

# Expanding FBI Surveillance Powers After September 11, 2001

A Unit from the Constitutional Rights Foundation Chicago\*

---

## Overview

The Federal Bureau of Investigation [FBI] is the primary criminal investigative agency in the federal government. Following the attacks of September 11, 2001, the central mission of the FBI became the prevention of terrorist acts against the United States and its people. In May 2002 U.S. Attorney General Ashcroft introduced new guidelines for investigations that include a new provision for counter-terrorism activities.

This unit focuses on the FBI's revised mission and extended powers under the new guidelines. It provides some background for these guidelines and shows how they are part of an enduring problem in American democracy: What powers does an open society delegate to those who guard that liberty? How does an open society "watch the watchers" so that those powers are not abused? The unit concludes with an opportunity to discuss the merits of this new policy.

## Focus Questions

- In order to prevent terrorism, should FBI agents be able to monitor public meetings, monitor internet chat rooms, attend religious observances and institutions on the same basis as other members of the public?
- For the purpose of detecting or preventing terrorist activities, should the FBI continue to be permitted to visit any place and attend any event that is open to the public, without any indication of criminal activity?

## Objectives

- Provide a historical and public policy context for the General Guidelines for federal investigations
- Promote understanding of competing interests of security and liberty
- Create a forum for civil discourse on the nature and implications of these changes

## Materials

A: Reading: Expanding FBI Surveillance Powers After September 11

B: Source: Counterterrorism Activities and other Authorizations: Visiting Public Places and Events

C: Strategy: Civil Conversations

D: Activity: Legislative Hearing on the Revised Guidelines for Federal Investigations

E: Expanding FBI Surveillance Powers: Questions for Review

F: Expanding FBI Surveillance Powers: Selected Community, Print, and Internet Resources

---

\* From: "Safety and Freedom in Post-September 11 America," 2003 Illinois Youth Summit Resource Guide for Students and Teachers, Copyright © 2003 Constitutional Rights Foundation Chicago. Copyright materials reprinted with permission as noted. May be reproduced for educational use only.

## B: Reading: Expanding FBI Surveillance Powers After September 11

The Federal Bureau of Investigation [FBI] is the primary criminal investigative agency in the federal government. It has the "authority and responsibility to investigate all criminal violations of federal law that are not exclusively assigned to another federal agency" [Preamble, "The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations" (1989), hereinafter "Thornberg Guidelines"]. But the attacks of September 11, 2001, changed many institutions in the federal government, including the FBI.

### **A New Mission**

The "Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act", known more widely by its acronym the USA PATRIOT Act, was passed by Congress on October 26, 2001 – just over six weeks after the World Trade Center was destroyed. At 342 pages, the bill made changes to over fifteen different federal statutes. Of these many changes, many had special significance for the U.S. Department of Justice, which includes the FBI as one component.

Among other changes, the USA PATRIOT Act: created greater powers of surveillance by the FBI of U.S. citizens, foreign residents, and foreign visitors; expanded the role of the CIA in coordinating intelligence gathering in the United States; and provided for greater cooperation between the CIA and the FBI on the sharing of intelligence. More fundamentally, the FBI's "highest priority" became "to protect the security of the nation and the safety of the American people against the depredations of terrorists and foreign aggressors" [Preamble, "The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations" (2002), hereinafter "Ashcroft Guidelines"].

This change is significant. Traditionally, the FBI has served as a crime solving organization. During its history, it has fought public corruption at all levels, worked against transnational and national criminal organizations and enterprises, combated major white-collar crime as well as significant violent crime, and worked to protect civil rights. As its name implies, the FBI's work has been primarily investigative – that is, it conducts inquiries and investigations when there is some basis for believing that a violation of federal law is taking place or about to occur. If after a preliminary inquiry, there is no basis for a full investigation, the inquiry is closed.

Immediately after the passing of the of the USA PATRIOT Act in Congress, Attorney General John Ashcroft sought to put the new law into effect through directives to FBI field offices and specific guidelines on a variety of issues, particularly guidelines on the prompt sharing of reports of possible criminal activity by foreign intelligence sources between the FBI and the CIA.

