

GOOD INTELLIGENCE IS THE BEST WEAPON AGAINST INTERNATIONAL TERRORISM

Obtaining information about the identity, goals, plans, and vulnerabilities of terrorists is extremely difficult. Yet, no other single policy effort is more important for preventing, preempting, and responding to attacks.

The Commission has identified significant obstacles to the collection and distribution of reliable information on terrorism to analysts and policymakers. These obstacles must be removed.

In addition, this information, often collected at great risk to agents and officers in the field, must be safeguarded. Leaks of intelligence and law enforcement information reduce its value, endanger sources, alienate friendly nations and inhibit their cooperation, and jeopardize the U.S. Government's ability to obtain further information.

"Nothing should be as favorably regarded as intelligence; nothing should be as generously rewarded as intelligence; nothing should be as confidential as the work of intelligence."

Sun Tzu

Eliminate Barriers to Aggressive Collection of Information on Terrorists

Complex bureaucratic procedures now in place send an unmistakable message to Central Intelligence Agency (CIA) officers in the field that recruiting clandestine sources of terrorist information is encouraged in theory but discouraged in practice.

Inside information is the key to preventing attacks by terrorists. The CIA must aggressively recruit informants with unique access to terrorists' plans. That sometimes requires recruiting those who have committed terrorist acts or related crimes, just as domestic law enforcement agencies routinely recruit criminal informants in order to pursue major criminal figures.

CIA has always had a process for assessing a potential informant's reliability, access, and value. However, the CIA issued new guidelines in 1995 in response to concern about alleged serious acts of violence by Agency sources. The guidelines set up complex procedures for seeking approval to recruit informants who may have been involved in human rights violations. In practice, these procedures have deterred and delayed vigorous efforts to recruit potentially useful informants. The CIA has created a climate that is overly risk averse. This has inhibited the recruitment of essential, if sometimes unsavory, terrorist informants and forced the United States to rely too heavily on foreign intelligence services. The adoption of the guidelines contributed to a marked decline in Agency morale unparalleled since the 1970s, and a significant number of case officers retired early or resigned.

Recruiting informants is not tantamount to condoning their prior crimes, nor does it imply support for crimes they may yet commit. The long-standing process in place before 1995 provided managers with adequate guidance to judge the risks of going forward with any particular recruitment.

Recommendations:

- The Director of Central Intelligence should make it clear to the Central Intelligence Agency that the aggressive recruitment of human intelligence sources on terrorism is one of the intelligence community's highest priorities.
- The Director of Central Intelligence should issue a directive that the 1995 guidelines will no longer apply to recruiting terrorist informants. That directive should notify officers in the field that the pre-existing process of assessing such informants will apply.

The Federal Bureau of Investigation (FBI), which is responsible for investigating terrorism in the United States, also suffers from bureaucratic and cultural obstacles to obtaining terrorism information.

The World Trade Center bombers and the foreign nationals arrested before the millennium sought to inflict mass casualties on the American people. These incidents highlight the importance of ensuring that the FBI's investigations of international terrorism are as vigorous as the Constitution allows.

The FBI's terrorism investigations are governed by two sets of Attorney General guidelines. The guidelines for Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FI guidelines), which are classified, cover the FBI's investigations of international terrorism, defined as terrorism occurring outside the United States or transcending national boundaries. Domestic terrorism is governed by the Attorney General guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations (domestic guidelines). The domestic guidelines would apply, for example, to an investigation of a foreign terrorist group's activities in the United States if the FBI does not yet have information to make the international connection required for the FI guidelines.

Both guidelines set forth the standards that must be met before the FBI can open a preliminary inquiry or full investigation. The domestic guidelines authorize a preliminary inquiry where there is information or an allegation indicating possible criminal activity. A full investigation may be opened where there is a reasonable indication of a criminal violation, which is described as a standard "substantially lower than probable cause."

The domestic and FI guidelines provide the FBI with sufficient legal authority to conduct its investigations. In many situations, however, agents are unsure as to whether the circumstances of a particular case allow the authority to be invoked. This lack of clarity contributes to a risk-averse

"The FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obliged to wear blinders until it may be too late for prevention."

U.S. Court of Appeals for the 2nd Circuit, Socialist Workers Party vs Attorney General, 510 F.2d 253, 256 (2d Cir. 1974).

culture that causes some agents to refrain from taking prompt action against suspected terrorists.

In 1995, largely in response to the Oklahoma City bombing and indications that confusion was inhibiting investigations, the Department of Justice (DoJ) issued a memorandum to the FBI field offices attempting to clarify the circumstances that would merit opening a preliminary inquiry and full investigation under the domestic guidelines. Nonetheless, there is still considerable confusion among the FBI field agents about the application of the guidelines. Neither the DoJ nor the FBI has attempted to clarify the FI guidelines for international terrorism investigations.

Recommendation:

- The Attorney General and the Director of the Federal Bureau of Investigation should develop guidance to clarify the application of both sets of guidelines. This guidance should specify what facts and circumstances merit the opening of a preliminary inquiry or full investigation and should direct agents in the field to investigate terrorist activity vigorously, using the full extent of their authority.

