



Office of the Attorney General
Washington, D. C. 20530

March 31, 1977

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Authority of the FBI to undertake
Domestic Security Investigations

In the absence of a statute expressly authorizing the FBI to undertake domestic security investigations of an intelligence nature, you have requested that we prepare an analysis of the authority on which such investigations are based. The following analysis is prepared in the context of the existing guidelines and therefore begins with a description of what the guidelines authorize.

1. The Bases of Domestic Security Investigations in the Guidelines

A. General Description

The guidelines permit investigations to obtain information on the activities of individuals or groups which involve or will involve force or violence and which involve or will involve violations of federal law. Further, the guidelines restrict domestic security cases to certain categories of activity, namely:

- (1) overthrowing the government of the United States or the government of a State;
- (2) substantially interfering, in the United States, with the activities of a foreign government or its authorized representatives;
- (3) substantially impairing for the purpose of influencing U.S. government policies or decisions:

- (a) the functioning of the government of the United States;
 - (b) the functioning of the government of a State;
or
 - (c) interstate commerce.
- (4) depriving persons of their civil rights under the Constitution, laws, or treaties of the United States.

The guidelines are thus centered on specific types of violent activity which directly affect the security of the government or its foreign relations, affect other federally protected persons and property for the purpose of influencing the government, or interfere with the federally protected civil rights of citizens.

B. Criminal Statutes Underlying the Guidelines

While the guidelines themselves do not cite specific criminal statutes that may be violated by the activities under investigation, the generic descriptions in the guidelines are based on such statutes.

Statutes penalizing conduct designed to overthrow the government include:

- 18 U.S.C. 111 - Assault on a federal official
- 18 U.S.C. 351 - Murder or kidnapping of a congressman
- 18 U.S.C. 372 - Conspiracy to injure or obstruct a federal officer
- 18 U.S.C. 1114 - Murder of a federal official
- 18 U.S.C. 1751 - Presidential assassination
- 18 U.S.C. 2152-55 - Sabotage of government or defense facilities
- 18 U.S.C. 2383 - Insurrection
- 18 U.S.C. 2384 - Conspiracy to overthrow the government
- 18 U.S.C. 2385 - Advocating overthrow of the government

Statutes penalizing conduct directed at foreign officials or foreign property in the United States include:

- 18 U.S.C. 112 - Assault on a foreign official
- 18 U.S.C. 970 - Injury to the property of a foreign government in the United States
- 18 U.S.C. 1116 - Murder of a foreign official
- 18 U.S.C. 1117 - Conspiracy to murder a foreign official
- 18 U.S.C. 1201 - Kidnapping of a foreign official

Statutes penalizing substantial impairment of the federal government include those listed under overthrow above and also include:

- 18 U.S.C. 1361 - Injury to government property
- 18 U.S.C. 1505 - Obstruction of government proceedings
- 18 U.S.C. 1507 - Obstruction of court proceedings
- 18 U.S.C. 1510 - Obstruction of criminal investigations
- 18 U.S.C. 1701 - Obstruction of the passage of the mails

Statutes penalizing substantial impairment of State government include:

- 18 U.S.C. 231 - Teaching the use of weapons in aid of a civil disorder or transporting weapons for this purpose
- 18 U.S.C. 2101 - Interstate transportation to engage in a riot
- 18 U.S.C. 2383 - Insurrection
- 18 U.S.C. 2385 - Advocating overthrow of a State Government

Specific statutes dealing with impairment of interstate commerce include:

- 18 U.S.C. 32 - destruction of aircraft
- 18 U.S.C. 33 - destruction of motor vehicles in interstate commerce

- 18 U.S.C. 832 - Transporting explosives
- 18 U.S.C. 842 - Unlicensed distribution of explosives
- 18 U.S.C. 875 - Making threats in interstate commerce
- 18 U.S.C. 876 - Sending threats through the mail
- 18 U.S.C. 922 - Unlawful manufacture or transport of firearms
- 18 U.S.C. 1701 - Obstruction of the passage of mail
- 18 U.S.C. 1951 - Interference with commerce by threats of violence
- 18 U.S.C. 1992 - Wrecking trains

The federal statutes for the protection of civil rights of individuals include:

- 18 U.S.C. 241 - Conspiracy to deprive of civil rights
- 18 U.S.C. 245 - Deprivation of specific federally protected civil rights
- 18 U.S.C. 594 - Intimidation of voters

The foregoing are the basic criminal statutes likely to be involved in domestic security cases under the guidelines although other statutes, both in Title 18 and elsewhere, could be violated in particular cases.