Thousands of FBI agents were redirected from their previous assignments – including narcotics, gang crimes, and white collar crime - following September 11. For many, the shift has proved difficult. In November 2002, the *New York Times* reported that senior FBI officials were frustrated with the FBI's performance in the war on terrorism and were demanding agents nationwide become more aggressive and focused on hunting terrorists ["F.B.I. Officials Say Some Agents Lack a Focus on Terror," *New York Times*, November 21, 2002]. Senior FBI officials said some field offices were finding it hard to make the shift, and a memo from Director Robert S. Mueller III to FBI employees also hinted at his frustration in trying to make counter-terrorism FBI's clear top priority.

## **New Powers for a New Mission**

In May 2002 U.S. Attorney General Ashcroft introduced new guidelines for investigations that include a new provision for counter-terrorism activities. "In order to carry out its central mission of preventing the commission of terrorist acts against the United States and its people, the FBI must proactively draw on all available sources of information to identify terrorist threats and activities. It cannot be content to wait for leads to come in through the actions of others, but rather must be vigilant in detecting terrorist activities to the full extent permitted by law, with an eye towards early intervention and prevention of acts of terrorism before they occur...." He explained the purpose behind these changes as follows:

Current counterterrorism priorities and the advent of the Internet have raised a number of issues which did not exist in any comparable form when the last general revision of these Guidelines were carried out in 1989... Part VI of these Guidelines is designed to provide clear authorizations and statements of governing principles for a number of important activities that affect these areas. [Introduction, D.]

"For the purpose of detecting and preventing terrorist attacks," these activities include FBI agents: operating and participating in counterterrorism information systems; attending any public meeting or demonstration, including entering religious institutions and attending religious observances; monitoring internet chat rooms; and reporting on their activities. These activities, along with close coordination with the CIA, are meant to help the federal government to "connect the dots" in time to avert another disastrous terrorist attack.

## **A Return to the Bad Old Days?**

For many people, these changes in the activities of the FBI sounded ominously familiar. The General Guidelines were an outgrowth of Congressional investigations into intelligence abuses by the FBI against the American people for over 30 years. The Select Committee to Study Governmental Operations with Respect to Intelligence Activities, [more commonly referred to as the Intelligence Activities Committee or the Church Committee after its chairman, U.S. Senator Frank Church (D-Idaho)], held extensive hearings on "whether intelligence activities threaten the 'rights of American citizens,'" [Final Report, I. Introduction and Summary, hereinafter "Church Report"].

"Intelligence Activities and the Rights of Americans," the Committee's final report, documented how the FBI had systematically threatened the rights of Americans through unauthorized, unsupervised, and often illegal intelligence operations involving intelligence collection, the dissemination of collected information, and "covert action designed to disrupt and discredit the activities of individuals and groups deemed a threat to the social order" [Church Report, I.]. The report documented the extraordinary efforts of the FBI to spy on, discredit, and disrupt the activities of literally hundreds of thousands of ordinary Americans and such leading citizens as Eleanor Roosevelt and Martin Luther King, Jr. In summarizing its findings, the report noted that

Too many people have been spied upon by too many Government agencies and too much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power. The Government, operating primarily through secret informants, but also using other intrusive techniques such as wiretaps, microphone "bugs" surreptitious mail opening, and break-ins, has swept in vast amounts of information about the personal lives, views, and associations of American citizens. Investigations of groups deemed potentially dangerous -- and even of groups suspected of associating with potentially dangerous organizations -- have

continued for decades, despite the fact that those groups did not engage in unlawful activity. Groups and individuals have been harassed and disrupted because of their political views and their lifestyles. Investigations have been based upon vague standards whose breadth made excessive collection inevitable. Unsavory and vicious tactics have been employed.... Intelligence agencies have served the political and personal objectives of presidents and other high officials. [Church Report, I.C.]

The Attorney General's Guidelines were devised in part to respond to these findings.

### **What Lies Ahead**

The Church Committee recognized that "a tension between order and liberty is inevitable in any society" and that "intelligence work has, at times, successfully prevented dangerous and abhorrent acts" ["Church Report," I.]. The FBI and the Justice Department are committed to addressing this tension fairly. Indeed, the statement of purpose for both the former and current guidelines is identical:

The duty of the FBI "must be performed with care to protect individual rights and to insure that investigations are confined to matters of legitimate law enforcement interest.... The Guidelines should encourage Agents of the FBI to perform their duties with greater certainty, confidence and effectiveness. They should also give the public a firm assurance that the FBI is acting properly under the law" ["Ashcroft Guidelines" and "Thornberg Guidelines," preamble].

