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New FBI Powers: A Necessary Step for Counterterrorism

By Michael Rolince
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On October 3, the Department of Justice published the revised Attorney General Guidelines (AGG), which govern all Federal Bureau of Investigation (FBI) activities, including those involving international terrorism. The AGG comes into effect on December 1, 2008, and will consolidate procedures controlling the FBI's various investigative programs. Although members of Congress, civil rights groups, and the media have criticized the AGG, the revision is a necessary and important step for the FBI's counterterrorism investigations as well as all of the Bureau's investigative programs. Justice Department and FBI officials, however, will have to exert strong leadership to ensure the appropriate and effective implementation of the guidelines.

Background

Until 1976, no formal Justice Department guidelines governed the FBI's investigative activities. Since the Congressional Church and Pike Commissions, which exposed troubling activities of the FBI and the intelligence community, U.S. intelligence and law enforcement agencies have been subject to far greater regulation and oversight. Former attorney general Edward Levi put in place several notable guidelines, separating the FBI's criminal investigations from those related to national security and intelligence. (The criminal guidelines were released, but the intelligence guidelines remained classified.)

The FBI's two distinct responsibilities -- serving as both the country's domestic intelligence agency and its chief federal law enforcement agency -- increasingly hampered the Bureau's counterterrorism efforts. In the 1990s, the now famous "wall" between intelligence and criminal activities made information sharing increasingly difficult, even on related investigations. The FBI also had different tools available in the criminal and intelligence arenas. For example, the FBI could use administrative subpoenas to acquire a small-time drug dealer's phone records almost immediately, yet it did not have this same authority when dealing with U.S. associates of the September 11 hijackers.

While the situation changed a number of times over the years, the FBI has, until now, continued to operate its criminal and intelligence investigations under distinct guidelines. The new AGG are an attempt to address this issue by consolidating all the procedures into one clear set of guidelines.

Impact

The confusion among FBI agents, officers, prosecutors, and managers engendered by the September 11 attacks is well documented. On the day of the attacks, the Bureau had approximately 500 agents assigned to international terrorism investigations in 56 main offices and 400 smaller offices throughout the United States, and in some 40 U.S. embassies around the world. Two days later, the number of agents exceeded 7,000. Agents who were investigating violent criminals, corrupt politicians, drug dealers, and organized crime families from New York to LA found themselves chasing al-Qaeda from Kabul to Kansas. And they were doing so with little or no training and guidance regarding the rules of the road.

Investigators and supervisors will welcome the new AGG for reasons of simplicity, clarity, and efficiency,

particularly in the realm of counterterrorism. For the first time in the FBI's hundred-year history, one set of guidelines will govern the conduct of all criminal, intelligence, counterintelligence, and counterterrorism investigations.

Having one set of clear guidelines will streamline the responsibilities of those charged with ensuring strict adherence to the law. For instance, if the current financial crisis requires the redeployment of agents from counterterrorism to the white-collar crime program, the new guidelines will be a welcome. With a working knowledge of exactly what agents can and cannot do during a lawful investigation, the FBI will meet with success.

Widespread Criticism, Need for Oversight

The Justice Department's announcement of the new guidelines has, not surprisingly, opened it up to widespread criticism from the media, Congress, and civil liberties groups. In the view of one civil liberties advocate, the new guidelines give the FBI too much latitude "to open investigations of innocent Americans based on no meaningful suspicion of wrongdoing."

Perhaps the most noticeable change in the AGG is the easing of the strict standards governing the initiation and continuation of active investigations to allow, in some cases, the use of surveys, or "assessments," to ascertain the potential threats warranting further scrutiny. According to critics, this provision opens up the potential for agents, especially inexperienced ones, to pursue questionable investigations for unjustifiable periods of time. Specifically, there is concern that this may encourage the violation of U.S. civil rights through the harassment of innocent persons, particularly in Muslim and Arab communities.

Although these concerns are not entirely without foundation, FBI supervisors and agents are willing and able to implement the new guidelines with due respect for the rights of the American people. FBI and Justice Department leaders must ensure that these new tools are used appropriately and effectively. The FBI should continue aggressive efforts to ensure its entire staff -- from senior executives to analysts -- fully understands the new AGG. Ensuring clarity, consistency, uniformity, and repetition during training will help guarantee that the streamlined AGG are used to maximum effect, while protecting the rights and liberties of the citizens every agent is sworn to protect.

The new guidelines may place FBI agents in greater contact with Arab Americans and other ethnic minority communities; this would, indeed, be a positive outcome. The FBI should seize the opportunity to redouble its efforts to eliminate ad hoc management of crucial community relationships and adopt an approach that is consistent, productive, and comprehensible by all. Since the September 11 attacks, the FBI has worked diligently to establish contact with the Arab American community and develop the means and methodologies to foster collaboration against a common threat. Only through constant, meaningful, and reasoned dialogue with these and other groups will the FBI gain a realistic appreciation of their views. Hopefully, the communities that often feel targeted will come to know the faces, intent, and culture of those who solicit their help.

Conclusion

The FBI has been entrusted with unparalleled authority to "chase the threat" without the constraints that governed the agency for many years. With increased authority, however, comes increased responsibility: proper training, retraining, coaching, supervising, and managing within the guidelines' framework have never been more important. Although this task will not be easy, it is not impossible. And since the FBI cannot succeed in fulfilling its mandate without the unwavering support and confidence of the American people, the FBI has to get it right.

Michael Rolince, a senior associate at Booz Allen Hamilton, was an FBI agent for thirty-one years, and served as special agent in charge of counterterrorism at the Washington, D.C. field office from 2002 to 2005.

