

Law Enforcement Intelligence in a Free Society – a Review of the “Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations”

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Introduction:

Law enforcement intelligence is an important element of an effective crime-fighting program. Terrorists, narcotics traffickers and members of other organized crime enterprises have developed elaborate mechanisms to conceal their activity and commit crimes. Simply arresting an organization member for a specific crime does not eliminate the criminal threat if the larger organization survives and continues to have the capacity to commit crimes. Intelligence operations, however, pose enormous risks to a free society for a number of reasons, including: 1) intelligence work is often conducted in secret making it hard to monitor; 2) intelligence work runs a greater risk of infringing on rights of innocent citizens due to the frequent need to target what appear to be legitimate entities, since organized crime often seeks to corrupt legitimate businesses or organizations to criminal ends; and 3) intelligence work, particularly when it focuses on groups that seek to advance political agendas by violence, risks targeting groups for legitimate political expression rather than criminal activity. This complex mix of concerns over conducting an effective investigation while protecting rights of privacy and free expression points to the importance of developing guidelines for fair and effective law enforcement intelligence.

The United States’ Example and the Attorney General’s Guidelines:

The United States has struggled with how to regulate properly law enforcement

intelligence investigations. In the 1960s and 1970s, there were widespread allegations that the Federal Bureau of Investigation (the “FBI”), the U.S. government’s primary criminal investigative agency, had abused its law enforcement powers to harass non-violent political groups. In response, a Senate Committee directed by Senator Frank Church (the “Church Committee”)¹ investigated. The Church Committee found that, in fact, the FBI had: 1) maintained massive numbers of files at FBI headquarters that detailed political activity of individuals; 2) conducted investigations into domestic political groups; and 3) infiltrated such groups and conducted surveillance of them, solely based on an individual’s or group’s political affiliation rather than for any legitimate criminal investigative purpose.²

These revelations led to significant reforms during the seven years following the Church Committee hearings. Among other things, the U.S. Attorney General established regulations for the FBI, published in 1983, called “The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations,” (the “Guidelines”).³ At their core, the Guidelines attempted to balance

¹ Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities Report, Book II, S. Rep. No. 775, 94th Cong., 2d Sess. 5 (1976) (Report of Church Committee).

² See e.g., Note, “Re-Examining the Attorney General’s Guidelines for FBI Investigations of Domestic Groups,” 39 Ariz. L. Rev. 769 (1997) (describing the background of the Guidelines, including the nature and extent of alleged abuses); Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities Report, Book II, S. Rep. No. 775, 94th Cong., 2d Sess. 5 (1976) (Report of Church Committee).

³ The Attorney General’s Guidelines on Domestic Security Investigations, reprinted in FBI Domestic Security Guidelines: Oversight Hearing Before the Committee on the Judiciary, House of Representatives, 98th Cong., 1st Sess. 67 (Apr. 27, 1983) [hereinafter “Guidelines”]. The Department of Justice issued an earlier set of guidelines prior to the 1983 version. In 1976, then Attorney General Edward Levi, developed a set of guidelines to govern FBI investigations, consisting of two sets of directives. The first set was a series of regulations governing the FBI’s investigation of terrorist groups linked to a foreign power. These guidelines remain classified. The second set of guidelines, which was made available to the public,

the legitimate needs of law enforcement to investigate sophisticated criminal enterprises with the need to safeguard citizen rights. The Guidelines present a useful example of how to approach many of the problems inherent in regulating law enforcement intelligence. A review of these regulations provides insight into problems facing any society seeking to resolve these issues within the contours of their own legal systems.