There is no question that under 28 U.S.C. 533 the FBI can investigate violations of these statutes when they occur and that the Department of Justice can prosecute these violations. The question raised by domestic security investigations is whether the FBI can collect intelligence in order to anticipate and prevent such violations. Attorney General Levi expressed the opinion to the Senate Select Committee that such investigations are proper under certain circumstances.

The argument is sometimes made that the Bureau's proper role, at least in purely domestic matters, should be limited to investigations of committed crimes. The basic statute for the Bureau [28 U.S.C. 533] is broader, since it refers to 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.

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[I]t does not necessarily follow that domestic security investigations are, therefore, outside the Bureau's proper functions. The detection of crime in some areas requires preparation and at least some knowledge of what is likely to be going on. What is at issue, I think, is the proper scope, the means and methods used, the attention paid to conduct and not views, and the closeness of the relationship of the conduct and that which is forbidden by the laws of the United States. (Testimony of December 10, 1975.)

II. Authority of the Government to Prevent Crimes as Well as Punish

While Congress has not generally specified that the Executive Branch has responsibility to prevent crimes, the courts have found this to be inherent in the President's authority to take care that the laws be faithfully executed, Art. II., Sec. 3, in his oath of office to "preserve, protect and defend the Constitution", Art. II., Sec. 1, and in the obligation of the federal government to protect the States "against domestic violence." Art. IV, Sec. 4.

The Supreme Court premised this authority on the "take care" clause in In re Neagle, 135 U.S.1, 63-65 (1890), and indicated, moreover, that the Justice Department was the proper agency to perform this function on the President's behalf.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it

has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed. 135 U.S. at 59.

* * *

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States * * * and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. 135 U.S. at 67.

In re Debs, 158 U.S. 564, 581 (1895), also relies on the "take care" clause as a basis for preventing interference with interstate commerce.

In the Keith case, Justice Powell relied on the President's oath of office as the basis for the power to engage in intelligence activities to protect the security of the nation:

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Article II, § 1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. United States v. United States District Court, 407 U.S. 297, 310 (1972).

In passing on the authority of executive officials of the States to restrict the rights of citizens in the interest of preserving order and preventing crimes, the Court has simply

stated that the power is "inherent" or "implicit" in the very concept of government.

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. Terry v. Ohio, 392 U.S. 1, 22 (1967).

This power extends even to incarceration without probable cause in extreme circumstances. Moyer v. Peabody, 212 U.S. 78 (1909).

Some have suggested that the power to prevent crime in advance is not only the prerogative of but even the duty of the government. Indeed, it has been suggested that the government has an obligation to compensate those who are victims of crimes which it has failed to prevent.

III. Intelligence Collection as a Means to Prevent Crime

To say that the government has the power or obligation to prevent criminal acts subject to its jurisdiction does not resolve the entire issue. There is the additional question whether the collection of information on the activities and plans of individuals and groups is a reasonable means to this end of preventing criminal conduct. The Court has suggested that it is, particularly where there is an on-going pattern of criminal conduct or where the fundamental values at stake justify strong measures.

In Hoffa v. United States, 385 U.S. 293, 311 (1966), the Court quoted with approval Judge Learned Hand's observation that infiltration by informants to collect intelligence may be necessary where there is a continuing criminal enterprise:

In the words of Judge Learned Hand, "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. . ."

Justice Powell's comments on the use of electronic surveillance in the Keith case are in a similar vein: " * * * the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency." 407 U.S. at 322. He noted that the legitimacy of the government's intelligence gathering efforts must be determined by weighing the values involved in order to determine the reasonableness of the government's action:

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. 407 U.S. at 314-15.

While the Court has stated that intelligence collection is a valid adjunct to the inherent power to prevent crime it has not addressed, except in the context of specific fact patterns, the limits to be imposed on the collection of intelligence. It is only by addressing these limits in connection with particular categories of cases, e.g. organized crime, narcotics, domestic security, that the proper scope of intelligence investigations can be determined.

