



# INTELLIGENCE COMMITTEE

*U.S. Senator Kit Bond* ■ *Vice Chairman*

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Media Contact:

Shana Marchio 202.224.0309

Charles Chamberlayne 202.224.7627

## **U.S. SENATOR KIT BOND - OPENING STATEMENT** **Attorney General Guidelines for Domestic FBI Operations: September 23, 2008**

### **Opening**

- Today's hearing on the FBI's Domestic Operations guidelines is of considerable interest to me, and I am pleased that the Department of Justice and the FBI have taken the unprecedented step of consulting with Congress prior to the adoption of these guidelines by the Attorney General.
- Given the importance of these guidelines and their impact on national security, it makes sense for us to discuss the merits of these consolidated guidelines prior to their adoption.

### **Welcome Witnesses**

- I want to welcome our distinguished witnesses to the Committee.
- Ms. Caproni and Ms. Cook, thank you for your participation today and for your service to our country.
- I am looking forward to your testimony and the question and answer session on these new and improved Attorney General guidelines.

### **Background**

- These new FBI guidelines can trace their roots back to 1976 when Attorney General Edward Levi issued classified guidelines governing FBI counterintelligence and foreign intelligence investigations.
- Over the years, these classified intelligence guidelines have been modified from time to time by different Attorneys General.
- The revision of Attorney General guidelines is never an easy task and takes a long time to work through the approval process.
- The last major revision occurred when Attorney General John Ashcroft issued the National Security Investigative Guidelines back in October 2003.
- That process took almost two years from the time the FBI formally requested the Department of Justice to update the Foreign Counterintelligence Guidelines in response to the terrorist attacks of September 11.

- There was a general consensus after 9/11 that the FBI's FCI Guidelines were outdated and did not provide sufficient flexibility to allow the FBI to effectively prevent and neutralize terrorist threats.
- There were two main goals for the 2003 revision process: the first was to remove the "walls" that had been preventing the effective sharing of information within the FBI and throughout the Intelligence Community and the second was to make the FCI Guidelines as flexible as the FBI's criminal guidelines.
- Although the 2003 Guidelines were a significant improvement in terms of operational effectiveness over the 1995 FCI Guidelines and advanced both of the aforementioned goals, the FBI recognized back in 2003 that there were still key differences between the criminal and intelligence guidelines that needlessly hampered FBI analysis and investigations.

## Observations

- Before addressing some of those differences, I note that these guidelines are novel in that they govern **both** the FBI's criminal investigations and intelligence operations. This consolidated approach simultaneously eliminates any remaining information-sharing walls and creates a framework under which the FBI's intelligence activities can be conducted with the same flexibility as criminal investigations and operations.
- This is a good thing. If we expect the FBI to be able to protect us against the threat of terrorism and other national security threats, we should at least permit them the latitude to take all lawful steps to neutralize these threats, including those used every day to put ordinary criminals in jail.
- Additionally, these guidelines are basically unclassified, which is a remarkable departure from past practice. This will further bolster the American public's confidence in the FBI's adherence to the rule of law in the conduct of its intelligence operations.

## Key Improvements

### Assessments

- One of the key improvements in the 2003 National Security Investigative Guidelines was the creation of the "Threat Assessment" concept, which clearly laid out the activities that the FBI could utilize prior to opening up a formal preliminary or full investigation.
- The techniques available under a threat assessment were based upon some of the activities permissible under the (quote) prompt and limited checking of leads (unquote) authority contained in the criminal guidelines.
- These new guidelines merge the two concepts under the category of "Assessments." It appears that the consolidated list of authorized assessment techniques borrowed the best from both sets of guidelines.
- It is important to remember that the real value of the assessment phase is that it allows the FBI to use non-invasive techniques to quickly determine how it should best invest its analytical and investigative resources.
- Without these assessment tools, the FBI's only alternative is to go through the bureaucratic step of opening up a predicated investigation, only to learn after one phone call that there was no substance to a particular allegation.

- Worse, the lack of an assessment phase keeps the FBI in a reactive mode and limits its ability to spot potential threats or criminal activities just over the horizon.

### **Recruiting and Tasking of Sources**

- Another improvement made in the new guidelines allows the recruiting and tasking of sources during an assessment.
- Under the National Security Investigative Guidelines, the FBI can only interview previously established assets or sources during a threat assessment. The criminal guidelines never contained such a restriction.
- This restriction is not practical if the goal of an assessment is to help prevent an attack or quickly rule out an innocent person.
- It makes sense that the FBI should be allowed to task an existing source or recruit a new asset to gather information related to a threat or future criminal enterprise in order to get to the ground truth as quickly as possible.
- The ability to recruit and task assets during the (quote) limited checking of leads (unquote) phase has worked well for years under the criminal guidelines. The authority to use this technique is long overdue in the national security context.

### **Observation and Surveillance**

- Another technique that has long been available for use under the criminal guidelines prior to the opening of a predicated investigation is the ability to engage in observation or surveillance not requiring a court order.
- The current National Security Investigative Guidelines do not explicitly authorize the use of such observation or surveillance during a threat assessment.
- This technique is often useful in situations in which an unknown individual is meeting with the subject of a current investigation.
- In these situations a photograph or physical surveillance that yields a license plate number or a street address will allow the FBI to use other assessment authorities to assess the need for additional investigation.

### **Pretext Interviews**

- Additionally, an important technique that has been included in the new guidelines taken from the criminal guidelines is the authority to conduct a “pretext” interview.
- A pretext interview is simply an interview where an FBI agent does not disclose his affiliation with the FBI.
- It could involve something as simple as a phone call to ensure a particular phone is being used by the subject of an investigation.

- Or it could be something more dangerous like talking to a suspected drug dealer who might not react favorably to the disclosure that he is being interviewed by an FBI agent.
- Again, this is a technique that has been routinely available to criminal investigators and I see no reason why it should not be used in the national security context.

### **Other Key Improvements**

- The new guidelines contain a number of other key improvements that I favorably endorse:
- The FBI will now be able to obtain information from foreign governments during the assessments phase.
- Criminal investigators will be able to access commercial databases during the assessments phase.
- The FBI may continue to use enterprise investigations, which focus on comprehensive investigations of a group or organization.
- The FBI will be explicitly authorized to be more proactive in the use of assessment techniques in the conduct of its strategic analysis.
- The guidelines maintain the historical respect for the least intrusive means concept and the exercise of First Amendment and other protected rights; and
- The guidelines explicitly preserve the application of the Attorney General's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

### **Conclusion**

- Let me wrap up by thanking the witnesses and the men and women who participated in what I know must have been a long and tedious negotiation and approval process for these new guidelines.
- It appears to me that all of that hard work was well worth it. These guidelines are a marked improvement over their predecessor guidelines and will protect both our civil liberties and our national security.
- Please convey to the Attorney General that I believe he should authorize these guidelines immediately.
- Thank you Mr. Chairman.

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