The Department of Justice applies the statute governing electronic surveillance and physical searches of international terrorists in a cumbersome and overly cautious manner.¹

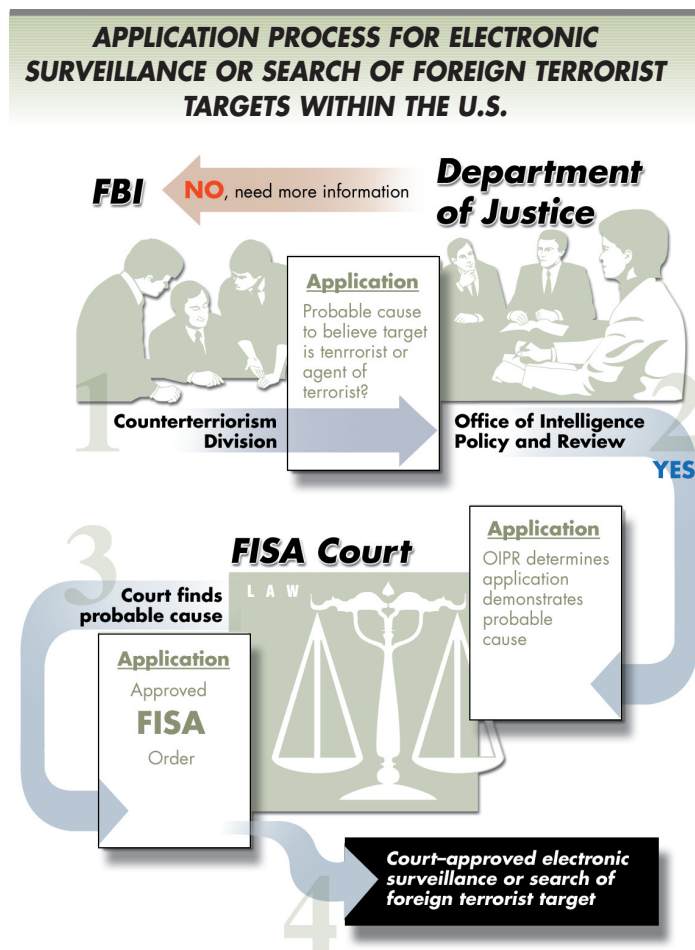
Pursuant to the Foreign Intelligence Surveillance Act (FISA), the FBI can obtain a court order for electronic surveillance and physical searches of foreign powers, including groups engaged in international terrorism, and agents of foreign powers.

¹ Commissioner Kayyem did not concur with the content of this section.

Applications from the FBI for FISA orders are first approved by the Office of Intelligence Policy and Review (OIPR) in the Department of Justice before being presented to a judge of the FISA Court for approval. OIPR has not traditionally viewed its role as assisting the FBI to meet the standards for FISA applications in the same way that the Criminal Division of DoJ assists the FBI investigators to meet the standards for a wiretap. For instance, the Criminal Division works with the investigating agents to identify and develop ways to obtain the type of information needed for a particular application to satisfy statutory requirements. OIPR has traditionally not been that proactive.

The Commission heard testimony that, under ordinary circumstances, the FISA process can be slow and burdensome, requiring information beyond the minimum required by the statute. For example, to obtain a FISA order, the statute requires only probable cause to believe that someone who is not a citizen or legal permanent resident of the United States is a member of an international terrorist organization. In practice, however, OIPR requires evidence of wrongdoing or specific knowledge of the group's terrorist intentions in addition to the person's membership in the organization before forwarding the application to the FISA Court. Also, OIPR does not generally consider the past activities of the surveillance target relevant in determining whether the FISA probable cause test is met.

During the period leading up to the millennium, the FISA application process was streamlined. Without lowering the FISA standards, applications were submitted to the FISA Court by DoJ promptly and with enough information to establish probable cause.



Recommendations:

- The Attorney General should direct that the Office of Intelligence Policy and Review not require information in excess of that actually mandated by the probable cause standard in the Foreign Intelligence Surveillance Act statute.
- To ensure timely review of the Foreign Intelligence Surveillance Act applications, the Attorney General should substantially expand the Office of Intelligence Policy and Review staff and direct it to cooperate with the Federal Bureau of Investigation.

The risk of personal liability arising from actions taken in an official capacity discourages law enforcement and intelligence personnel from taking bold actions to combat terrorism.

FBI special agents and CIA officers in the field should be encouraged to take reasonable risks to combat terrorism without fear of being sued individually for officially authorized activities. However, government representation is not always available to such agents and officers when they are sued. As a result, FBI special agents and CIA officers are buying personal liability insurance, which provides for private representation in such suits.

By recent statute, federal agencies must reimburse up to one half of the cost of personal liability insurance to law enforcement officers and managers or supervisors.

Recommendation:

- Congress should amend the statute to mandate full reimbursement of the costs of personal liability insurance for Federal Bureau of Investigation special agents and Central Intelligence Agency officers in the field who are combating terrorism.