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July 13, 2000

Countering the Changing Threat of International Terrorism

Report of the National Commission on Terrorism, Pursuant to Public Law 277, 105th Congress

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Surprise, when it happens to a government, is likely to be a complicated, diffuse, bureaucratic thing. It includes neglect of responsibility but also responsibility so poorly defined or so ambiguously delegated that action gets lost. It includes gaps in intelligence, but also intelligence that, like a string of pearls too precious to wear, is too sensitive to give to those who need it. It includes the alarm that fails to work, but also the alarm that has gone off so often it has been disconnected. It includes the unalert watchman, but also the one who knows he'll be chewed out by his superior if he gets higher authority out of bed. It includes the contingencies that occur to no one, but also those that everyone assumes somebody else is taking care of. It includes straightforward procrastination, but also decisions protracted by internal disagreement. It includes, in addition, the inability of individual human beings to rise to the occasion until they are sure it is the occasion-- which is usually too late. (Unlike movies, real life provides no musical background to tip us off to the climax.) Finally, as at Pearl Harbor, surprise may include some measure of genuine novelty introduced by the enemy, and possibly some sheer bad luck.

The results, at Pearl Harbor, were sudden, concentrated, and dramatic. The failure, however, was cumulative, widespread, and rather drearily familiar. This is why surprise, when it happens to a government, cannot be described just in terms of startled people. Whether at Pearl Harbor or at the Berlin Wall, surprise is everything involved in a government's (or in an alliance's) failure to anticipate effectively.

Thomas C. Schelling,
Forward to **Pearl Harbor; Warning and Decision,**
by Roberta Wohlstetter

FOREWORD

Six months ago, the National Commission on Terrorism began its Congressionally mandated evaluation of America's laws, policies, and practices for preventing and punishing terrorism directed at American citizens. ~~After a thorough review, the Commission concluded that,~~ although American strategies and policies are basically on the right track, significant aspects of implementation are seriously deficient. Thus, this report does not attempt to describe all American counterterrorism activities, but instead concentrates on problem areas and recommended changes. ~~We wish to note, however, that in the course of our assessment we gained renewed confidence in the abilities and dedication of the Americans who stand on the front lines in the fight against terrorism.~~

Each of the 10 commissioners approached these issues from a different perspective. If any one commissioner had written the report on his or her own, it might not be identical to that which we are presenting today. However, through a process of careful deliberation, we reached the consensus reflected in this report.

41

CH5 TAB1

CIA has always had a process for assessing a potential informant's reliability, access, and value. However, the CIA issued new guidelines in1995 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.

secrecy between agencies & lack of coordination

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.

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See Chapter 5

Chapter 5

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 Constitutionallows.

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

41

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."

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

3I Problems th conducting appropriate Investigations

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.

lck of Goals objectives technology FBI support etc.

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.

FISA

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

(1) Probable Cause Reasonable Suspicion VS. (2) Beyond A Reasonable Doubt Standards Are less in A Criminal Case.

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

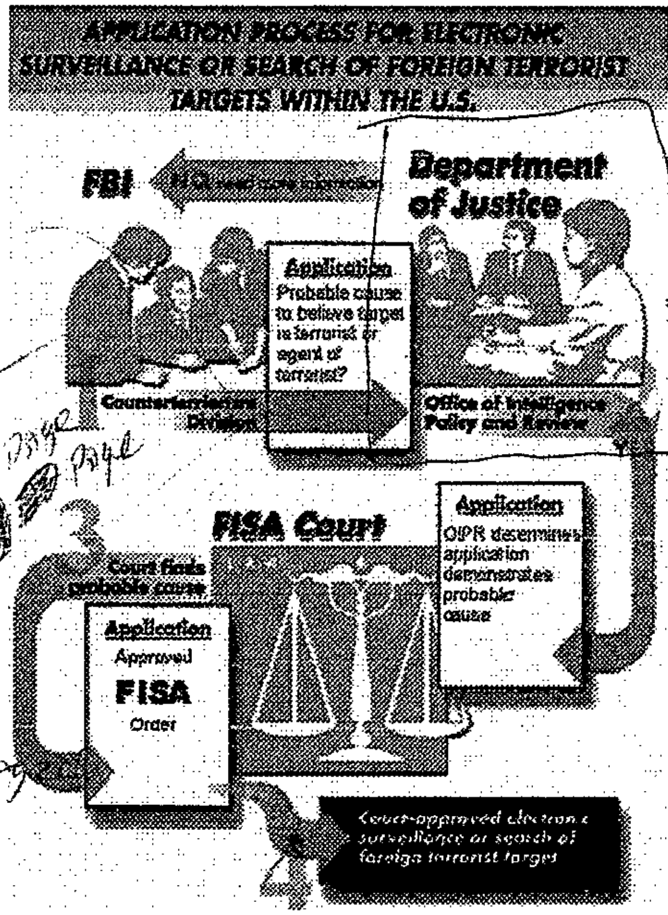
Pursuant to the Foreign Intelligence Surveillance Act (FISA), the FBI can obtain a court order for electronic surveillance and physical searches of foreign powers, including groups engaged in international terrorism, and agents of foreign powers.

