concerns.”

V. OIG Analysis, Conclusions, and Recommendation

In this section, we assess whether, under Department and FBI policies in effect at the time of the 2007 investigation, appropriate approval was obtained for the undercover activities the FBI conducted to locate Jenkins. We concluded that Department and FBI policies in effect in 2007 did not prohibit agents from impersonating journalists or from posing as a member of a news organization, nor was there any requirement that agents seek special approval to engage in such practice. The only policies in effect at the time that might have required elevated consideration regarding the FBI’s plans turned on whether the undercover activity involved a “sensitive circumstance.” We concluded, given the lack of clarity in the policy language, that making a determination about the required approvals was a challenging one and that the judgments made by the agents were not unreasonable. However, we also concluded that after the plan was launched and Jenkins indicated to the undercover agent that he wanted to be left alone, the investigative team should have considered whether a message to Jenkins that included an implied offer of confidentiality would create a “sensitive circumstance” requiring a higher level of approval before the message was sent.

We also assess in this section whether those same undercover activities conducted in 2007 would require a higher level of approval under Department and FBI policies currently in effect. We concluded that an interim policy change adopted by the FBI on June 8, 2016 would prohibit the 2007 undercover activities unless they were part of an undercover operation reviewed by the Undercover Review Committee at FBIHQ and authorized by the FBI Deputy Director, after consultation with the Deputy Attorney General.

A. Policies in effect in 2007

In 2007, FBI policies did not prohibit the practice of agents impersonating journalists, nor was there any requirement that agents seek special approval to engage in such practice. Instead, agents were left to consult with the more general undercover policies which implicitly prohibited impersonation of a member of the news media only if there was a “significant risk” that a third party would enter into a confidential relationship with the undercover FBI employee.

There essentially were three questions that had to be answered in 2007 regarding the proposed online undercover activity to determine what level of approval was required before the activity was initiated. First, was the proposed activity in fact “undercover activity”? Second, how many “substantive undercover contacts” were expected to occur between the undercover employee and the subject of the investigation? Third, did the undercover activity involve any “sensitive circumstances”? As summarized in the following table, the answers to these questions established the level of approval required:

Type of Undercover Event	Review and Approval Requirements
Undercover Activity with 3 or fewer contacts	Supervisory Special Agent
Undercover Operation (<i>i.e.</i> , undercover activity more than 3 contacts)	Head of Field Office
Undercover Activity with Sensitive Circumstance(s)	Review by Criminal Undercover Operations Review Committee and FBIHQ Approval
Undercover Operation with Sensitive Circumstance(s)	Review by Criminal Undercover Operations Review Committee and FBIHQ approval

The FBI’s plan to locate Jenkins clearly was undercover activity, that is, “any investigative activity involving the use of an assumed name or cover-identity by an employee of the FBI” The plan called for an agent to pose as an editor working for the AP and contact Jenkins by e-mail for purpose of surreptitiously installing a computer program – the CIPAV – that would reveal the location of the computer Jenkins was using. This plan constituted “undercover activity” under FBI policy.

The agents involved in the development of the plan anticipated that it would require three or fewer substantive contacts with Jenkins to install the CIPAV. We do not believe this was an unreasonable expectation. The bomb threats alone were brazen, and in the e-mails communicating the threats, Jenkins was arrogant and dismissive of the authorities’ efforts to locate and identify him. Further, Jenkins created a public profile on Myspace.com and invited 33 of his classmates to post links to the page, even threatening one student that if she failed to do so, he would associate her with the next bomb threat. We believe that in view of Jenkins’s display of conceit and his contempt for the efforts to locate him, it was not unreasonable to expect that he would respond quickly to an inquiry from the media about the bomb threats, and that it would therefore probably not take more than three online “contacts” to deploy the CIPAV.

We believe that the third question that had to be addressed – whether the undercover activity involved a “sensitive circumstance” – was a difficult one.

However, we ultimately concluded that SSA Johnson's judgment that the plan did not involve a sensitive circumstance was not unreasonable.

As described in this report, the plan to get the CIPAV installed on Jenkins's computer would implicate the category of sensitive circumstances referenced in the FGUSO involving "privileged relationships" if there was:

a reasonable expectation that the undercover operation would involve . . . [a] significant risk that a third party [would] enter into a professional or confidential relationship with a person participating in an undercover operation who [was] acting as . . . [a] member of the news media.

