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## *Organization and Coordination of Counterterrorism Investigations*

The constitutional and statutory framework established by the judiciary and by Congress in the Foreign Intelligence Surveillance Act (FISA) and other statutes tells only part of the legal story of counterterrorism investigations. Particularly for investigative techniques other than electronic surveillance and physical searches, the discretion in the executive branch to initiate and then conduct investigations is largely governed by executive branch rules, not by statute, and the courts have had little to say to provide guidance for these investigations. Nevertheless, important legal determinations must be made—such as whether to approve an agent’s request to follow the daily routine of a potential suspected terrorist, whether sufficient suspicion exists to launch even a preliminary investigation, and when informants may be placed inside a targeted organization. Once intelligence is collected—for example, by the FBI—under what circumstances should the information be shared, and with what other agencies?

In this chapter we first probe the executive branch organization for counterterrorism investigations. An executive order supplies an overarching template for the conduct of intelligence operations by executive agencies, including the FBI and CIA. Then we explore the rules that govern how the FBI—the principal federal intelligence agency for countering terrorism—conducts its terrorism detection activities. Post-September 11 evaluations by the Department of Justice have produced important revisions to longstanding FBI guidelines governing a range of investigative activities.

Second, it is now common knowledge that some of the September 11 hijackers lived openly in the United States when their names or names of their close associates were on intelligence “watch lists.” The watch-list information was not shared in a timely fashion with the FBI or state and local law enforcement agencies, which might have been able to detect the hijackers’ plot before it was implemented. Because intelligence about would-be terrorists might be obtained by the FBI, CIA, NSA, or agencies inside the Defense Department, or by a state or local law enforcement agency, the challenges of sharing intelligence are staggering. Moreover, the FBI, long embedded in its role as the federal government’s chief law enforcement agency, has struggled to reshape its mission to incorporate a vigorous counterterrorism component. How should information classified by one agency be shared with another agency? How should a federal agency share with a state or local agency? How can information be shared in a secure way without jeopardizing the privacy interests of those identified in the intelligence? Here we survey the efforts toward information sharing that have been made in the counterterrorism area, and we examine briefly the state of reforms at the FBI.

## **A. EXECUTIVE AUTHORITY FOR NATIONAL SECURITY INVESTIGATIONS**

The Attorney General is expressly vested with “primary investigative authority for all Federal crimes of terrorism.” 18 U.S.C. §2332b(f) (2006). The FBI, in contrast, has scant statutory authority to carry out its mission. Lacking a legislative charter, the FBI operates on the basis of the Attorney General’s authority found in 28 U.S.C. §533 (2000 & Supp. V 2005) to appoint officials:

- (1) to detect and prosecute crimes against the United States;
- (2) to assist in the protection of the person of the President; and . . .
- (4) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

The FBI also draws investigative authority from statutes such as FISA.

All FBI investigations are conducted according to guidelines promulgated by the Attorney General and an executive order that directs the activities of all the agencies that make up the intelligence community. On September 29, 2008, Attorney General Michael Mukasey announced the issuance of *The Attorney General’s Guidelines for Domestic FBI Operations*, available at <http://www.usdoj.gov/ag/readingroom/guidelines.pdf>, to take effect on December 1, 2008. According to the Attorney General, the new consolidated guidelines “will address in a comprehensive way the FBI’s investigation of crimes and threats to the national security and its collection of foreign intelligence; the FBI’s provision of assistance and information to other agencies; and the FBI’s intelligence analysis and planning functions.” *Fact Sheet: Attorney General Consolidated Guidelines for FBI Domestic Operations*, 2008 WLNR 18835376 (Oct. 3, 2008). The consolidated guidelines combine nearly uniform standards for all FBI domestic investigations and replace five sets of previously discrete guidance on crimes investigation, national security investigations, and foreign intelligence investigations. Excerpts of the *Guidelines for Domestic FBI Operations*, along with a portion of amended Executive Order No. 12,333, are set out below.

### **Executive Order No. 12,333**

#### **United States Intelligence Activities**

46 Fed. Reg. 59,941 (Dec. 4, 1981), as amended by Executive Order No. 13,284,  
68 Fed. Reg. 4075 (Jan. 23, 2003); Executive Order No. 13,355, 69 Fed. Reg. 53,593  
(Aug. 27, 2004); and Executive Order No. 13,470 (2008), 73 Fed. Reg. 45,325 (July 30, 2008))  
<http://www.whitehouse.gov/infocus/nationalsecurity/amended12333.pdf>

Timely, insightful, and accurate information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons and their agents, is essential to the national security of the United States. All reasonable and lawful means must be used to ensure that the United States will receive the best intelligence possible. For that purpose, by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including the National Security Act of 1947, as amended, and as President of the United States of America, in order to provide for the effective conduct of United States intelligence activities and the protection of constitutional rights, it is hereby ordered as follows: . . .

#### 1.7. *Intelligence Community Elements*. . . .

- (a) The Central Intelligence Agency. The Director of the Central Intelligence Agency shall:
  - (1) Collect (including through clandestine means), analyze, produce, and disseminate foreign

intelligence and counterintelligence;

(2) Conduct counterintelligence activities without assuming or performing any internal security functions within the United States; . . .

(7) Perform such other functions and duties related to intelligence as the Director may direct. . . .

2.3. *Collection of Information.* Elements of the Intelligence Community are authorized to collect, retain or disseminate information concerning United States persons only in accordance with procedures established by the head of the Intelligence Community element concerned . . . and approved by the Attorney General . . . after consultation with the Director. Those procedures shall permit collection, retention, and dissemination of the following types of information: . . .

(b) Information constituting foreign intelligence or counter-intelligence, including such information concerning corporations or other commercial organizations. Collection within the United States of foreign intelligence not otherwise obtainable shall be undertaken by the Federal Bureau of Investigation (FBI) or, when significant foreign intelligence is sought, by other authorized elements of the Intelligence Community, provided that no foreign intelligence collection by such elements may be undertaken for the purpose of acquiring information concerning the domestic activities of United States persons; . . .

2.4. *Collection Techniques.* Elements of the Intelligence Community shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad. Elements of the Intelligence Community are not authorized to use such techniques as electronic surveillance, unconsented physical searches, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures established by the head of the Intelligence Community element concerned or the head of a department containing such element and approved by the Attorney General, after consultation with the Director. Such procedures shall protect constitutional and other legal rights and limit use of such information to lawful governmental purposes. These procedures shall not authorize:

(a) The Central Intelligence Agency (CIA) to engage in electronic surveillance within the United States except for the purpose of training, testing, or conducting countermeasures to hostile electronic surveillance;

(b) Unconsented physical searches in the United States by elements of the Intelligence Community other than the FBI, except for:

(1) Searches by counterintelligence elements of the military services directed against military personnel within the United States or abroad for intelligence purposes, when authorized by a military commander empowered to approve physical searches for law enforcement purposes, based upon a finding of probable cause to believe that such persons are acting as agents of foreign powers; and

(2) Searches by CIA of personal property of non-United States persons lawfully in its possession;

(c) Physical surveillance of a United States person in the United States by elements of the Intelligence Community other than the FBI, except for:

(1) Physical surveillance of present or former employees, present or former intelligence element contractors or their present or former employees, or applicants for any such employment or contracting; and

(2) Physical surveillance of a military person employed by a non-intelligence element of a military service; and

(d) Physical surveillance of a United States person abroad to collect foreign intelligence, except to obtain significant information that cannot reasonably be acquired by other means.