The Investigative Implications of the Difference Between Organized Crime and Common Crime:

Organized crime and political terrorism pose fundamentally different challenges to society and law enforcement than what can be characterized as common crime. There is a dramatic difference between investigating a terrorist cell or a narcotics trafficking organization and a bank robbery. The standard investigative tools and techniques employed to identify and prosecute a common criminal fall short when faced with the challenge of an organized and sophisticated criminal enterprise. The Guidelines articulate the difference as follows:

[A]n investigation of a completed criminal act is normally confined to determining who committed that act and with securing evidence to establish the elements of the particular offense. It is, in this respect, self-defining. . . . While a standard criminal investigation terminates with the decision to prosecute or not to prosecute, the investigation of a criminal enterprise does not necessarily end, even though one or more of the participants may have been prosecuted.⁴

Inherent in the concept of an “enterprise” is the notion that these criminal

regulated the investigation of domestic groups. In 1983, the Department of Justice issued new guidelines, to replace the non-classified set of Levi guidelines on domestic investigations. *Id.*

⁴ The Guidelines at 9.

organizations operate with a coherent organizational structure, much the way a legitimate enterprise would. Members of a criminal enterprise often play limited roles that in isolation would not necessarily appear particularly nefarious or even illegal, but may provide critical support to the overall enterprise.⁵ If the FBI were restricted to the investigation of discrete acts as separate crimes, this would create two problems. First, often an isolated act may not be criminal unless it is understood in the larger context of the enterprise's activities. Second, the inability to coordinate a broad-based investigation that truly corresponds to the extent of the criminal activity would hobble effective information sharing and strategic planning.

With a broader potential scope than an investigation of a common crime, a criminal intelligence investigation may target “enterprises who seek either to obtain monetary or commercial gains or profits through racketeering activities or to further political or social goals through activities that involve criminal violence.”⁶ Among other things, the Guidelines authorize the FBI to investigate: 1) the size and composition of the group involved, including identifying the members of the enterprise and other persons likely to be knowingly acting in furtherance of its criminal objectives, provided that the information concerns such persons' activities on behalf or in furtherance of the enterprise; 2) the finances of the enterprise; 3) its geographic dimensions; 4) its past acts and intended criminal goals; and 5) its capacity for harm. In practice, this means that

⁵ See, e.g., Airtel to All SACs and LEGATs of March 17, 1983), reprinted in Oversight Hearings at 87. The Guidelines permit the FBI to investigate individuals “who provide safehouses, money, weapons or otherwise knowingly support the criminal activities” of a criminal enterprise as part of one overall investigation rather than as a series of separate investigations.

⁶ The Guidelines at 9.

what might otherwise would be a series of isolated investigations can be linked in a larger investigative effort.⁷

The Appropriate Role for a Criminal Intelligence Investigation:

With these goals and criteria in mind, the Guidelines set forth specific circumstances when the FBI can begin an investigation of an organized criminal enterprise or a domestic terrorist organization. If law enforcement were simply able to label every common crime the work of a criminal enterprise, than there would be no practical limit on criminal intelligence investigations.

The Guidelines set forth two broad set of criteria for the use of a criminal intelligence investigation. First, in the case of organized crime investigations, the Guidelines authorize a criminal intelligence investigation when:

facts or circumstances reasonably indicate that two or more persons are engaged in a continuing course of conduct for the purpose of obtaining monetary or commercial gains or profits wholly or in part through racketeering activity.⁸

The Guidelines define racketeering activity to include only a certain subset of activities, including “violence, extortion, narcotics, or systematic public corruption.”⁹ Second, in the case of domestic terrorism investigations, the Guidelines set the following standard:

[T]he facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or

⁷ Id. at 15.

⁸ The Guidelines at 11.

⁹ The Guidelines at 11. In order to investigate enterprises involved in activities other than those specified in the Guidelines, the director of the FBI and the US Attorney General must certify in writing that such an investigation is justified by “exceptional circumstances.” Id.

social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States.¹⁰

In either case, prior to undertaking an investigation, the FBI must show “facts or circumstances” that “reasonably indicate” that a group is involved in racketeering activity or is going to use “violence” to promote its political cause. A “reasonable indication” is more than a mere “hunch,” guess or intuition.¹¹ There must be 1) an evaluation of all the facts and circumstances, 2) by a prudent investigator, that 3) allows the investigator to articulate specific facts or circumstances indicating a past, current, or impending violation of law. The standard of a “reasonable indication” captures the importance of preventing the subjective whim of an investigator from controlling the classification of an investigation.