But the Church Committee also added a warning. "In light of the record of abuse revealed by our inquiry, the Committee is not satisfied with the position that mere exposure of what has occurred in the past will prevent its recurrence. Clear legal standards and effective oversight and controls are necessary to ensure that domestic intelligence activity does not itself undermine the democratic system it is intended to protect" [Church Report, I. C. 7].

## B: Source: Counterterrorism Activities and Other Authorizations: Visiting Public Places and Events

---

The ability to discuss controversial public issues civilly is a fundamental skill for citizens in a democracy. Learning how to talk about difficult issues takes practice, but such discussions have never been more important.

Below is an excerpt from the Attorney General's New Guidelines for federal investigations which specifically explain new ways that the FBI can gather information in order to prevent terrorist acts.

To prepare, read selection 3A, "Expanded Search and Seizure Powers of the Federal Government." Then break into pairs and identify the most important information and questions the reading raises for you. Discuss as a large group.

Next, working as a class or in small groups, use Handout 3C, "Civil Conversations," to read this excerpt carefully, gain a deeper understanding of what it means, and consider what you think about these practices.

### **VI. Counterterrorism Activities and Other Authorizations**

"In order to carry out its central mission of preventing the commission of terrorist acts against the United States and its people, the FBI must proactively draw on all available sources of information to identify terrorist threats and activities. It cannot be content to wait for leads to come in through the actions of others, but rather must be vigilant in detecting terrorist activities to the full extent permitted by law, with an eye towards early intervention and prevention of acts of terrorism before they occur...."

#### **A. Counterterrorism Activities (2.) Visiting Public Places and Events**

"For the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally. No information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activity."

---

Source: The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (May 30, 2002), <http://www.usdoj.gov/olp/generalcrimes2.pdf>

## C: Strategy: Civil Conversations

---

### Rules for Civil Conversations

- (1) Read the text as if it were written by someone you really respected.
- (2) Everyone in the conversation group should participate in the conversation.
- (3) Listen carefully to what others are saying.
- (4) Ask clarifying questions if you do not understand a point raised.
- (5) Be respectful of what others are saying.
- (6) Refer to the text to support your ideas.
- (7) Focus on ideas, not personalities.

### Civic Conversation Reading Guide

Reading: \_\_\_\_\_

Read through the entire selection without stopping to think about any particular section. Pay attention to your first impression as to what the reading is about. Look for the main points, and then go back and re-read it. Briefly answer the following questions.

- 1) This selection is about \_\_\_\_\_
- 2) The main points are:
  - a) \_\_\_\_\_
  - b) \_\_\_\_\_
  - c) \_\_\_\_\_
- 3) In the reading, I agree with \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 4) I disagree with \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 5) What are two questions about this reading that you think need to be discussed? (The best questions are ones that have no simple answers, ounces that can use materials in the text as evidence.)  

*The next two questions should be answered after you hold your civil conversation.*
- 6) What did you learn from the civil conversation? \_\_\_\_\_  
\_\_\_\_\_
- 7) What common ground did you find with other members of the group? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

From: *The Challenge of Information*, © 1998, Constitutional Rights Foundation

## D: Activity: Legislative Hearing on the New General Guidelines for Federal Investigations

---

Legislative hearings are held by committees of the United States Congress and other legislative bodies to gather information upon which to base recommendations regarding subjects regulated by law or for which laws are being considered. These hearings are a basic function of legislative branches of government. This simulated legislative hearing involves a panel of legislators and fictional groups of citizens – representing a variety of interests – who have come to testify about the New General Guidelines for Federal Investigations.

### Preparations

- Assign the following roles (divide the class into groups of 4 to 6):
  - Congressional Oversight Committee.** This Committee is interested in whether Congress should be concerned about the new General Guidelines for the FBI. Six legislators is a practical number for a committee but this number may be varied to meet class requirements. One legislator is designated as chairperson.
  - Center for Civil Liberties.** This group sued the FBI for illegal activities in the past and is concerned about any expansion of powers for federal agents. One person should be prepared to testify.
  - Coalition for American Security.** This national membership organization favors law enforcement and is opposed to foreign aid. Their slogan is “Promoting American values by Protecting American interests.” One person should be prepared to testify.
  - The National Association for Immigrant Rights.** This umbrella organization represents different immigrant groups and is concerned that immigrants will be unfairly targeted under the new Guidelines. One person should be prepared to testify.
  - Safety After September 11.** This group favors creative intelligence gathering and more aggressive law enforcement investigations in order to prevent future catastrophic attacks on U.S. soil. One person should be prepared to testify.
  - Recorder.** A person or persons selected to keep a record of proceedings and present a review of recommendations.
- Explain the purpose of the legislative hearing and the procedures to be followed [see below]. Prepare a handout of the student instructions to a legislative hearing if needed.
- Allow time for participants to prepare for the legislative hearing in accordance with their assigned roles.
- Arrange to use the hearing or committee room of a local legislative body or arrange to have a table for six legislators, a desk for the recorder, and a desk for the witness in the front of your classroom. You might wish to arrange for a gavel and for nameplate with the students’ names and their roles.
- Conduct the legislative hearing using the outlined procedures.