2.5. *Attorney General Approval.* The Attorney General hereby is delegated the power to approve the

use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power. The authority delegated pursuant to this paragraph, including the authority to approve the use of electronic surveillance as defined in the Foreign Intelligence Surveillance Act of 1978, as amended, shall be exercised in accordance with that Act. . . .

2.6. *Assistance to Law Enforcement and Other Civil Authorities.* Elements of the Intelligence Community are authorized to: . . .

(b) Unless otherwise precluded by law or this Order, participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers, or international terrorist or narcotics activities; . . .

2.8. *Consistency with Other Laws.* Nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.

2.9. *Undisclosed Participation in Organizations Within the United States.* No one acting on behalf of elements of the Intelligence Community may join or otherwise participate in any organization in the United States on behalf of any element within the Intelligence Community without disclosing such person's intelligence affiliation to appropriate officials of the organization, except in accordance with procedures established by the head of the Intelligence Community element concerned or the head of a department containing such element and approved by the Attorney General, after consultation with the Director. Such participation shall be authorized only if it is essential to achieving lawful purposes as determined by the Intelligence Community element head or designee. No such participation may be undertaken for the purpose of influencing the activity of the organization or its members except in cases where:

(a) The participation is undertaken on behalf of the FBI in the course of a lawful investigation; or

(b) The organization concerned is composed primarily of individuals who are not United States persons and is reasonably believed to be acting on behalf of a foreign power. . . .

## **THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS**

Department of Justice, October 2008

<http://www.usdoj.gov/ag/readingroom/guidelines.pdf>

### **INTRODUCTION . . .**

The general objective of these Guidelines is the full utilization of all authorities and investigative methods, consistent with the Constitution and laws of the United States, to protect the United States and its people from terrorism and other threats to the national security, to protect the United States and its people from victimization by all crimes in violation of federal law, and to further the foreign intelligence objectives of the United States. At the same time, it is axiomatic that the FBI must conduct its investigations and other activities in a lawful and reasonable manner that respects liberty and privacy and avoids unnecessary intrusions into the lives of law-abiding people. . . .

The issuance of these Guidelines represents the culmination of the historical evolution of the FBI and the policies governing its domestic operations subsequent to the September 11, 2001, terrorist attacks on the United States. Reflecting decisions and directives of the President and the Attorney General, inquiries and enactments of Congress, and the conclusions of national commissions, it was recognized that the FBI's actions needed to be expanded and better integrated to meet contemporary realities:

[C]ontinuing coordination . . . is necessary to optimize the FBI's performance in both national security and criminal investigations . . . . [The] new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old "wall" between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very different FBI from the one we had on September 10, 2001. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 466, 452 (2005).)

In line with these objectives, the FBI has reorganized and reoriented its programs and missions, and the guidelines issued by the Attorney General for FBI operations have been extensively revised over the past several years. Nevertheless, the principal directives of the Attorney General governing the FBI's conduct of criminal investigations, national security investigations, and foreign intelligence collection have persisted as separate documents involving different standards and procedures for comparable activities. These Guidelines effect a more complete integration and harmonization of standards, thereby providing the FBI and other affected Justice Department components with clearer, more consistent, and more accessible guidance for their activities, and making available to the public in a single document the basic body of rules for the FBI's domestic operations. . . .

**A. FBI Responsibilities — Federal Crimes, Threats to the National Security, Foreign Intelligence**

Part II of these Guidelines authorizes the FBI to carry out investigations to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence. The major subject areas of information gathering activities under these Guidelines—federal crimes, threats to the national security, and foreign intelligence—are not distinct, but rather overlap extensively. For example, an investigation relating to international terrorism will invariably crosscut these areas because international terrorism is included under these Guidelines' definition of "threat to the national security," because international terrorism subject to investigation within the United States usually involves criminal acts that violate federal law, and because information relating to international terrorism also falls within the definition of "foreign intelligence." Likewise, counterintelligence activities relating to espionage are likely to concern matters that constitute threats to the national security, that implicate violations or potential violations of federal espionage laws, and that involve information falling under the definition of "foreign intelligence."

While some distinctions in the requirements and procedures for investigations are necessary in different subject areas, the general design of these Guidelines is to take a uniform approach wherever possible, thereby promoting certainty and consistency regarding the applicable standards and facilitating compliance with those standards. Hence, these Guidelines do not require that the FBI's information gathering activities be differentially labeled as "criminal investigations," "national security investigations," or "foreign intelligence collections," or that the categories of FBI personnel who carry out investigations be segregated from each other based on the subject areas in which they operate. Rather, all of the FBI's legal authorities are available for deployment in all cases to which they apply to protect the public from crimes and threats to the national security and to further the United States' foreign intelligence objectives. In many cases, a single investigation will be supportable as an exercise of a number of these authorities, i.e., as an investigation of a federal crime or crimes, as an investigation of a threat to the national security, and/or as a collection of foreign intelligence. . . .

## ***2. Threats to the National Security . . .***

. . . These Guidelines (Part VII.S) specifically define threats to the national security to mean: international terrorism; espionage and other intelligence activities, sabotage, and assassination, conducted by, for, or on behalf of foreign powers, organizations, or persons; foreign computer intrusion; and other matters determined by the Attorney General, consistent with Executive Order 12333 or any successor order. . . .

. . . [T]hese investigations . . . often serve important purposes outside the ambit of normal criminal investigation and prosecution, by providing the basis for, and informing decisions concerning, other measures needed to protect the national security. These measures may include, for example: excluding or removing persons involved in terrorism or espionage from the United States; recruitment of double agents; freezing assets of organizations that engage in or support terrorism; securing targets of terrorism or espionage; providing threat information and warnings to other federal, state, local, and private agencies and entities; diplomatic or military actions; and actions by other intelligence agencies to counter international terrorism or other national security threats.

In line with this broad range of purposes, investigations of threats to the national security present special needs to coordinate with other Justice Department components, including particularly the Justice Department's National Security Division, and to share information and cooperate with other agencies with national security responsibilities, including other agencies of the U.S. Intelligence Community, the Department of Homeland Security, and relevant White House (including National Security Council and Homeland Security Council) agencies and entities. Various provisions in these Guidelines establish procedures and requirements to facilitate such coordination.

## ***3. Foreign Intelligence . . .***

The general guidance of the FBI's foreign intelligence collection activities by DNI-authorized requirements does not . . . limit the FBI's authority to conduct investigations supportable on the basis of its other authorities—to investigate federal crimes and threats to the national security—in areas in which the information sought also falls under the definition of foreign intelligence. The FBI conducts investigations of federal crimes and threats to the national security based on priorities and strategic objectives set by the Department of Justice and the FBI, independent of DNI-established foreign intelligence collection requirements.

Since the authority to collect foreign intelligence enables the FBI to obtain information pertinent to the United States' conduct of its foreign affairs, even if that information is not related to criminal activity or threats to the national security, the information so gathered may concern lawful activities. The FBI should accordingly operate openly and consensually with U.S. persons to the extent practicable when collecting foreign intelligence that does not concern criminal activities or threats to the national security.

### **B. The FBI as an Intelligence Agency**

The FBI is an intelligence agency as well as a law enforcement agency. . . . Enhancement of the FBI's intelligence analysis capabilities and functions has consistently been recognized as a key priority in the legislative and administrative reform efforts following the September 11, 2001, terrorist attacks:

[Counterterrorism] strategy should . . . encompass specific efforts to . . . enhance the depth and quality of domestic intelligence collection and analysis . . . . [T]he FBI should strengthen and improve its domestic [intelligence] capability as fully and expeditiously as possible by immediately instituting

measures to . . . significantly improve strategic analytical capabilities . . . . (Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 351 & H.R. Rep. No. 792, 107th Cong., 2d Sess. 4-7 (2002) (errata print).)

