

Conclusions of the Workshop on Intelligence and Proactive Methods of Criminal Investigation*

Recognizing that, since the September 11, 2001 terrorist attacks on the United States, the advent of unregulated law enforcement and intelligence cooperation may be the most influential innovation in how criminal cases are investigated and prosecuted on both the domestic and international level, and, at the same time, may pose the greatest threat to traditional criminal justice and due process, the participants highlight the following concerns and recommend further study into the potentially deleterious effects of this recent phenomenon on the penal process:

1. Privacy Concerns. In moving toward an intelligence-led method of law enforcement, law enforcement agencies will, in addition to seeking evidence of crime, begin monitoring and cataloguing the innocent activities of citizens and lawful organizations, which will lead, in turn, to the creation of citizen dossiers. Such dossiers can be used to target or harass those who dissent against government policies or disagree politically. In addition, by adopting intelligence methods, law enforcement agencies will likely turn to the practice of disruption of groups engaged in protected political activity.

2. Evidentiary Standards. Intelligence is obtained under a much lower legal standard than that permitted for the collection of evidence used in criminal prosecutions, the latter which traditionally must meet the standard of probable cause. By allowing the commingling of information between law enforcement and intelligence, the fairness of criminal proceedings will be compromised and the evidentiary value of materials used in such trials tainted. Furthermore, prosecutors will attempt to bypass normal channels by utilizing intelligence warrants to obtain evidence, especially where probable cause is lacking to obtain a criminal warrant from a judicial officer. The result will be that such evidence, and any leads obtained therefrom, will be subject to suppression – thereby frustrating otherwise legitimate prosecutions.

3. Reliability of Intelligence. Because intelligence is collected for an entirely different purpose than evidence sought by law enforcement for use in a criminal case, its reliability and accuracy are subject to challenge on two separate grounds: (1) intelligence often consists of rumors and gossip, which hearsay is generally not admissible in a criminal trial; and (2) because intelligence sources and methods are secret, they are not subject to adversarial testing in a court of law, thus making meaningful confrontation impossible.

4. Classified Information. Information gathered for intelligence purposes will often be classified because of its importance to national security. Therefore, a nation may be very reticent about sharing intelligence information that it asserts is critical to its own national security with another country that is attempting to carry out a criminal prosecution. In addition, the rights of defendants in a domestic setting may be violated by classified evidence procedures that deny the accused the ability to review such evidence or allow the government to submit a substitution, such as a summary, in place of the actual evidence.

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- 5. Right to a Public Trial.** Because of the sensitive nature of intelligence information and the undesirability of exposing intelligence agents and their testimony to public scrutiny, the use of such evidence in a criminal trial will lead to the closure of critical hearings and trial testimony, thereby depriving defendants of the guarantee of a public trial and the public and press of the ability to assess the legitimacy of such proceedings.
- 6. Availability.** The question of the circumstances under which agencies or countries will be granted access to certain intelligence information is currently being debated in the European Union. A more serious issue, however, may be what controls are in place to prevent the misuse of this information once it is transferred to another entity. In addition, a related question is for what purpose can such information be utilized – may its usage be restricted to intelligence purposes only or may it be utilized as criminal evidence?
- 7. Evidence Obtained by Unlawful Means or Extraterritorially.** The increase of the sharing of information between law enforcement and intelligence agencies in different nations will inevitably raise the spectre of evidence that has been secured by illegal means by another nation or is otherwise obtained extraterritorially. The practice of extraordinary rendition and the extraction of confessions by torture are several examples of how this type of evidence may be procured. Moreover, the courts in certain nations take the view that whatever transpires outside of their borders is beyond the scope of their domestic laws, even if the evidence is obtained by means violative of national law. States must resolve this issue to ensure that they comply with their obligations to adhere to human rights and international due process standards.
- 8. Impact on Mutual Legal Assistance.** The advent of law enforcement and intelligence cooperation is having a dramatic effect on traditional mutual legal assistance methods. Because of the speed and efficiency of this method of information exchange, states and judiciaries will most likely utilize this alternative on an informal basis and bypass the more time-consuming mutual legal assistance procedures.
- 9. Judicial Oversight.** The unanimous consensus of the workshop was that law enforcement and intelligence functions should not be combined in a single agency because of the extreme potential for abuse. All were in agreement that judicial oversight was necessary in order to ensure that intelligence information that finds its way into the criminal process as evidence does not violate the due process rights of the accused.
- 10. Effectiveness in the Fight Against Terrorism.** Lastly, it is still an open question as to whether the free flow of information between law enforcement and intelligence agencies is an effective tool in the fight against terrorism. For example, following the September 11th attacks, federal agencies in the United States that failed to detect the plot were faulted not because they did not have enough information, but because they failed to act on material information they already had in their possession. By increasing the amount of data that these agencies must process, the sharing of law enforcement and intelligence information may actually be making these organizations less efficient. This raises the important question of whether, under the guise of the “war on terrorism,” the dismantling of the traditional “wall” between law enforcement and intelligence was actually designed to significantly empower governments to spy on their own citizens at the cost of precious civil liberties.