Additional Risks of Investigating Political Groups (Part I):

In the case of a domestic intelligence investigation of politically-motivated crime, the need for additional controls is particularly strong because of the danger of investigations targeting legitimate political activity. In many ways, this remains the most controversial aspect of the Guidelines and the most difficult problem facing any regulator. Given the overwhelming power of a national law enforcement network, there are great temptations to the party in power or to those who control the law enforcement agency to deploy law enforcement resources to defend their own principles or ideals. In addition, there are ample examples of political movements that include both a non-violent political wings unrelated to the efforts of criminal elements who are attempting to pursue

¹⁰ Id.

¹¹ The Guidelines at 13.

the same or similar agenda through violent and criminal means. If law enforcement were to pursue those involved only in peaceful political expression, it would clearly violate rights of free expression, without countering the criminal element.

The Guidelines address these concerns in two ways. First, a criminal investigation cannot be based “solely on activities [speech and media activity] protected by the First Amendment [of the U.S. Constitution] or on the lawful exercise of any other rights secured by the Constitution or laws of the United States,” but must be considered “in context” to establish a threat of violence and criminal activity.¹² This is designed to ensure that a criminal intelligence investigation does not target unpopular opinions or an unpopular political party. The investigation ultimately must have a “legitimate law enforcement interest,” i.e. to prevent, investigate or prosecute a crime. The Guidelines also mandate that any investigation must be conducted with as little “intrusion into the privacy” of individuals as possible under the circumstances.¹³

Second, the Guidelines mandate “tighter management controls and higher levels of review” than would be required in the investigation of an ordinary crime.¹⁴ Thus, a senior FBI supervisor is required to authorize the investigation. The Guidelines also

¹² In its advice to field agents, the FBI stressed that “[t]he point to remember . . . is that the basis for initiating an inquiry or investigation is not the advocacy itself, but rather that the statement of advocacy taken in context presents a credible threat of harm.” Airtel to All SACs and LEGATs of March 17, 1983), reprinted in Oversight Hearings at 90. This is a “recognition of the fact that some statements are themselves crimes, e.g. 18 U.S.C.35 (false bomb threats), 18 U.S.C. 112 (threatening a foreign official), 18 U.S.C. 871 (threatening the President). Letter from Ass’t Attorney General Robert A. McConnell to Sen. Joseph Biden, March 24, 1983, reprinted in Oversight Hearings at 131.

¹³ The Guidelines at 3.

mandate that the FBI report its initiation of an investigation to prosecutors within the Department of Justice. These prosecutors, in turn, can request additional information about the investigation. Although the prosecutors do not have the power to authorize or terminate an investigation, prosecutors can play an important role in ensuring that investigations are properly targeted to meet the legal requirements of any future potential prosecution.¹⁵

The Role of a Preliminary Investigation:

Whether an investigation targets organized crime or terrorism, there will still be cases when an investigator cannot articulate a “reasonable indication” of facts sufficient to support a full investigation. In that case, an investigator may still need to conduct further inquiry than simply checking out the initial lead. The Guidelines regulate such a preliminary inquiry. These inquiries are limited to ensuring that the investigation solely obtains information necessary to make an informed judgment as to whether a full investigation is warranted. Again, this preliminary investigation requires oversight by supervisory FBI agents. In addition, if the nature of the investigation concerns certain sensitive matters, including investigations that target political, media or religious organizations,¹⁶ the FBI must notify a federal prosecutor of the existence of the

¹⁴ The Guidelines at 15.

¹⁵ *Id.* at 15. The Guidelines direct the FBI to notify prosecutors in the the Department of Justice’s Office of Intelligence Policy and Review (OIPR) of the initiation of any domestic security/terrorism investigation. OIPR, staffed by federal prosecutors, is the office within the Department of Justice that oversees and sets policy with respect to intelligence matters affecting the law enforcement community.