A “smart” government would *integrate* all sources of information to see the enemy as a whole. Integrated all-source analysis should also inform and shape strategies to collect more intelligence. . . . The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to “connect the dots.” (Final Report of the National Commission on Terrorist Attacks Upon the United States 401, 408 (2004).)

Part IV of these Guidelines accordingly authorizes the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The functions authorized under that Part include: (i) development of overviews and analyses concerning threats to and vulnerabilities of the United States and its interests, (ii) research and analysis to produce reports and assessments concerning matters relevant to investigative activities or other authorized FBI activities, and (iii) the operation of intelligence systems that facilitate and support investigations through the compilation and analysis of data and information on an ongoing basis.

### **C. Oversight**

The activities authorized by these Guidelines must be conducted in a manner consistent with all applicable laws, regulations, and policies, including those protecting privacy and civil liberties. The Justice Department’s National Security Division and the FBI’s Inspection Division, Office of General Counsel, and Office of Integrity and Compliance, along with other components, share the responsibility to ensure that the Department meets these goals with respect to national security and foreign intelligence matters. In particular, the National Security Division’s Oversight Section, in conjunction with the FBI’s Office of General Counsel, is responsible for conducting regular reviews of all aspects of FBI national security and foreign intelligence activities. These reviews, conducted at FBI field offices and headquarter units, broadly examine such activities for compliance with these Guidelines and other applicable requirements. . . .

## **I. GENERAL AUTHORITIES AND PRINCIPLES**

### **A. Scope**

These Guidelines apply to investigative activities conducted by the FBI within the United States or outside the territories of all countries. They do not apply to investigative activities of the FBI in foreign countries, which are governed by the Attorney General’s Guidelines for Extraterritorial FBI Operations. . . .

### **C. Use of Authorities and Methods**

#### ***1. Protection of the United States and Its People***

The FBI shall fully utilize the authorities provided and the methods authorized by these Guidelines to protect the United States and its people from crimes in violation of federal law and threats to the national security, and to further the foreign intelligence objectives of the United States.

## ***2. Choice of Methods***

a. The conduct of investigations and other activities authorized by these Guidelines may present choices between the use of different investigative methods that are each operationally sound and effective, but that are more or less intrusive, considering such factors as the effect on the privacy and civil liberties of individuals and potential damage to reputation. The least intrusive method feasible is to be used in such situations. It is recognized, however, that the choice of methods is a matter of judgment. The FBI shall not hesitate to use any lawful method consistent with these Guidelines, even if intrusive, where the degree of intrusiveness is warranted in light of the importance of foreign intelligence sought to the United States' interests. This point is to be particularly observed in investigations relating to terrorism.

b. United States persons shall be dealt with openly and consensually to the extent practicable when collecting foreign intelligence that does not concern criminal activities or threats to the national security.

## ***3. Respect for Legal Rights***

All activities under these Guidelines must have a valid purpose consistent with these Guidelines, and must be carried out in conformity with the Constitution and all applicable statutes, executive orders, Department of Justice regulations and policies, and Attorney General guidelines. These Guidelines do not authorize investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. These Guidelines also do not authorize any conduct prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

## ***4. Undisclosed Participation in Organizations***

Undisclosed participation in organizations in activities under these Guidelines shall be conducted in accordance with FBI policy approved by the Attorney General.

## ***5. Maintenance of Records under the Privacy Act***

The Privacy Act restricts the maintenance of records relating to certain activities of individuals who are United States persons, with exceptions for circumstances in which the collection of such information is pertinent to and within the scope of an authorized law enforcement activity or is otherwise authorized by statute. 5 U.S.C. 552a(e)(7). Activities authorized by these Guidelines are authorized law enforcement activities or activities for which there is otherwise statutory authority for purposes of the Privacy Act. These Guidelines, however, do not provide an exhaustive enumeration of authorized FBI law enforcement activities or FBI activities for which there is otherwise statutory authority, and no restriction is implied with respect to such activities carried out by the FBI pursuant to other authorities. . . .

## **D. Nature and Application of the Guidelines . . .**

### ***2. Status as Internal Guidance***

These Guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural,

enforceable by law by any party in any matter, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

### ***3. Departures from the Guidelines***

Departures from these Guidelines must be approved by the Director of the FBI, by the Deputy Director of the FBI, or by an Executive Assistant Director designated by the Director. If a departure is necessary without such prior approval because of the immediacy or gravity of a threat to the safety of persons or property or to the national security, the Director, the Deputy Director, or a designated Executive Assistant Director shall be notified as soon thereafter as practicable. The FBI shall provide timely written notice of departures from these Guidelines to the Criminal Division and the National Security Division, and those divisions shall notify the Attorney General and the Deputy Attorney General. Notwithstanding this paragraph, all activities in all circumstances must be carried out in a manner consistent with the Constitution and laws of the United States. . . .

## **II. INVESTIGATIONS AND INTELLIGENCE GATHERING . . .**

The scope of authorized activities under this Part is not limited to “investigation” in a narrow sense, such as solving particular cases or obtaining evidence for use in particular criminal prosecutions. Rather, these activities also provide critical information needed for broader analytic and intelligence purposes to facilitate the solution and prevention of crime, protect the national security, and further foreign intelligence objectives. . . .

In the course of activities under these Guidelines, the FBI may incidentally obtain information relating to matters outside of its areas of primary investigative responsibility. For example, information relating to violations of state or local law or foreign law may be incidentally obtained in the course of investigating federal crimes or threats to the national security or in collecting foreign intelligence. These Guidelines do not bar the acquisition of such information in the course of authorized investigative activities, the retention of such information, or its dissemination as appropriate to the responsible authorities in other agencies or jurisdictions. . . .

### **A. Assessments**

#### ***1. Purposes***

Assessments may be carried out to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence.

#### ***2. Approval***

The conduct of assessments is subject to any supervisory approval requirements prescribed by FBI policy.

#### ***3. Authorized Activities***

Activities that may be carried out for the purposes described in paragraph 1. in an assessment include:

- a. seeking information, proactively or in response to investigative leads, relating to:
  - i. activities constituting violations of federal criminal law or threats to the national security,

- ii. the involvement or role of individuals, groups, or organizations in such activities; or
- iii. matters of foreign intelligence interest responsive to foreign intelligence requirements;
- b. identifying and obtaining information about potential targets of or vulnerabilities to criminal activities in violation of federal law or threats to the national security;
- c. seeking information to identify potential human sources, assess the suitability, credibility, or value of individuals as human sources, validate human sources, or maintain the cover or credibility of human sources, who may be able to provide or obtain information relating to criminal activities in violation of federal law, threats to the national security, or matters of foreign intelligence interest; and
- d. obtaining information to inform or facilitate intelligence analysis and planning as described in Part IV of these Guidelines.

#### ***4. Authorized Methods***

Only the following methods may be used in assessments:

- a. Obtain publicly available information.
- b. Access and examine FBI and other Department of Justice records, and obtain information from any FBI or other Department of Justice personnel.
- c. Access and examine records maintained by, and request information from, other federal, state, local, or tribal, or foreign governmental entities or agencies.
- d. Use online services and resources (whether nonprofit or commercial).
- e. Use and recruit human sources in conformity with the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources.
- f. Interview or request information from members of the public and private entities.
- g. Accept information voluntarily provided by governmental or private entities.
- h. Engage in observation or surveillance not requiring a court order.
- i. Grand jury subpoenas for telephone or electronic mail subscriber information.