~~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

41

~~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.



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1. See Source 25 p

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:

Educate + Test Agents. Mandatory Pass Rate.

- 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.

Problem with investigations

Provide Resources and Capabilities to Exploit Fully Information on Terrorists

U.S. intelligence and law enforcement communities lack the ability to prioritize, translate, and understand in a timely fashion all of the information to which they have access.

Their computers are light years ahead.

Terrorists are using the same modern computer and communications technology as the rest of us, resulting in more information being collected. For example, a raid on a terrorist hideout is increasingly likely to result in the seizure of their computers. Instead of just finding a few handwritten notebooks and address books, counterterrorism authorities are faced with dozens of CD-Roms and hard drives. While there may well be information stored away in an encrypted file that could prevent the next terrorist attack, it is far more difficult to find that one file quickly out of the hundreds that may be stored on the terrorists' computers. To determine what is relevant,counterterrorism agencies must be able to process volumes of information-- this can mean decrypting it, translating it, and perhaps making sense of conversations using code words. Until the information is in plain English, it is almost impossible to determine whether it is relevant to a terrorism operation.

The ability to exploit information collected-- process it into understandable information and prioritize it-- is essential to an effective global counterterrorist program. Intelligence derived from modern communications sources can provide indispensable warning and supports all aspects of the government's counterterrorism program, including military and law enforcement operations. Such intelligence is a necessary complement to that derived from human sources.

analysis of information collected

Unfortunately, this is an area where the United States, like other nations, is having trouble keeping pace with the information revolution.The National Security Agency (NSA) is America's most important asset for technical collection of terrorism information, yet it is losing its capability to target and exploit the modern communications systems used by terrorists, seriously weakening the NSA's ability to warn of possible attacks. The Senate Select Committee on Intelligence established a Technical Advisory Group whose recent

41

A terrorist attack in the United States using a biological agent, deadly chemicals, or nuclear or radiological material, even if only partially successful, would profoundly affect the entire nation, as would a series of conventional attacks or a single bombing that caused thousands of deaths. Given the trend toward more deadly terrorist attacks and indications that mass casualties are an objective of many of today's terrorists, it is essential that America be fully prepared to prevent and respond to this kind of catastrophic terrorism.

Over the past few years, the U.S. Government has taken a number of positive steps. Several Presidential Directives have effected major changes in organizational responsibilities and improved cooperation. The Department of Health and Human Services' Strategic Plan, the Attorney General's Five-Year Plan, the establishment of a military Joint Task Force for Civil Support, and improvement in first responders' capabilities are valuable efforts, but there is still more to do.

There is a risk that, in preventing [redacted] a catastrophic terrorist attack, officials may hesitate or act improperly because they do not fully understand their legal authority or because there are gaps in that authority.

There is some statutory authority that does not now exist that should be considered for catastrophic conditions. For example:

- Federal quarantine authority cannot be used in a situation that is confined to a single state.
- Not all cities or states have their own quarantine authority.
- There is no clear federal authority with regard to compelling vaccinations, or rationing scarce vaccinations, or requiring autopsies when necessary for a terrorism investigation.

The Constitution permits extraordinary measures in the face of extraordinary threats. To prevent or respond to catastrophic terrorism, law enforcement and public health officials have the authority to conduct investigations and implement measures that temporarily exceed measures applicable under non-emergency conditions. These may include cordoning off of areas, vehicle searches, certain medical measures, and sweep searches through areas believed to contain weapons or terrorists.

Determining whether a particular measure is reasonable requires balancing privacy and other rights against the public interest in coping with a terrorist threat which may lead to massive casualties. Advance preparation is the best way to deal successfully with a terrorist incident without jeopardizing individuals' Constitutional rights.

Recommendations:

- The President should direct the preparation of a manual on the implementation of existing legal authority necessary to address effectively a catastrophic terrorist threat or attack. The manual should be distributed to the appropriate federal, state, and local officials and be used in training, exercises, and educational programs.