

Analysis: New FBI investigative guidelines

SHAUN WATERMAN

Published: October 06, 2008

WASHINGTON, Oct. 6 (UPI) -- Congressional Democrats are calling on the Bush administration to hold off implementing new rules that broaden the FBI's investigative authorities until a new administration can approve them next year.

"It is not appropriate for the current administration to make such sweeping changes to FBI procedures at this late date, only a month before the election," House Judiciary Committee Chairman John Conyers, D-Mich., said in a statement. He said they should be provided "as suggestions (for) the new administration to consider early next year."

The new rules, currently scheduled to come into force on Dec. 1, were published Friday after a contentious process during which the Justice Department engaged in what officials say was an unprecedented consultation effort to hear concerns from lawmakers as well as advocates for privacy and civil liberties.

Officials said Monday the consultation had pushed back the schedule for implementation two months already and that since the rewrite had been initiated at the request of career FBI officials and not political appointees, no further delay would be appropriate.

"The implementation date has been set," department spokesman Brian Roehrkasse told UPI. "It's Dec. 1."

The new rules are consolidated guidelines from the attorney general on the bureau's domestic operations, merging three previous sets of guidance and providing for the first time a single set of rules governing the full gamut of FBI activities, from criminal investigations to counterintelligence operations and intelligence gathering about and assessment of national security threats.

Bureau Director Robert Mueller and Attorney General Michael Mukasey said in a joint statement that the new guidelines "provide more uniform, clearer and simpler rules" designed to help "the FBI to become, among other things, a more flexible and adept collector of intelligence," as recommended by the Sept. 11 Commission and the president's Weapons of Mass Destruction Intelligence Commission.

The guidelines govern the circumstances under which FBI agents are allowed to initiate certain activities -- surveillance, for example, or public records searches -- potentially bringing the bureau's extensive panoply of information-gathering capabilities to bear on an individual or group.

The guidelines redefine a category of FBI activity called "assessment" -- introduced in 2003 as a proactive effort by agents to identify potential terrorist threats or other dangers to national security.

The new guidelines say assessments designed to lead to a criminal investigation can be undertaken without a factual predicate -- evidence that a crime has been committed or is being planned -- or approval from FBI supervisors, except under certain conditions that the FBI will spell out.

According to the guidelines, "The methods authorized in assessments are generally those of relatively low intrusiveness, such as obtaining publicly available information, checking government records, and requesting information from members of the public."

The guidelines give as an example of assessment activities "proactively surfing the Internet to find publicly accessible Web sites and services through which recruitment by terrorist organizations and promotion of terrorist crimes is openly taking place."

But the list of "authorized methods" that can be used by agents conducting assessments includes "observation or surveillance not requiring a court order," the "use and recruit(ment of) human sources" or informants, and "grand jury subpoenas for telephone or electronic mail subscriber information."

Critics said the new rules lowered the bar for agents to target Americans too far. The chairman of the Senate Committee on the Judiciary, Democrat Patrick Leahy of Vermont, said they gave the bureau "broad new powers to conduct surveillance and use other intrusive investigative techniques on Americans without requiring any indication of wrongdoing or any approval even from FBI supervisors."

Leahy said the rules "continue the pattern of this administration of expanding authority to gather and use Americans' private information without protections for privacy or checks to prevent abuse and misuse."

ACLU Legislative Counsel Michael German, himself a former FBI agent, added, "Not since J. Edgar Hoover ran the place has the FBI claimed the right to investigate American citizens without a factual predicate," calling it "extraordinarily dangerous."

"Any FBI agent can launch one of these assessments against anyone, so long as it is for (what the guidelines call) an 'authorized purpose.' There is no requirement for any factual connection between the target and that purpose."

He said the absence of a requirement for approval from FBI supervisors was "stunning ... even from a management point of view," given the bureau's record of mismanaging other authorities it had been granted, such as National Security Letters.

He warned that the new rules could give rise to a series of open-ended investigations based on hunches or grudges that would be "a tremendous waste of resources, aside for the potential for abuse" of civil liberties and constitutional rights.

At a briefing about an earlier draft of the guidelines last month, a senior FBI official described the way that the proactive assessment process would work, citing the hypothetical example of a university that had defense research contracts in an area that was known was the target of foreign efforts at intelligence collection and technology theft.

With the cooperation of the university authorities and the State Department, the local FBI chief finds that there are a large number of students from a country that "has a history of stealing technology from the United States."

Under existing guidelines, the official said, agents would be limited to operating overtly and tapping current informants about what they already know. "You can't recruit a new source or task him, or task any of your existing sources against any of these students, because recruiting and tasking sources under the (old) guidelines is prohibited unless you've got a preliminary investigation open," and "to open an investigation, you have to have information or an allegation that the person is or may be a terrorist or a spy or a criminal. We don't have that. All we know is they're from a foreign country."

German said the way the guidelines were written continued to raise concerns about the potential for race and religion to be used as factors in deciding whom to investigate.

"It would have been very simple to include ... a clear ban" on the use of race or religion, he said, noting instead that the guidelines refer to earlier rules on racial profiling, which themselves have exclusions for national security investigations. "This convoluted language ... leaves the impression that (the rules) are designed to create a loophole."

© 2008 United Press International. All Rights Reserved.

This material may not be reproduced, redistributed, or manipulated in any form.