### **B. Predicated Investigations**

#### ***1. Purposes***

Predicated investigations may be carried out to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence.

#### ***2. Approval***

The initiation of a predicated investigation requires supervisory approval at a level or levels specified by FBI policy. A predicated investigation based on paragraph 3.c. (relating to foreign intelligence) must be approved by a Special Agent in Charge or by an FBI Headquarters official as provided in such policy.

#### ***3. Circumstances Warranting Investigation***

A predicated investigation may be initiated on the basis of any of the following circumstances:

- a. An activity constituting a federal crime or a threat to the national security has or may have occurred, is or may be occurring, or will or may occur and the investigation may obtain information relating to the activity or the involvement or role of an individual, group, or organization in such activity.

b. An individual, group, organization, entity, information, property, or activity is or may be a target of attack, victimization, acquisition, infiltration, or recruitment in connection with criminal activity in violation of federal law or a threat to the national security and the investigation may obtain information that would help to protect against such activity or threat.

c. The investigation may obtain foreign intelligence that is responsive to a foreign intelligence requirement.

#### ***4. Preliminary and Full Investigations***

A predicated investigation relating to a federal crime or threat to the national security may be conducted as a preliminary investigation or a full investigation. A predicated investigation that is based solely on the authority to collect foreign intelligence may be conducted only as a full investigation.

##### **a. Preliminary investigations**

**i. Predication Required for Preliminary Investigations.** A preliminary investigation may be initiated on the basis of information or an allegation indicating the existence of a circumstance described in paragraph 3.a.-.b.

**ii. Duration of Preliminary Investigations.** A preliminary investigation must be concluded within six months of its initiation, which may be extended by up to six months by the Special Agent in Charge. Extensions of preliminary investigations beyond a year must be approved by FBI Headquarters.

**iii. Methods Allowed in Preliminary Investigations.** All lawful methods may be used in a preliminary investigation except for methods within the scope of Part V.A.11.-.13. of these Guidelines.

##### **b. Full Investigations**

**i. Predication Required for Full Investigations.** A full investigation may be initiated if there is an articulable factual basis for the investigation that reasonably indicates that a circumstance described in paragraph 3 .a.-.b. exists or if a circumstance described in paragraph 3.c. exists.

**ii. Methods Allowed in Full Investigations.** All lawful methods may be used in a full investigation.

#### ***5. Notice Requirements***

a. An FBI field office shall notify FBI Headquarters and the United States Attorney or other appropriate Department of Justice official of the initiation by the field office of a predicated investigation involving a sensitive investigative matter. If the investigation is initiated by FBI Headquarters, FBI Headquarters shall notify the United States Attorney or other appropriate Department of Justice official of the initiation of such an investigation. If the investigation concerns a threat to the national security, an official of the National Security Division must be notified. The notice shall identify all sensitive investigative matters involved in the investigation.

b. The FBI shall notify the National Security Division of:

i. the initiation of any full investigation of a United States person relating to a threat to the national security; and

ii. the initiation of any full investigation that is based on paragraph 3.c. (relating to foreign

intelligence).

c. The notifications under subparagraphs a. and b. shall be made as soon as practicable, but no later than 30 days after the initiation of an investigation.

d. The FBI shall notify the Deputy Attorney General if FBI Headquarters disapproves a field office's initiation of a predicated investigation relating to a threat to the national security on the ground that the predication for the investigation is insufficient.

## **C. Enterprise Investigations**

### ***1. Definition***

A full investigation of a group or organization may be initiated as an enterprise investigation if there is an articulable factual basis for the investigation that reasonably indicates that the group or organization may have engaged or may be engaged in, or may have or may be engaged in planning or preparation or provision of support for:

- a. a pattern of racketeering activity as defined in 18 U.S.C. 1961(5);
- b. international terrorism or other threat to the national security;
- c. domestic terrorism as defined in 18 U.S.C. 2331(5) involving a violation of federal criminal law;
- d. furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law; or
- e. an offense described in 18 U.S.C. 2332b(g)(5)(B) or 18 U.S.C. 43.

### ***2. Scope***

The information sought in an enterprise investigation may include a general examination of the structure, scope, and nature of the group or organization including: its relationship, if any, to a foreign power; the identity and relationship of its members, employees, or other persons who may be acting in furtherance of its objectives; its finances and resources; its geographical dimensions; and its past and future activities and goals. . . .

## **III. ASSISTANCE TO OTHER AGENCIES . . .**

### **A. The Intelligence Community**

The FBI may provide investigative assistance (including operational support) to authorized intelligence activities of other Intelligence Community agencies. . . .

### **D. Foreign Agencies**

1. At the request of foreign law enforcement, intelligence, or security agencies, the FBI may conduct investigations or provide assistance to investigations by such agencies, consistent with the interests of the United States (including national security interests) and with due consideration of the effect on any United States person. Investigations or assistance under this paragraph must be approved as provided by FBI policy. . . .

## V. AUTHORIZED METHODS

### A. Particular Methods

All lawful investigative methods may be used in activities under these Guidelines as authorized by these Guidelines. Authorized methods include, but are not limited to, those identified in the following list. The methods identified in the list are in some instances subject to special restrictions or review or approval requirements as noted:

1. The methods described in Part II.A.4 of these Guidelines.
2. Mail covers.
3. Physical searches of personal or real property where a warrant or court order is not legally required because there is no reasonable expectation of privacy (e.g., trash covers).
4. Consensual monitoring of communications, including consensual computer monitoring, subject to legal review by the Chief Division Counsel or the FBI Office of the General Counsel. Where a sensitive monitoring circumstance is involved, the monitoring must be approved by the Criminal Division or, if the investigation concerns a threat to the national security or foreign intelligence, by the National Security Division.
5. Use of closed-circuit television, direction finders, and other monitoring devices, subject to legal review by the Chief Division Counsel or the FBI Office of the General Counsel. (The methods described in this paragraph usually do not require court orders or warrants unless they involve physical trespass or non-consensual monitoring of communications, but legal review is necessary to ensure compliance with all applicable legal requirements.)
6. Polygraph examinations.
7. Undercover operations. . . . In investigations that . . . concern threats to the national security or foreign intelligence, undercover operations involving religious or political organizations must be reviewed and approved by FBI Headquarters, with participation by the National Security Division in the review process.
8. Compulsory process as authorized by law. . . .

### C. Otherwise Illegal Activity . . .

2. Otherwise illegal activity by a human source must be approved in conformity with the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources.
3. Otherwise illegal activity by an FBI agent or employee that . . . [concerns national security] must be approved by a United States Attorney's Office or a Department of Justice Division, except that a Special Agent in Charge may authorize the following:
  - a. otherwise illegal activity that would not be a felony under federal, state, local, or tribal law;
  - b. consensual monitoring of communications, even if a crime under state, local, or tribal law;
  - c. the controlled purchase, receipt, delivery, or sale of drugs, stolen property, or other contraband;
  - d. the payment of bribes;
  - e. the making of false representations in concealment of personal identity or the true ownership of a proprietary; and
  - f. conducting a money laundering transaction or transactions involving an aggregate amount not exceeding \$1 million. . . .
4. The following activities may not be authorized:
  - a. Acts of violence.

b. Activities whose authorization is prohibited by law, including unlawful investigative methods, such as illegal electronic surveillance or illegal searches. . . .

5. An agent or employee may engage in otherwise illegal activity that could be authorized under this Subpart without the authorization required by paragraph 3. if necessary to meet an immediate threat to the safety of persons or property or to the national security, or to prevent the compromise of an investigation or the loss of a significant investigative opportunity. . . .