¹⁶“‘Sensitive criminal matter’ is any alleged criminal conduct involving corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious organization or a primarily political organization or the related activities of any individual prominent in such an organization or the organization, or the activities of the news media. . . .” The Guidelines at 4.

investigation.¹⁷

Although the preliminary inquiry places few restrictions on the types of investigative techniques allowed (barring only those which require judicial approval, mail covers — a technique in which an investigator records the name and address of letters being delivered to a particular person while the letter is still at the post office — mail openings and nonconsensual electronic surveillance), the preliminary inquiry is to be of short duration and to use the “least intrusive means” possible. The Guidelines acknowledge that the target of an investigation may have important concerns about his or her reputation, which even the hint of an investigation could undermine.¹⁸ Particularly in a political context, an investigation itself can have a chilling effect on otherwise protected political protest and expression.

Limits on the Duration of Criminal Intelligence Investigations:

Criminal intelligence investigations will almost always be of longer duration than a regular criminal investigation. The Guidelines explain this as follows:

[T]he organization provides a life and continuity of operation that are not normally found in a regular criminal activity. As a consequence, these investigations may continue for several years. Furthermore, as Justice Powell noted, the focus of such investigations “May be less precise than that directed against more conventional types of crime.” United States v. United States District Court, 407 U.S. 297, 322 (1972). Unlike the usual criminal case, there may be no completed offense to provide a framework for the investigation. . . . [T]he investigation is broader and less discriminate than usual, involving “the interrelation of various sources and

¹⁷ Id. at 4 – 5.

¹⁸ The Guidelines at 4 – 6.

types of information.” Id.¹⁹

Still, it would seem to defeat the purpose of any regulation if there were no limits on how long an inquiry could proceed without any review or update. There are two important reasons for this. First, an open-ended inquiry poses too great a danger of losing its focus on a group’s criminal objectives and simply become a review of a group’s advocacy or policies. Second, a law enforcement organization must target its limited resources strategically to combat the most urgent crime and not become distracted by lengthy and unproductive investigations.

The Guidelines provide that FBI supervisors can authorize criminal intelligence investigations for 180-day periods, subject to reauthorization by FBI supervisors at the end of the term. In addition, in cases of domestic security or terrorism investigations, the Guidelines require the Department of Justice to review FBI intelligence investigations at least annually. These authorization and review requirements are designed to ensure that an investigation does not continue longer than necessary. This does not mean that a group must be actively undertaking crimes for an investigation to continue. For example, if a group is dormant, but still suspected of preparing for criminal activity, the Guidelines do not require the FBI to close the investigation. The investigation, however, must be limited to development of facts that evidence a return to criminal activity.²⁰

Permissible Investigative Techniques:

One of the basic rules of criminal investigative work is that it must be conducted

¹⁹ Id. at 9 – 10.

²⁰ Id. at 12.

in accordance with applicable law. In the U.S., this means that certain intrusions on a person's privacy are only allowed pursuant to judicial authorization based on a finding that there is probable cause to believe that a crime was committed. The Guidelines do not alter this basic balance between individual privacy interests and the government's interest in effective law enforcement. On the one hand, an effective regulatory regime should clearly rule out blatantly illegal means by which agents could collect intelligence information. On the other, given the long-term nature of intelligence investigations, law enforcement must ensure that it is not unduly intruding on the privacy of law-abiding citizens, even if the investigative techniques are lawful.

The Guidelines seek to address these concerns by imposing a general rule that FBI investigations should employ the least intrusive measures possible. Specifically, the Guidelines provide that the FBI may:

Use any lawful investigative technique. Before employing a technique, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether a highly intrusive technique should be used depends on the seriousness of the crime and the strength of the information indicating the existence of the crime.²¹

Within this general framework, the Guidelines also enumerate certain restrictions on certain types of investigative techniques, including certain types of electronic surveillance and use of confidential informants.²²

²¹ *Id.* at 16.