According to FBI policy guidance, this sensitive circumstance extended to scenarios where a relationship with a subject was established that the subject believed was privileged. The plan in the Jenkins investigation was for the undercover agent to represent himself to Jenkins as a journalist working for the AP in order to entice Jenkins to click on a link to a fake news article. The idea to use a "press angle" originated with the FBI analyst who conducted a behavioral assessment of Jenkins. The analyst told the agents and the AUSA that this approach would "play on [Jenkins's] ego." Also, SSA Johnson told us that he consulted the relevant policy manual and concluded that the plan did not present a sensitive circumstance because, even though the undercover agent would pose as a member of the media, the communication would be limited to establishing the credibility needed to get Jenkins to click the link to the fake news article. There was no intention or expectation that they would be engaging in protracted discussions with Jenkins, or any need or attempt to enter into a confidential or privileged relationship with him.

According to witnesses, the press angle they decided to use in the contact with Jenkins was intended to take advantage of his ego and to establish the undercover agent's credibility. The plan did not entail an attempt to develop a confidential relationship with Jenkins. Considering this, and the agents' belief that it would take three or fewer contacts with Jenkins to get the CIPAV deployed, we found that it was not unreasonable for SSA Johnson to conclude at the outset of the undercover activity that there was not a "significant risk" that Jenkins would enter into a confidential relationship with a member of the media, and that therefore the undercover activity did not include a sensitive circumstance.

Having concluded that the judgments the agents made about the anticipated number of online contacts between the FBI and Jenkins and whether any "sensitive circumstances" existed were not unreasonable, we found – as indicated in the table above – that it was permissible for SSA Johnson to approve the online undercover activity.

However, the FBI knew little about Jenkins and could not predict with any reasonable degree of confidence how he would react to the undercover contact. Indeed, Jenkins did not respond to the agent's first communication, and when he did reply to the second, it was to tell the agent to "leave me alone." It was only after the agent told Jenkins that he was not trying to determine his true identity, and that he "would rather not know who you are as writers are not allowed to

reveal their sources," that Jenkins expressed a willingness to help.²⁷ We highlight this – that is, how the plan actually unfolded – not because it proves the agents' advance assessment of the plan was wrong, but to demonstrate the plan's inherent unpredictability and of the potential need to reassess the necessary approval requirements.

We considered whether the level of approval required for the undercover activity changed after the plan was launched based upon either the number of substantive contacts the undercover agent was having with Jenkins or the content of the communications. With respect to the number of substantive contacts, and considering the guidance the FBI provided agents for counting online contacts, we did not find a basis to question whether the level of approval required should have been reevaluated as the plan unfolded. However, with respect to the content of the communications, we found that the message to Jenkins assuring him that his identity would not be revealed had the potential to cause Jenkins to believe he was entering into a confidential relationship with the undercover agent. At this point, we believe the investigative team should have re-evaluated the situation and consulted with their SAC before sending the additional message.

As noted above and described in Section III, Jenkins did not respond to the undercover agent's first e-mail message, and in response to the agent's second message replied, "leave me alone." At that point, the investigative team discussed what to say in response. The message that was sent to Jenkins included assurances that they were not trying to identify him – "[a]s a member of the Press, I would rather not know who you are as writers are not allowed to reveal their sources." According to SSA Johnson, the message was intended to play on Jenkins's ego and build rapport, and to take advantage of his desire for attention while assuring him that he was not being asked to disclose his identity. As described earlier, Jenkins responded to this message 2 minutes after it was sent with his offer to help.

We believe the assurance made to Jenkins – particularly the statement that "writers are not allowed to reveal their sources" – was an implied promise of confidentiality. As such, it created a risk that Jenkins would believe he was entering into a confidential relationship with an undercover agent acting as a member of the news media. The investigative team did not adequately consider whether that risk was "significant" and therefore whether a "sensitive circumstance" existed under the FGUSO's "privileged relationships" provision. Had the team concluded that the message prepared for Jenkins created a significant risk, FBI policy accommodated operational needs by authorizing the SAC, or designated ASAC, to grant interim authority for online undercover contacts involving a sensitive circumstance. Thus, although FBIHQ and CUORC ultimately would have had to

²⁷ This implicit promise of confidentiality, made by an undercover agent posing as a journalist, was one of the objections the media raised about this practice out of a concern that it could make potential sources leery of trusting journalists for fear they might actually be police or agents posing as journalists.

approve the activity, there was a mechanism by which the investigative team could have continued its engagement with Jenkins with little delay.