6. In an investigation relating to a threat to the national security or foreign intelligence collection, the National Security Division is the approving component for otherwise illegal activity for which paragraph 3. requires approval beyond internal FBI approval. However, officials in other components may approve otherwise illegal activity in such investigations as authorized by the Assistant Attorney General for National Security.

## VI. RETENTION AND SHARING OF INFORMATION

### A. Retention of Information

1. The FBI shall retain records relating to activities under these Guidelines in accordance with a records retention plan approved by the National Archives and Records Administration.

2. The FBI shall maintain a database or records system that permits, with respect to each predicated investigation, the prompt retrieval of the status of the investigation (open or closed), the dates of opening and closing, and the basis for the investigation. . . .

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## NOTES AND QUESTIONS

### a. Executive Order 12,333

1. *Investigatory Authorizations Under Executive Order No. 12,333.* The preamble to Executive Order No. 12,333 is directed at intelligence information about “foreign powers, organizations, and persons and their agents” and its importance to national security. What is the legal significance of the preamble’s description of the scope of the order? Preamble language typically sets forth the presumed authority for the prescriptions that follow. Precisely what constitutional or statutory authority empowers the President to promulgate this executive order?

What constitutes a “lawful” FBI investigation within the meaning of Executive Order No. 12,333? What are the likely elements of a probable cause determination under §2.5? How does such a probable cause decision differ from those made pursuant to either the Foreign Intelligence Surveillance Act (FISA) or Federal Rule of Criminal Procedure 41? See *supra* p. 525.

According to the executive order, the most important factor in assessing executive power to conduct national security investigations is the presence or absence of a connection between the target of surveillance and a foreign power. Until the FISA Amendments Act in July 2008 (*2008-2009 Supplement* p. 52), it was accurate to say that the executive order tracked FISA. Can you see how the 2008 FISA amendments diverge from the authorizations in the executive order? What are the legal and practical effects of the departures in the investigations authorized by the FISA amendments from what is permitted by the executive order? Bearing in mind the provisions of FISA, what “technique[s] for which a warrant would be required if undertaken for law enforcement purposes” (§2.5) continue to be governed by Executive Order 12,333 and FBI guidelines?

2. *12,333 and the National Security Act of 1947.* The National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 10 & 50 U.S.C.), authorizes the Director of the Central Intelligence Agency (CIA) to collect intelligence “through human sources and by other appropriate means.” 50 U.S.C. §403-4a(d)(1). The Act also authorizes the Director to “perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct.” *Id.* §403-4a(d)(4). The Act provides, however, that the Director “shall have no police, subpoena, or law enforcement powers or internal security functions.” *Id.* §403-4a(d)(1). Apart from the Executive Order, what law governs CIA intelligence collection?

Compare §§1.7(a) and 2.3(b) of Executive Order No. 12,333, *supra*, to the National Security Act of 1947. Do you see any significant differences in the “such other functions and duties” authorizations in the Act and the Executive Order? What are they? How may the CIA “conduct counterintelligence activities” without performing any “internal security functions” within the United States? What do you suppose constitutes “foreign intelligence information not otherwise obtainable,” and how may the CIA or NSA collect “significant” foreign intelligence within the United States without violating the proscription against collecting information on the domestic activities of United States persons?

3. *Collection Techniques.* Can you tell from §2.4 of Executive Order No. 12,333 exactly what activities the CIA and NSA may conduct within the United States? Are the activities permitted by the CIA consistent with the prohibition in the National Security Act on “police . . . or law enforcement powers or internal security functions”? Regarding the FBI, compare the techniques permitted by the executive order with those authorized by the *Guidelines for Domestic FBI Operations*, §§V.A, C, *supra*. Do you see any potential conflicts between the two lists?

4. *Infiltration.* Is CIA or FBI infiltration of domestic organizations permitted by Executive Order No. 12,333? On the basis of what information will the “agency head or designee” determine that infiltration is “essential to achieving lawful purposes”? If infiltration is authorized outside the limits of the order, what redress would be available to aggrieved persons? See Seth Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. Pa. J. Const. L. 133 (2004). Of what value is §I.C.4. of the *Guidelines for Domestic FBI Operations*? If there is an FBI policy on undisclosed participation in organizations, should members of the public be able to read it?

5. *Making of Guidelines for Investigation.* Several sections of Executive Order No. 12,333 provide that procedures for intelligence collection are to be independently established by each agency, subject to approval by the Attorney General. Should the public be able to participate in setting such procedures? Where would they be published?

## **b. The FBI Guidelines in Context**

1. *Authority for Guidelines.* Does the FBI have statutory authority to promulgate the guidelines set out above? In addition to the authority granted by 28 U.S.C. §533, the Attorney General “may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.” *Id.* §510. Do you think Congress should provide more explicit statutory authority for the FBI to conduct national security investigations? See Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 Iowa L. Rev. 1201 (2004).

2. *The Guidelines and FISA.* What purposes are served by these guidelines that are not met by FISA? Can you see where the prescriptions in FISA end and those of the guidelines begin? How do the 2008 FISA amendments affect the relationship between FISA and the guidelines?

3. *Relationship to Other Guidelines and Policies.* The 2008 *Guidelines for Domestic FBI Operations* repeal and replace several existing sets of guidelines, including separate sets for criminal investigation, national security investigation, and foreign intelligence collection. Other Department of Justice guidelines affecting FBI activities remain in effect, including the *Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations* (May 2002), available at <http://www.usdoj.gov/olp/fbiundercover.pdf>; *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* (Dec. 13, 2006), available at <http://www.fas.org/irp/agency/doj/fbi/chs-guidelines.pdf>; and *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003, updated July 2008) (excerpted *supra* p. 604), available at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.usdoj.gov/crt/split/documents/guidance_on_race.php). Nor do the 2008 *Guidelines for Domestic FBI Operations* apply to extraterritorial operations carried out by FBI agents or human sources in foreign countries. Attorney General Mukasey announced in September 2008 that he would be issuing new *Attorney General's Guidelines for Extraterritorial FBI Operations*. See Memorandum from the Attorney General to Heads of Department Components (Sept. 29, 2008), available at <http://www.usdoj.gov/ag/readingroom/guidelines-memo.pdf>. Notwithstanding the general repeal of the earlier guidelines, the Attorney General directed that existing guidelines remain in effect in their application to extraterritorial operations until the new guidelines are issued. *Id.* Can you see the advantages in consolidating the guidelines for domestic activities of the FBI into one set, or one set with the supplements noted above? Do you see any disadvantages in the consolidation? If the constitutionality of the elimination of the “wall” between foreign intelligence and domestic law enforcement remains controversial in the FISA setting (*see supra* pp. 544-546), does the consolidation of the guidelines exacerbate the blurring of intelligence and law enforcement that may threaten First and Fourth Amendment values?

### c. The Scope of the Guidelines

1. *Combining FBI Responsibilities.* Is there any downside to making *all* of the FBI's legal authorities available in any investigation where the FBI seeks to protect the public from crimes or national security threats, or to collect foreign intelligence? Can you see how these objectives might be combined in a single investigation? What are the legal and practical implications of the statement in §II. that the “scope of authorized activities . . . is not limited to ‘investigation’ in a narrow sense”?

2. *Choice of Methods.* How and through which methods would you advise an agent to proceed if she wants to launch an investigation of a domestic political action group, consisting of U.S. persons and others from abroad, that is reportedly providing financial support to one or more terrorist organizations abroad? See §I.C.2.a, II. Can you think of any way to improve the guidance provided in these sections? Does §I.C.3 help?