²² *Id.* at 17.

Additional Risks of Investigating Political Groups (Part II):

As in the case of the initial decision to investigate a political oriented group, the decision about the appropriate investigative techniques holds special risks. In the U.S. experience, for example, FBI agents infiltrated political groups and posed as members of these groups solely for the purpose of gathering information about the groups' political views. This not only impermissibly infringed on the free expression rights of the members of the groups, but ran the unacceptable risk that the FBI was actually influencing the activity of the group. As the U.S. experience illustrates, any investigation of a political group holds out a heightened risk of "dirty tricks" on the part of the investigating agency. Simply monitoring a political demonstration can infringe on political expression if the participants in the demonstration believe that they are being targeted by the government for additional investigation simply on the basis of their appearance at a peaceful political event.

The Guidelines provide an example of the regulation of two lawful investigative techniques that are subject to abuse, namely 1) undercover operatives in political groups; and 2) monitoring of political demonstrations. As the Guidelines note, "special care must be exercised in sorting out protected activities from those which may lead to violence or serious disruption of society." As a consequence, the "[G]uidelines establish safeguards for group investigations of special sensitivity, including tighter management controls and higher levels of review."²³ In the case of the use of undercover agents or informants

²³ Id. at 10.

against political groups, the FBI must obtain additional approvals as well as notify the Department of Justice.²⁴ In the case of investigations of political demonstrations, the FBI cannot begin such an investigation “in the absence of any information indicating planned violence by a group or enterprise.” “[M]ere speculation that force or violence might occur during the course of an otherwise peaceable demonstration is not sufficient grounds for the initiation of an investigation.”²⁵ The Guidelines draw a distinction between peaceful assembly, which must be free from scrutiny, and violent demonstrations, which legitimately require a law enforcement response.

Limitations on Information Storage and Sharing:

In addition to the actual investigation itself, any regulation of law enforcement intelligence also must address what can be done with the information collected and with whom it can be shared. There are certainly legitimate uses for law enforcement intelligence. For example, if a law enforcement agent learns about a threat to the president or other elected official, it would be important to share that information. The Guidelines, in fact, permit the FBI to provide information to another federal or state or local law enforcement agency to assist in law enforcement efforts or to prevent a crime, violence or any other conduct dangerous to human life.²⁶ The Guidelines also allow the FBI to cooperate with the Secret Service (the agency assigned to protect the President of the United States) in order to thwart criminal action that could threaten the President.²⁷

²⁴ Id. at 17

²⁵ Id. at 14

²⁶ Id. at 18.

²⁷ Id.

On the other hand, however, both the U.S. and other nations have had bad experiences when government agencies are able to gather information and maintain investigative files on citizens for reasons unrelated to a specific criminal investigation. Although this topic is somewhat outside the scope of this paper, the U.S. has developed extensive regulations to control what information the government can maintain about citizens and with whom such information can be shared. The Guidelines incorporate some aspects of these regulations by, among other things, preventing the FBI from maintaining files on activity not related to criminal activity, beyond a conventional reference library.²⁸ This aspect of the Guidelines has been interpreted by the Department of Justice in the context of other laws that govern privacy concerns of citizens. Specifically, the Privacy Act sets out that a Federal Agency shall maintain “no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized” to do so.²⁹ Moreover, the Privacy Act and the related Freedom of Information Act both provide certain access rights to records (limited by law enforcement needs) and require federal agencies to file a list of the databases that the agencies maintain. This is an additional check on federal authorities’ ability to maintain secret

²⁸ There is considerable debate regarding the meaning of library. One interpretation based in the Privacy Act is a library may contain “standard bibliographic materials maintained in agency libraries such as library indexes, Who’s Who volumes [a commercially available publication that lists prominent individuals in society and the professions] and similar materials.” Office of Management and Budget Guidance on the Privacy Act, 40 F.R. 56741 *et seq.*