This was the point made by the Comptroller General in discussing the FBI's domestic security investigations:

It seems to us that the issue is not whether the FBI should conduct domestic intelligence operations but, rather, what the purpose and scope of such operations should be. Few would deny that there are elements or groups within our Nation which pose threats to our

domestic tranquility. But differences begin to surface on questions of the exact nature, intent, and threat of certain groups; the techniques used to identify and monitor them, and the scope of coverage applied to specific investigations. (Testimony before the Subcommittee on Civil Rights and Constitutional Rights, House Committee on the Judiciary, Sept. 14, 1975).

IV. Intelligence Investigations in a First Amendment Context

Even though the Court has recognized the government's responsibility to prevent crime and the appropriateness of intelligence gathering to carry out this duty, it must be recognized that intelligence gathering, when it involves advocacy, association or protests against the government, raises First and Fourth Amendment issues. Whether the target be organized crime or organized political protest, the focus on group activity presents issues of freedom of association.

The mere fact that First Amendment activities are involved does not foreclose government investigation. Even First Amendment rights are not absolute, particularly where activity is involved and governmental interests are at stake. Adderley v. Florida, 385 U.S. 39 (1966). Protest against the government does not encompass a right of groups to act whenever and however and wherever they please. Cf. Cox v. Louisiana, 379 U.S. 536, 559 (1965).

Once the expression of political views passes mere speech and encompasses action, it is subject to government constraints:

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. * * This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. United States v. O'Brien, 391 U.S. 367, 376 (1968).

The difficulty, of course, is determining what degree of government intrusion is permissible in certain circumstances.

The guidelines have attempted to do this, in the abstract, while recognizing that case-by-case refinements are necessary. They establish the review mechanism to make these refinements.

For example, the guidelines have followed the development of Fourth Amendment law with respect to the degree of intrusiveness on privacy permitted, limiting techniques on the basis of the facts available to the investigator. As the Supreme Court has recognized, minimal intrusion into privacy may be permitted on such slight justification as presence at the scene of a crime. Miranda v. Arizona, 384 U.S. 436, 477-78. Greater intrusion is justified to protect general health and safety. Camara v. Municipal Court, 387 U.S. 523, 534-39. Where there is suspicion based on specific and articulable facts a minimal personal search may be reasonable even without probable cause to believe a crime has been committed. Terry v. Ohio, 392 U.S. 1, 20-27. Probable cause to believe a crime has been committed, of course, permits full arrest, search or seizure under the Fourth Amendment.

Following this same pattern the guidelines permit intelligence investigations of varying intensity dependent upon the degree of certainty of information available. It categorizes the various levels of investigation as preliminary, limited and full, and limits the techniques that can be used at each level, permitting a greater scope of investigation at each level as the certainty of individual involvement in violence increases. Thus, a preliminary investigation based on unsubstantiated allegations of violent criminal activity would only justify a check of existing sources for the purpose of verifying or refuting the allegation. Interviews would be permitted under a limited investigation but only after there has been a balancing of privacy concerns against the seriousness of the alleged activity. A full investigation, using informant coverage and other investigative techniques would be authorized only after the determination has been made that there are specific and articulable facts justifying the investigation -- the Terry standard.

In addition, the Court's standard for balancing First Amendment rights against government security needs, articulated

in Dennis v. United States, 341 U.S. 494, 510 (1951), would be applied to all full investigations. Decisions must be predicated on assessing the magnitude of the threatened harm against its likelihood and immediacy and balancing this, in turn, against the danger to First and Fourth Amendment rights.

V. Conclusion

We recognize that express statutory authority for domestic security investigations is needed. In the interim, however, it is our view that the Supreme Court has found implicit constitutional authority to prevent crime and to collect intelligence for this purpose and that 28 U.S.C. 533 is sufficiently broad to permit the Attorney General to authorize such investigations. So long as the guidelines strike a proper balance between governmental authority and First and Fourth Amendment rights -- and we believe they follow the applicable case law in doing so -- it is our opinion that such investigations are lawful. Moreover, we believe they must be continued where they afford the government the opportunity to prevent death or serious threat to human life. We want to see the monkey put on Congress' back but not at the risk of the lives of those we are sworn to protect.



Mary C. Lawton
Chairman, FBI Guidelines
Committee

Att:

Domestic Security Guidelines
Memorandum to Attorney General Levi
Excerpts from GAO Report on Domestic
Security Investigations

cc: Deputy Attorney General