3. *Enforceability.* The *Guidelines for Domestic FBI Operations* state that they are not judicially enforceable. Do they therefore serve no useful purpose? Would they ever be relevant in a judicial proceeding?

4. *Departures*. What is the purpose of a process for exceeding the authority given by the *Guidelines*? What is the legal effect, if any, of a departure that is approved by or noticed to the Attorney General?

#### **d. Methods and Their Application**

1. *The Use of Race*. Section II of the 2003 *Guidance on the Use of Race by Federal Law Enforcement Agencies*, *supra* p. 604, states the “federal law enforcement officers who are protecting national security . . . may consider race, ethnicity and other relevant factors to the extent permitted by our laws and the Constitution.” When engaged in traditional law enforcement activities, officers may not use race or ethnicity to any degree, except that officers may rely on race or ethnicity in a specific suspect description. Is there any reason not to apply the same direction to national security investigations? To foreign intelligence investigations? What is the effect of 2008 *Guidelines for Domestic FBI Operations* §I.C.3?

2. *Assessments*. Prior to the opening of a formal investigation, FBI assessments may be undertaken without any predicate suspicion or threat. What is their value? Does the FBI have statutory authority to conduct these assessments? Note that the FBI may recruit human sources or task existing ones in an assessment. The *Attorney General’s Guidelines Regarding the Use of FBI Confidential Human Sources* (Dec. 13, 2006), *supra*, provide detailed guidance on the use of human sources. Do you see any potential legal problems with the use of human sources in conducting an assessment?

In addition, the FBI may engage in physical surveillance in an assessment. Physical surveillance had been available to the Bureau in general crimes investigations at the assessment level. Do you see any legal prohibition against extending physical surveillance to this broader set of guidelines? Will these rules encourage the FBI to engage in fishing expeditions that waste resources and damage the reputations of innocent people?

3. *Pretext Interviews*. A pretext interview occurs if an FBI agent interviews someone without identifying himself as an FBI agent, or without correctly stating the purpose of the interview. U.S. Dept. of Justice, *Transcript of Background Briefing with Department of Justice Officials on Consolidated Attorney General Guidelines* 5, Sept. 13, 2008, available at <http://www.usdoj.gov/opa/pr/2008/September/08-opa-814.html>. Before the FBI guidelines were rewritten in 2008, the FBI could not conduct a pretext interview unless there was an open investigation to which the interview applied. For federal criminal investigations, pretext interviews were permitted. In advance of the 2004 Republican and Democratic Party conventions in New York and Boston, the FBI interviewed dozens of members of anti-war groups. Although the Attorney General declared publicly that the interviews were based on specific threat information about planned violent disruptions, a subsequently disclosed and heavily redacted FBI field office memorandum characterized the effort as “pretext interviews to gain general information concerning possible criminal activity at the upcoming political conventions and presidential election.” See Dan Eggen, *FBI Memos Show Agents Conducting “Pretext Interviews,”* Wash. Post, May 18, 2005, at A4. If the interviews were “pretext interviews,” do they suggest that the FBI was treating political dissent as terrorism, as some critics asserted? *Id.* An internal Justice Department review concluded that the interviews were conducted for legitimate law enforcement purposes, not to inhibit the exercise of First Amendment rights. Inspector General, U.S. Dept. of Justice, *A Review of the FBI’s Investigative Activities at the 2004 Democratic and Republican National Political Conventions*, Apr. 27, 2006.

A senior FBI official explained the reason for revising the rules for pretext interviews during threat assessments in a background briefing for reporters in September 2008: “Why as a matter of policy do we want to make it more difficult for agents trying to resolve national security information, and national

security threats, than we do to resolve your garden variety criminal threat?” Are you persuaded that the change in policy is lawful?

4. *Predicated Investigations.* The Guidelines state that predicated investigations are generally based on “allegations, reports, facts or circumstances indicative of possible criminal or national security-threatening activity, or the potential for acquiring information responsive to foreign intelligence requirements . . . [where] supervisory approval must be obtained.” *Guidelines for Domestic FBI Operations*, §II. Do you think that the described triggering circumstances for a preliminary or full predicated investigation comply with pertinent legal requirements? How do these standards compare to the predicates for investigation under Rule 41? How do they compare to the FISA standards? To those required by the Fourth Amendment? Why do you suppose the *Guidelines* distinguish between foreign intelligence collection and criminal or national security investigations in providing discretion to conduct preliminary or full investigations?

What justifies the different methods permitted in preliminary and full investigations? Are you satisfied that the limits on methods in preliminary investigations adequately protect the First and Fourth Amendment rights of U.S. persons? What purpose is served by having the FBI notify the Deputy Attorney General if Headquarters disapproves an investigation on the grounds of insufficient predication? What is the likely effect of such a requirement?

5. *Enterprise Investigations.* What distinguishes an enterprise investigation from the other forms of authorized investigation? How does the scope of an authorized enterprise investigation differ from the other forms?

6. *Assistance to Other Agencies.* Apart from providing general investigative assistance to other agencies, the *Guidelines for Domestic FBI Operations* authorize, at the direction of the Attorney General, Deputy Attorney General, or the Assistant Attorney General for the Criminal Division, the FBI to “collect information relating to actual or threatened civil disorders to assist the President in determining” whether to call forth armed forces in response. §III.B.2. Such an investigation may consider “the potential for expansion of the disorder in light of community conditions and underlying causes of the disorder.” §III.B.2.a.iii. Investigations may be conducted for 30 days, subject to renewal, and the FBI may use the techniques in §II.A.4.a.-d. and f. (other than pretext interviews or requests) or g. §III.B.2.b., c.

How and by which official would it be determined that FBI assistance for foreign agencies is “consistent with the interests of the United States . . . and with due consideration on the effect on any United States person”?

7. *The List of Methods.*

a. Mail Covers. Mail covers consist of viewing and recording information on the outside covers of mail. The Postal Inspector is authorized by regulation to initiate a mail cover at the request of a law enforcement agency. 39 C.F.R. §233.3 (2008). What degree of individualized suspicion would a FBI agent have to show to authorize the use of a mail cover? What limits exist on the use of mail covers?

b. Electronic monitoring devices. Is it true that the devices authorized in §V.A.5. “usually do not require court orders or warrants unless they involve physical trespass or non-consensual monitoring of communications”? If such devices do not require court orders, does their implementation require any suspicion of wrongdoing?

c. Undercover Operations. An undercover operation uses a government employee whose relationship with the FBI is concealed from third parties in the course of an investigation. Undercover operations that are part of investigations that concern federal law enforcement and do not involve national security or

foreign intelligence are subject to the *Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations* (May 30, 2002), available at <http://www.usdoj.gov/olp/fbiundercover.pdf>.

§V.A.7. Why would the *Guidelines for Domestic FBI Operations* exempt the latter categories from the *Undercover Operations Guidelines*? What do you suppose is the legal justification for doing so? Why do you suppose the *Guidelines for Domestic FBI Operations* single out operations involving religious or political organizations for special review before conducting an undercover operation? What factors should Headquarters consider before deciding whether to approve the operation?

d. Otherwise Illegal Activity and the Use of Informants. Just what *is* “otherwise illegal activity”? On the basis of what legal authority is the FBI empowered to authorize otherwise illegal activity? The activities of human sources (a/k/a confidential informants, “rats,” “snitches”) are governed by the 2006 *Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources*, *supra*. A confidential informant is any person who provides useful and credible information to the FBI. §I.B.7. The *Confidential Human Sources Guidelines* do not mention the First Amendment interests of groups that may be infiltrated by an informant or undercover agent. Compare the provisions for the use of informants in the executive order with those in the *Guidelines for Domestic FBI Operations*.