After reviewing a draft of this report, the FBI told us that it concurred with our conclusion that the “privileged relationships” provision applies to scenarios involving subjects of investigations as well as third parties. However, the FBI provided the OIG with comments that indicated to us that the scope and application of the FGUSO’s “privileged relationships” provision is potentially susceptible to multiple interpretations. This was also evident in interviews we conducted during the course of this review. In light of the fact the current FBI policy – the USOPIG – fully incorporates the FGUSO provision, including the associated commentary, we believe it is important that the FBI provide clear guidance to employees about the circumstances to which the provision is meant to apply. Therefore, we recommend the FBI consider whether revisions to the USOPIG are required to ensure that undercover activity involving a significant risk that a subject believes he has entered into a privileged relationship with an undercover agent, is treated as a “sensitive circumstance.”²⁸

B. Policies in effect today

We also assessed whether those same undercover activities conducted in 2007 would require a higher level of approval if conducted under Department and FBI policies currently in effect today. As described in Section III.B. of this report, on June 8, 2016, the FBI adopted an interim policy – PN 0907N – that prohibits FBI employees from engaging in undercover activities that involve posing as members of the news media, unless those activities are authorized as part of an undercover operation by the Deputy Director, after consultation with the Deputy Attorney General. The number of substantive contacts by an undercover employee with the individual under investigation is no longer a relevant factor under this policy as it applies to employees posing as members of the news media.

The AP is “organized and operated for the purpose of gathering, reporting, or publishing news” and clearly falls within the definition of “news media” under FBI policy. It is equally clear under FBI policy currently in effect, that any undercover activity that would involve an employee posing as a member of the AP would have to be approved as an undercover operation at FBIHQ. The head of the FBI field office proposing the activity would first have to approve the application for the undercover operation to be submitted for approval to FBIHQ; the Undercover Review Committee at FBIHQ would then be required to review the application; and the Deputy Director, after consulting with the Deputy Attorney General, would be responsible for approving the application.

²⁸ As discussed earlier, the FBI’s June 2016 interim policy applies to employees posing as members of the news media or as a documentary film crew. The types of privileged relationships covered by the USOPIG include those with an attorney, physician, or clergyman, as well as with a member of the news media. Therefore, the June 2016 interim policy does not obviate the need to provide clear guidance on the scope and application of the discussed USOPIG provision.

We believe the June 2016 policy on FBI employees posing as members of the news media is a significant and important improvement to FBI policies that existed in 2007 during the Timberline investigation, as well as to those policies that would have governed similar undercover activities prior to June 8, 2016. The Department and the FBI have previously implemented a number of policies addressing the use of law enforcement tools to obtain information from or about members of the news media in criminal and civil investigations. Since 1980, federal regulations have required the Attorney General to authorize subpoenas issued to or for the telephone records of any member of the news media. See 28 C.F.R. § 50.10(e). Those regulations, which also governed the interrogation, indictment, or arrest of members of the news media, were re-examined by the Attorney General in 2013 at the direction of the President. The re-examination followed public criticism of the Department's actions in issuing subpoenas for 2 months of records related to 20 telephone lines used by AP staff as part of a criminal investigation into the unauthorized disclosure of classified information.^{29*} Following the Attorney General's review, the Department amended these regulations in February 2014 in order to "provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering activities," see 28 C.F.R. § 50.10(a), and to "ensure more robust oversight by senior Department officials; centralize the internal review and evaluation process; [and] set out specific standards for the use and handling of information obtained from, or records of, members of the news media" Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 79 F.R. § 10989-01 (2014).

While impersonating a member of the media potentially implicates different First Amendment concerns than using tools such as subpoenas and court orders to obtain information directly from news organizations, the activity also has the potential to "impair newsgathering activities" by, for example, making it less likely that sources will share information with journalists, fearing they might actually be FBI agents posing as journalists. The FBI's June 2016 interim policy on undercover activities that involve agents posing as members of the news media is an important and appropriate addition to the policies the Department previously implemented to regulate certain law enforcement activities that affect members of the news media.