## **Student Instructions for a Legislative Hearing**

1. Prior to the hearing, student legislators may contact local legislators or other outside resource people to understand their proper role as well as to understand current laws on the topic.
2. Prior to the hearing, student witnesses may contact local groups or local chapters of national organizations that would have an interest in this topic. You should obtain any background information that will help you in presenting that group's position on the topic, including a proposed bill that contains their views.
3. Student witnesses may wish to discuss similarities in positions with other student witnesses. You might wish to explore the possibilities of supporting a common bill proposal.
4. The committee chairperson calls the legislative hearing to order, announces the purpose of the hearing, and announces the order in which the witnesses will testify.
5. Each witness is called and permitted a set amount of time to present an opening statement, followed by questions from members of the committee.
6. The chairperson is the first to question the witness, followed by each of the other members of the committee. However, a committee member may interrupt to ask a question or make a comment at any time during the proceedings.
7. The following time limits are suggested: from two to five minutes for a witness' opening statement and from five to ten minutes for questions from the chairperson and other committee members.
8. After the witnesses have been heard, the legislators on the committee review the testimony, discuss the problem, and make recommendations on what their next step(s) will be.

## **Followup Questions**

- In what ways is testifying before a committee an effective way for Congress to get information? In what ways is it limited?
- What was the most compelling thing you learned about the General Guidelines from your preparation? From another participant?
- Do you agree with the committee's recommendation? Why or why not?
- What would help you to understand better this issue?

Adapted from: "Legislative Hearings," *Law-Related Education in Juvenile Justice Settings*. 1993, 1999, 2003: Youth for Justice.

## E. Expanding FBI Surveillance Powers: Questions for Review

---

- Read the text of the Fourth Amendment. What do you believe the Framers of the Constitution meant when they crafted it? What do you think the Framers would say about the new guidelines for federal investigations? What do you think the Fourth Amendment says about them?
- The original General Guidelines for Investigations were introduced in response to abuses of power by FBI agents who spied on people like Dr. Martin Luther King who were engaged in protected First Amendment activities such as speech, assembly, and worship. The new guidelines states that “no information from these visits shall be retained by the FBI unless it relates to potential criminal or terrorist activity.” Is this a sufficient protection against abuse? If not, is it a necessary risk when facing the possibility of future acts of terrorism?
- The last general revision of the Guidelines were written in 1989. The new Guidelines, in particular “Part VI. Counterterrorism Activities and Other Authorizations” were written “to provide clear authorizations and statements of governing principles for a number of important activities that affect these areas.” After September 11, is it better to err on the side of more security than in favor of rights that might be abused by those seeking to commit acts of terror?
- The Federal Bureau of Investigations is part of the U.S. Department of Justice under the supervision of the Attorney General. Who should be responsible for monitoring the FBI in the conduct of their investigations – who, in other words, will watch the watchers?
- When should ordinary citizens learn how the FBI is operating under the new guidelines?
- For the purpose of detecting or preventing terrorist activities, should the FBI continue to be permitted to visit any place and attend any event that is open to the public, without any indication of criminal activity?