By implication, the elimination of the warrant requirement in the executive order for authorized activities means that federal agents may, for example, conduct searches based on uncorroborated information from informants, without concern for satisfying the criminal law standards for informant use in criminal investigations. Accordingly, the FBI could take action on the basis of any informant's tip the officials deem credible, without having to demonstrate to any court that the informant is reliable or that he has knowledge that terrorist activities are underway or threatened. *See* Daniel V. Ward, *Confidential Informants in National Security Investigations*, 47 B.C. L. Rev. 627, 648 (2006). Nor are the *Confidential Human Sources Guidelines* applicable to investigations of foreign intelligence, including investigations of international terrorism in the United States. Do you think that the *Guidelines for Domestic FBI Operations* supply adequate legal controls on the use of informants to the FBI? If not, how would you revise them?

8. *Retention of Information*. Are you concerned that the FBI may share with other agencies information about U.S. persons collected during the course of an investigation where there is no suspicion of a crime, threat to national security, or other wrongdoing? Why do you suppose the *Guidelines for Domestic FBI Operations* do not incorporate a FISA-like minimization procedure, to protect against improper dissemination of collected information? Would it work as well here?

## **B. INFORMATION SHARING AND AGENCY REFORMS**

### **1. Bridging the Law Enforcement/Intelligence Collection Divide**

The chapters in this part of the book have traced the increased intermingling of intelligence and law enforcement activities in support of counterterrorism objectives. While the FBI has expanded its extraterritorial role to acquire information about transnational threats, the CIA and agencies inside the Departments of Homeland Security and Defense have also stepped up their efforts in support of counterterrorism. In theory, at least, law enforcement and intelligence collection roles, activities, and methods had been legally and functionally separated to protect the integrity of their tasks and to protect the civil liberties of those targeted for investigation by the government. *See* Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 Yale L. & Poly. Rev. 331, 336-337 (1998). Intelligence gathering for counterterrorism must anticipate threats before they are carried out, while law

enforcement typically reacts after the event. However, because terrorism and international crime pose national security threats that transcend both national borders *and* the borders between law enforcement and intelligence collection, coordination and cooperation are required among intelligence agencies and between the intelligence and law enforcement arms of the FBI.

The National Security Act of 1947 declares that the CIA shall have no “internal security” functions. See Note a.2, above. It was thus determined by Congress that the already functioning FBI would continue to serve as the nation’s domestic security agency. At the same time, it was understood early on that the “internal security” prohibition in the 1947 Act would not forbid the CIA from coordinating or collecting *foreign* intelligence information in the United States. However, there was nothing in the Act to provide for CIA and FBI coordination, and no rules to say when the CIA could play a counterintelligence role in the United States. Thus, the 1947 Act “cut the man down the middle . . . between domestic and foreign counterespionage.” Mark Riebling, *Wedge: The Secret War Between the FBI and CIA* 78 (1994).

The 1947 Act also calls on the Director of the CIA to take any actions necessary to “protect intelligence sources and methods from unauthorized disclosure.” In addition, the CIA is to “perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct.” See Note a.2, above. According to Mark Riebling, this language provided “a pair of operational baggy pants,” while CIA Counsel Scott Breckinridge called the “other functions” language a “banana-peel clause.” Riebling, *supra*, at 79. In fact, efforts to coordinate FBI and CIA operations within the United States occurred from the beginning, with several high and low points in the decades since 1947.

In addition to the 1947 Act, Executive Order No. 12,333 implicitly confirms FBI and CIA shared authority over foreign intelligence and counterintelligence operations, §2.3(b), while it sustains the notion of divided FBI and CIA roles by charging the CIA with conducting counterintelligence activities within the United States “without assuming or performing any internal security functions.” §1.7(a)(2). Executive Order 12,333 explicitly charges the Director of National Intelligence (DNI) with developing guidelines for sharing of intelligence information by the intelligence community, subject to approval by the Attorney General. §1.3(a)(2). The DNI also “shall ensure, through appropriate policies and procedures, the deconfliction, coordination, and integration of all intelligence activities conducted by an intelligence Community element or funded by the National Intelligence Program.” §1.3(b)(20). In accordance with these policies and procedures, the amended order directs the FBI to coordinate collection of foreign intelligence from human sources and counterintelligence activities within the United States, subject to approval by the Attorney General, and the CIA to coordinate them outside the United States. *Id.*

A USA Patriot Act provision authorizes a greater degree of interagency cooperation and sharing of information than was permitted previously. The Act permits, “[n]otwithstanding any other provision of law . . . foreign or counterintelligence . . . information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.” Pub. L. No. 107-56, §203(d)(1), 115 Stat. 272, 281 (2001), amending 50 U.S.C. §403-5(d). The same discretion is given for the sharing of grand jury information. *Id.* §203(a)(1), 115 Stat. 278-279, amending 18 U.S.C. §6(e)(3)(C). In addition, the USA Patriot Act amended FISA as follows:

- (1) Federal officers who conduct electronic surveillance [or a physical search] to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against—
  - a. actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
  - b. sabotage or international terrorism by a foreign power or an agent of a foreign power;

c. clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) Coordination authorized [above] shall not preclude the certification required by [FISA] or the entry of an order . . . [*Id.* §504(a), (b), 115 Stat. 364-365, amending 50 U.S.C. §1825.]

The Homeland Security Act further amended FISA by permitting intelligence officers to consult with state and local law enforcement officers regarding foreign intelligence information. Pub. L. No. 107-296, §898, 116 Stat. 2258 (2002), amending 50 U.S.C. §1806(k)(1).

Likewise, the USA Patriot Act amended the National Security Act of 1947 to require the Director of Central Intelligence to “establish requirements and priorities” for disseminating foreign intelligence information collected under FISA, Pub. L. No. 107-56, §901, 115 Stat. 387, and to direct the Attorney General to disclose to the Director of the CIA foreign intelligence acquired by the Department of Justice in the course of a criminal investigation. *Id.* §905(a)(2), 115 Stat. 389. Exceptions to disclosure for classes, matters, or targets of foreign intelligence may be determined by the Attorney General in consultation with the Director of the CIA. *Id.* The same officials are obligated to develop guidelines to help inform the Director of the CIA “within a reasonable period of time” of a determination by the Department of Justice whether a foreign intelligence source will be subject to a criminal investigation. *Id.* §905(b), 115 Stat. 389.

Among the reforms recommended by the 9/11 Commission, *supra* p. 363, was creation of a national counterterrorism center. In August 2004, President Bush adopted the recommendation by executive order. Executive Order No. 13,354, *National Counterterrorism Center*, 69 Fed. Reg. 53,589 (Aug. 27, 2004). A few months later, in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638, Congress created a National Counterterrorism Center (NCTC). *Id.* §1021, 118 Stat. 3672. The Senate-confirmed Director of the NCTC reports to the DNI generally, but to the President on the planning and implementation of joint counterterrorism operations. *Id.* In turn, IRTPA vests in the DNI the “principal authority to ensure maximum availability of and access to intelligence information within the intelligence community consistent with national security.” *Id.* §1011(a), 118 Stat. 3650. IRTPA also requires a “coordinated environment” in which intelligence information can be “provided in its more shareable form.” *Id.* §1016(b)(2), (d)(1), 118 Stat. 3665-3666. This Information Sharing Environment (ISE) is supposed to combine policies, procedures, and technologies to link information collectors and users. A November 2006 implementation plan for the ISE includes procedures for sharing information among agencies at all levels of government. The plan also contains procedures for protecting information privacy and civil liberties. *See Information Sharing Environment Implementation Plan, available at* <http://www.ise.gov/docs/ISE-impplan-200611.pdf>. Privacy advocates noted that the new guidelines lack specificity and fail to match the protections offered by the Privacy Act of 1974 (*see infra* p. 1017). Ellen Nakashima, *Civil Libertarians Protects Privacy Policy: New Guidelines Do Little to Protect Established Rights, White House Board Told*, Wash. Post, Dec. 6, 2006, at A11.