Finally, as we described in Section III of this report, we learned during the course of this review that while FBIHQ approval is required to use a third person's "online identity" in undercover online communications or to make "untrue representations . . . concerning the activities or involvement of any third person" without that person's knowledge or consent, special approval was not required to use the identity of an organization or business in undercover online communications

²⁹ See, e.g., https://www.washingtonpost.com/world/national-security/under-sweeping-subpoenas-justice-department-obtained-ap-phone-records-in-leak-investigation/2013/05/13/11d1bb82-bc11-11e2-89c9-3be8095fe767_story.html (accessed August 3, 2016).

* An earlier version of this report incorrectly stated that the subpoenas were issued to the AP.

or in other undercover activities. The new interim policy changes that policy as it relates to news organizations, but does not address this issue with regard to non-news organizations or businesses. We think the Department should consider the appropriate level of review necessary before agents in a criminal investigation are allowed to use the name of a third-party organization or business without its knowledge or consent, in light of the potential impact that use might have on the third party's reputation.³⁰

C. Conclusion and Recommendations

We found that Department and FBI policies in effect in 2007 did not prohibit agents from impersonating journalists or from posing as a member of a news organization, nor was there any requirement that agents seek special approval to engage in such undercover activities. The only policies in effect at the time that might have required elevated consideration regarding the FBI's plans turned on whether the undercover activity involved a "sensitive circumstance." We concluded, given the lack of clarity in the policy language, that making a determination whether a situation was a "sensitive circumstance" was a challenging one and that the judgments made by the agents were not unreasonable given the lack of clarity. However, we also concluded that after the plan was launched, the investigative team should have considered whether a message to Jenkins that included an implied offer of confidentiality would create a "sensitive circumstance" requiring a higher level of approval before the message was sent.

We also found that prior to the adoption of the new interim policy in June 2016, FBI policy would not have prohibited FBI employees from engaging in the undercover activities agents conducted during the 2007 Timberline investigation. The new interim policy, however, clearly prohibits FBI employees from engaging in an undercover activity in which they represent, pose, or claim to be members of the news media, unless the activity is authorized as part of an undercover operation. In order for such an operation to be authorized, the undercover application must first be approved by the head of the FBI field office submitting the application to FBIHQ, reviewed by the Undercover Review Committee at FBIHQ, and approved by the Deputy Director, after consultation with the Deputy Attorney General.

We believe the new interim policy on undercover activities that involve FBI employees posing as members of the news media is a significant improvement to FBI policies that existed in 2007 during the Timberline investigation, as well as to those policies that would have governed similar undercover activities prior to June

³⁰ After reviewing a draft of this report, the FBI provided comments explaining that the heightened level of review and approval required for FBI employees to pose as members of the news media was introduced because such activity potentially could "impair newsgathering activities" under the First Amendment, but that such constitutional considerations do not apply to businesses and other third parties. Our recommendation, however, does not rely on equating the reputational interests of some third party organizations and businesses with the constitutional interests of others. We believe that reputational interests, and the potential impact FBI investigations can have on those interests, are themselves sufficiently important to merit some level of review before FBI employees use the names of third party organizations or businesses without their knowledge or consent.

2016. The new interim policy also is an important extension of policies the Department has previously implemented to regulate certain law enforcement activities that affect members of the news media, such as obtaining information from or about members of the news media in criminal and civil investigations. The FBI should move expeditiously to update its undercover policy guide to incorporate this new interim policy, and widely inform and educate FBI employees about the policy's existence and application.

Based upon our review, we make three recommendations to help ensure that FBI policies governing certain undercover activities and operations are well known, clear, and understood. The FBI concurs with the recommendations.

Recommendation 1: The FBI should move expeditiously to update its undercover policy guide to incorporate the June 2016 interim policy on undercover activities in which FBI employees represent, pose, or claim to be members of the news media or a documentary film crew; and widely inform and educate FBI employees about the policy's existence and application.

Recommendation 2: The FBI should consider the appropriate level of review required before FBI employees in a criminal investigation use the name of third-party organizations or businesses without their knowledge or consent.

Recommendation 3: The FBI should consider whether revisions to the USOPIG are required to ensure that undercover activity involving a significant risk that a subject believes he has entered into a privileged relationship with an undercover agent, is treated as a "sensitive circumstance."

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