## F: Expanding FBI Surveillance Powers: Selected Community, Print, and Internet Resources

---

### Resources

American Civil Liberties Union of Illinois  
180 North Michigan Avenue #2300  
Chicago, Illinois 60601-1287  
312/201-9740  
<http://www.aclu-il.org/>

Electronic Privacy Information Center  
1718 Connecticut Avenue, NW, Suite 200  
Washington, DC 20009  
202/483-1140  
<http://www.epic.org>

Federal Bureau of Investigation  
219 South Dearborn Street, Suite 905  
Chicago, Illinois 60604  
312/431-1333  
<http://chicago.fbi.gov/>

Office of the U.S. Attorney, Northern District of Illinois  
219 South Dearborn Street, 4th floor  
Chicago, IL 60604  
312/353-5300  
<http://www.usdoj.gov/usao/iln/>  
U.S. Department of Justice  
[www.usdoj.gov](http://www.usdoj.gov)

The White House, Homeland Security  
<http://www.whitehouse.gov/homeland/>

### Documents

"The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations," May 30, 2002 <http://www.usdoj.gov/olp/generalcrimes2.pdf>.

The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations [1989],  
<http://www.usdoj.gov/ag/readingroom/generalcrimea.htm>

USA PATRIOT Act of 2001  
[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf).

"Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate, 94th Congress, 2nd Session, 1976: Intelligence Activities and the Rights of Americans, Book II,"  
<http://www.icdc.com/~paulwolf/cointelpro/cointel.htm>

## Information and Analysis

American Civil Liberties Union. "ACLU Seeks Information on Government's Use of Vast New Surveillance Powers." *American Civil Liberties Freedom Network* August 21, 2002  
[http://archive.aclu.org/issues/privacy/USAPA\\_feature.html](http://archive.aclu.org/issues/privacy/USAPA_feature.html).

Bridis, Ted. "FBI Benefits From Surveillance Law." *Associated Press* November 21, 2002  
[http://news.findlaw.com/ap/a/w/1155/11-21-2002/20021121000006\\_4.html](http://news.findlaw.com/ap/a/w/1155/11-21-2002/20021121000006_4.html).

Cohen, Robert. "Homeland War on Terror Worries Civil Libertarians." *New Jersey Star-Ledger* November 25, 2002 <http://www.nj.com>.

Electronic Frontier Foundation. "EFF Analysis of the Provisions of the USA PATRIOT Act that Relate to Online Activities," October 31, 2001,  
[http://www.eff.org/Privacy/Surveillance/Terrorism\\_militias/20011031\\_eff\\_usa\\_patriot\\_analysis.html](http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html)

Johnson, Marvin. "Interested Persons Memo: Analysis of Changes to Attorney General Guidelines." *ACLU Legislative Update* June 6, 2002  
<http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10428&c=111>.

Lewis, Neil A. "Traces of Terror: The Inquiry; Ashcroft Permits F.B.I. to Monitor Internet and Public Activities." *The New York Times.com* May 31, 2002  
<http://query.nytimes.com/search/article-printpage.html?res=9401E1D6163AF932A05756C0A9649C8B63>.

Lichtblau, Eric. "F.B.I. Officials Say Some Agents Lack a Focus on Terror," *New York Times*, November 21, 2002,  
<http://query.nytimes.com/gst/abstract.html?res=F00812FA3F5D0C728EDDA80994DA404482>

Liptak, Adam. "Traces of Terror: News Analysis; Changing the Standard." *The New York Times.com* May 31, 2002 <http://query.nytimes.com/search/article-page.html?res=9501E1DD173AF932A05756C0A9649C8B63>.

McGee, Jim. "Fighting Terror With Databases." *Washington Post* February 16, 2002: A27.

Moss, Michael and Ford Fessenden. "New Tools for Domestic Spying, and Qualms." *The New York Times.com* December 10, 2002 <http://www.nytimes.com/2002/12/10/national>

Posner, Richard A. "Security Versus Civil Liberties." *Atlantic Monthly* December 2001  
<http://www.theatlantic.com/issues/2001/12/posner.htm>.

Rehnquist, William H. "Inter Arma Silent Leges." In *All the Laws but One: Civil Liberties in Wartime* (1998: Vintage Books, New York), pp. 218-225.

Rutherford Institute. "Forfeiting 'Enduring Freedom' for 'homeland Security': A Constitutional Analysis of the USA PATRIOT Act of 2001 and the Justice Department's Anti-Terrorism Initiatives," January 9, 2002,  
[http://www.rutherford.org/documents/pdf/tri\\_analysis\\_of\\_usa\\_pat\\_act.pdf](http://www.rutherford.org/documents/pdf/tri_analysis_of_usa_pat_act.pdf)

Taylor, Stuart Jr. "How Flawed Laws Help Terrorists and Serial Killers." *The Atlantic Online* October 21, 2002 <http://www.theatlantic.com/politics/nj/taylor2002-126.htm>.