In December 2005, the 9/11 Commission, reincarnated as the Public Discourse Project, issued its *Final Report on 9/11 Commission Recommendations*, Dec. 5, 2005, *available at* <http://www.9-11pdp.org>. The Report gave a grade of “B” to the NCTC, noting that “shared analysis and evaluation of threat information is in progress; joint operational planning is beginning,” but that insufficient resources are available to fulfill the intelligence and planning role envisioned.

The NCTC runs three video teleconferences (VTCs) on a daily basis, and its staff posts intelligence on a Web site, classified but accessible to about 5,000 analysts. The NCTC operates alongside the Counterterrorist Center (CTC) at the CIA, in addition to Information Analysis and Infrastructure Protection (IAIP) Directorate at the Department of Homeland Security (DHS). The CTC and NCTC have considerable overlap – pursuing Al Qaeda operatives worldwide and providing strategic operational planning for counterterrorism activities. *See Scott Shane, Year Into Revamped Spying, Troubles and Some*

*Progress*, N.Y. Times, Feb. 28, 2006, at A12. Former National Intelligence Council vice chairman Gregory Treverton described the NCTC-CTC relationship as a “food fight,” and called the relationship between federal officials and state and local law enforcement “a complete mess.” *Id.*

## 2. Reforming the FBI

Owing at least in part to its longstanding tradition of performing the federal law enforcement role, FBI intelligence collection and analysis efforts were long regarded inside the Bureau as of secondary importance. Even as additional resources and staff were devoted to intelligence collection and analysis inside the FBI during the 1990s, the intelligence function was still not central to the FBI mission. In addition to the perception among many that engaging heavily in intelligence work would only compromise the effectiveness of FBI law enforcement, the Bureau’s reluctance to embrace an intelligence mission wholeheartedly was also due in part to our nation’s cultural and historical antipathy to a domestic intelligence service. Images of the sinister omnipresence of the German Gestapo and the Soviet KGB were firmly etched into the public consciousness.

A few months after Congress created a revised intelligence community structure in December 2004, President Bush issued an order creating a new national security division within the FBI that will be subject to the overall direction of the DNI. See Douglas Jehl, *Bush to Create New Unit in F.B.I. for Intelligence*, N.Y. Times, June 30, 2005, at A1. The restructuring was designed to break down historic barriers between the FBI and CIA, while elevating the relative importance of the intelligence mission inside FBI. *Id.* The new division, called the National Security Service, includes counterterrorism and counterintelligence divisions and an intelligence directorate. A new position of Assistant Attorney General for National Security, in charge of counterterrorism, counterintelligence, and the Office of Intelligence Policy Review, was approved by Congress in the USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §506(a), 120 Stat. 192, 247 (2006).

The *Guidelines for Domestic FBI Operations* excerpted above represent a next step in the continuing efforts to reshape the FBI as an intelligence agency. Part IV of the *Guidelines* authorizes the FBI to develop analytic reports and assessments and to operate data compilation and analysis systems on an ongoing basis.

### NOTES AND QUESTIONS

1. *Organizing the Intelligence Sharing Network.* IRTPA places the Director of National Intelligence (DNI) at the head of the National Intelligence Program and vests in him authority to task intelligence agencies and shape their budgets and spending. See 50 U.S.C. §403(b). The Act does not, however, prescribe how to organize a network for sharing information or provide much detail concerning the rules for its implementation. In April 2008 DNI Michael McConnell announced the *U.S. Intelligence Community Information Sharing Strategy*, available at [http://www.dni.gov/reports/IC\\_Information\\_Sharing\\_Strategy.pdf](http://www.dni.gov/reports/IC_Information_Sharing_Strategy.pdf). The *Strategy* calls for the removal of technical and institutional barriers to information sharing. Implementation in the near term relies on a *500 Day Plan for Integration and Collaboration*. *Id.* One model that is different in some important ways from the ISE was proposed in 2003 by the Markle Foundation Task Force, *Creating a Trusted Information Network for Homeland Security* (2003), available at [http://www.markletaskforce.org/reports/TFNS\\_Master.pdf](http://www.markletaskforce.org/reports/TFNS_Master.pdf) (proposing a decentralized network of information sharing and analysis around presidential guidelines shaped by public debate on how to achieve security and liberty).

2. *Separate Agencies for Domestic and Foreign Intelligence Activities?* Should there be a strict legal requirement that separate agencies gather intelligence inside and outside the United States? What is the value of such a requirement? Is it required by the Constitution? To the extent that such separation exists, are the inevitable compromises in information sharing worth the benefits?

3. *Utility of the Information Sharing Requirements.* Are the USA Patriot Act and IRTPA information-sharing provisions clearly advisable? Do these provisions raise the possibility that the CIA will collect information in the United States about Americans? In light of the complexities of mounting an effective counterterrorism strategy, can you think of any good alternatives to these information-sharing mechanisms? Can you think of ways to create greater accountability for their use?

Is the NCTC likely to promote effective information sharing? How will the Center discourage agencies from hoarding their own intelligence leads? Is the placement of the NCTC just below the DNI a good idea, or is the NCTC simply another layer of bureaucracy, this time at the top? The Public Discourse Project gave a “D” grade to the information-sharing efforts to date by Congress and the Administration and commented that “many complaints about lack of information sharing between federal authorities and state and local level officials” remain. *Final Report, supra*, at 3. What legal measures might improve information sharing across these jurisdictional lines? Between agencies? See Peter P. Swire, *Privacy and Information Sharing in the War on Terrorism*, 51 Vill. L. Rev. 951 (2006) (suggesting a due diligence checklist for information sharing projects).

4. *Checks and Balances vs. Efficiency.* Is competition between the CIA and the FBI inevitable? If the coordination and competition problems *can* be solved, *should* they be solved? Or is it part of our nation’s character “to chafe at bureaucratic inefficiency . . . [but] to distrust the centralization of power needed to correct it”? Riebling, *supra*, at 460. Are the agencies’ missions so different that their work cannot be coordinated? Is the reluctance to vest one agency with both foreign and domestic security responsibility a sign of healthy skepticism about the dangers of the accumulation of power in one entity? In the end, is the foreign/domestic dichotomy that continues to dominate the law of internal security workable? Is it constitutionally defensible? Is the better dividing line one between intelligence collection and law enforcement?

5. *Oversight.* Can oversight of intelligence agencies and their information sharing activities help safeguard the civil liberties that might otherwise be at risk? Oversight might be performed outside the intelligence community—through the intelligence and appropriations committees in Congress—or internally—by agency overseers, inspectors general, or presidential advisory groups such as the White House privacy board. See Nakashima, *supra*. Part C of the Introduction to the *Guidelines for Domestic FBI Operations* contemplates internal oversight of the implementation of the *Guidelines* by the National Security Division of the FBI. How do you think the oversight function should be organized? How should it be codified? What agencies and congressional committees would have an interest in this question? What are the implications for democratic government?