²⁹ Privacy Act, 5 U.S.C. 552a(e)7. See, also, Senate Report on the privacy act: “This section’s restraint is aimed particularly at preventing collection of protected information, not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future. . . .” S. Rept. 93-1183, 93rd Cong., 2d Sess.

files unrelated to law enforcement goals.³⁰

Conclusion:

The Guidelines set forth an example of the way in which a law enforcement agency can both provide for effective law enforcement intelligence and protect important privacy and political rights. The Guidelines arose at a time in U.S. history when the American public perceived that law enforcement had abused its power to undercut legitimate political activity rather than to fight crime. This perception led the Department of Justice to institute Guidelines that reflect certain basic principles.

First, law enforcement activities must be carefully reigned in to prevent an impermissible attack on free speech and political activities. Both civil libertarians and proponents of more aggressive law enforcement have criticized the Guidelines in this connection. Civil libertarians argue that the Guidelines permit an intelligence investigation without a tighter link between criminal activity and the actual activity or advocacy of the targeted group.³¹ At the time the Guidelines were published, numerous U.S. congressional critics also suggested that the Guidelines were too permissive in the use of investigative techniques, which could impermissibly infringe on protected speech.³² More recently, with an increased threat in the seriousness of U.S. domestic

³⁰ Privacy Act, 5 U.S.C. 552 *et. seq.* A full analysis of the Privacy Act and FOIA is beyond the scope of this paper. Certain source materials are included at the web site of the Department of Justice, www.usdoj.gov.

³¹ See, e.g., *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 575 (N.D. Ill. 1983), modified, 733 F.2d 1187 (7th Cir. 1984), and rev'd, 742 F.2d 1007 (7th Cir. 1984) (articulating arguments that the Guidelines allow the FBI to undertake investigations based on protected free speech activities).

³² See, e.g. Letter to the Hon. William Webster from Cong. Don Edwards, dated April 12, 1983, reprinted in Oversight Hearings at 141-44. (criticizing the standards permitting investigations of political groups as

terrorism, supporters of tougher law enforcement have argued that the Guidelines are too limiting for effective law enforcement. Interestingly, U.S. law enforcement has resisted any effort to change the Guidelines to make them more flexible.³³

Second, in the area of criminal intelligence investigations there must be enhanced supervision and controls. This must take place on two levels. Within the agency itself, there must be higher levels of management review and supervision to ensure that individual agents do not violate rules. The leaders of the agency must ensure that the agents understand that their mission is to fight criminal acts rather than simply to keep tabs on citizens. Outside of the agency, it is important to involve prosecutors in the oversight of investigations. Although this does not mean micro-management of the investigators, it requires the investigative agency to provide periodic reporting and justification for its activities. This is both a way to target investigations so that they will be more successful and a way to ensure that law enforcement agencies remain focused on their crime-fighting mission.

Finally, there must be a clear statement of goals so that agents do not misunderstand the mission and that those in the political branches of government understand that law enforcement agencies are not to be used as their personal or party enforcement agency. Although a party in power may see the opposition as “threatening”

endangering free speech rights and warning of the dangers of using confidential informants to investigate political groups).

³³ For example, after the bombing of the federal building in Oklahoma City in 1995, FBI Director Louis Freeh testified before Congress that the FBI had sufficient authority to investigate domestic terrorism without easing any of the Guidelines’ restrictions. Terrorism Hearings, House Int’l Relations Comm., Crime Subcomm., 104th Cong., 1st Sess., p.7 (1995) (Testimony of FBI Director Louis Freeh).

to the government, as long as such “threat” is brought about by the free and fair exchange of ideas, law enforcement has no role in defending the government in power politically. Although there is no pat response for how best to balance law enforcement and civil rights concerns, taken together, these elements provide helpful insight for any program designed to preserve the capacity to fight crime while protecting civil rights.