Kentucky Law Journal

Volume 78 | Issue 2 Article 6

1989

# Constitutional Protections in FBI Investigations

William Sessions
*Federal Bureau of Investigation*

# SPEECH

# Constitutional Protections in FBI Investigations*

BY WILLIAM SESSIONS**

I was interested to learn that, at the age of twenty-seven, Henry Clay held the Professorship of Law and Politics in the earliest beginnings of this great University That was in 1805—over one hundred years before the formal founding of your College of Law Henry Clay would probably be astonished to see how national issues and legal issues have changed; indeed, he would probably be stunned to see how the world itself has changed in the intervening years. But I think he would have been very comfortable with the subject of my lecture this evening. Throughout his long and distinguished career, he stood as strongly for law—and for law and order—as he did for the rights of each and every American.

In fact, in those early days of democracy, he, perhaps above all others, saw that the future of the nation depended on its ability to maintain a reasonable balance between individual liberties and social order. It was that insistence on balance that led him to middle ground, and he occupied that ground as "the great compromiser."

My subject this evening concerns this "reasonable balance between individual liberties and social order" as it works out in practical terms. In other words, how can our nation maintain social order on its streets and in its marketplaces—and at the same time protect the right of its citizens to be left alone?

Often it is *crime* that tests the balance between these two conflicting concerns. *Criminal acts* force us to evaluate and make decisions about how safe we want and need to be—and at what cost to the way we freely go about our own individual business.

---

* The Sixth Biennial Roy and Virginia Ray Lecture of the University of Kentucky College of Law, October 17, 1989.

** Director of the Federal Bureau of Investigation; former U.S. District Judge for the Western District of Texas. B.A. 1956, Baylor University; J.D. 1958, Baylor Law School.

As an example, think about the terrorist bombing of Pan Am flight 103 over Lockerbie, Scotland in December, 1988. Pan Am 103 reaffirmed the necessity of enduring the intrusiveness of strict airport security measures in order to protect ourselves, our airways, and our citizens—both at home and abroad.

My point is that the FBI plays a strong and continuing role in efforts to keep our society safe and free. In order to fulfill this critical mission, the FBI has, within strict attorney general guidelines, been given the authority to use some intrusive techniques to investigate certain kinds of crime. The fact is, in many cases, sensitive investigative techniques like the use of informants, court-authorized surveillances, and undercover agents are the *only* way that the FBI can penetrate terrorist and drug-trafficking organizations that threaten our national security; that we can gather evidence of fraud in our free markets and in our financial institutions; and that public corruption can be detected within the government—corruption that insidiously undermines our institutions and betrays the public trust.

At the same time, because this kind of evidence-gathering can encroach on our citizens' expectation of privacy, we must be scrupulously careful to minimize intrusions that might impact on civil liberties. Obviously, this is often a very delicate balance to maintain.

I would like to address these constitutional concerns with you this evening and describe the FBI's use of sensitive investigative techniques. I will discuss how the FBI manages these techniques and procedures in a fair and lawful manner, and give you some examples of how the FBI uses these techniques to bring virtually undetectable crime to light.

Let us start with a brief review of the time-tested investigative technique of electronic surveillance. The object of electronic surveillance, of course, is to unearth and *record* criminal activity, that might otherwise go undetected, for use as courtroom evidence of *exactly* what transpired.

Needless to say, any electronic surveillance is also very intrusive—and for this reason, it is used only in strict compliance with the Constitution, applicable federal statutes, and FBI and strict Department of Justice controls and procedures. By the strict observance of these requirements, we can assure the constitutional "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1]

---

[1] U.S. CONST. amend. IV.

Wiretapping, which is probably the most frequently used intrusive surveillance, has been the subject of constitutional challenges for over sixty years. In the 1928 case *Olmstead v. United States*,[2] the Supreme Court ruled that wiretapping was not contrary to the U.S. Constitution because there was no physical trespass and no search or seizure of physical belongings.

Today, as a result of a 1967 Supreme Court decision in *Katz v. United States*,[3] wiretapping is classified as a "search,"[4] and its use is permitted only under the most careful procedural safeguards, set out in Title III of the 1968 Omnibus Crime Control and Safe Secrets Act. The Electronic Communications Privacy Act of 1986 was enacted to extend protection from electronic surveillance to voice and data digital communications, electronic mail and messaging services, and cellular phones, thus expanding Title III protections.

I think you will be interested in learning how the FBI governs the use of this technique. Long before we send a Title III electronic surveillance application to a reviewing judge, we rigorously review it ourselves. First, in the application, we describe fully the minimization procedures we employ to prevent the accumulation of information that has no relationship to crime. These procedures include not overhearing a conversation that is unrelated to crime or where the attorney-client privilege might be involved. Thus, the procedure is designed to protect the public from indiscriminate listening.

Next, we initiate an approval process that begins in the field office when a case agent prepares the affidavit in support of an application for a Title III electronic surveillance. Thereafter, the application must pass through rigorous reviews at several levels. After reviews at the local level, it is sent to FBI headquarters in Washington, where it is examined by our legal counsel division, our criminal investigative division, and attorneys at the Department of Justice. It is then referred to the attorney general, or his designate, for authority to file it in federal court. Finally, the application is submitted to a U.S. district court judge by the appropriate U.S. attorney's office. I should also mention that when the application involves particularly sensitive circumstances, I personally review and approve it.

---

[2] Olmstead v. United States, 277 U.S. 438 (1928).

[3] Katz v. United States, 389 U.S. 347 (1967).

[4] *Id.* at 353.

In the application to the reviewing judge, even though not constitutionally required, we go one step further by advising the court every time we make a surreptitious entry to install a device. We ask the court to include the authority for such an entry in the court's order. Though these steps are not required by law, their inclusion in the process confirms our great caution and concern for fairness.

A brief review of a few cases will illustrate the FBI's careful use of court-authorized electronic surveillance. Perhaps some of you have heard of the case known as Illwind, "the defense procurement scandal," a case where government bidding regulations were allegedly being circumvented but without leaving a trace of evidence. No documents described the fraud; no notes signalled bribery attempts. The bribes were offered and the deals were sealed only with spoken words—and these words would have evaporated into the air if they had not been captured by court-authorized wiretaps.

This two-year investigation, conducted jointly by the FBI and the Naval Investigative Service, made extensive use of electronic surveillances. By recording conversations that demonstrated improper dealings among consultants, some defense contractors, and certain government officials, we were able to shine a light into dark corners of fraud that cannot—and will not—be tolerated in our government. To date, twenty-seven individuals have been convicted.

Another FBI case involving a Puerto Rican terrorist group has had far-reaching consequences. In the course of our investigation, we actually videotaped the terrorists as they busily constructed deadly bombs. The terrorists were indignant when they saw the film, and they protested that we had violated their privacy rights! Ultimately, the information we gathered with our court-authorized closed-circuit TV surveillance was upheld in court as proper and legally obtained evidentiary material that would be admissible in a trial. Judge Posner of the Seventh Circuit Court of Appeals ruled against the terrorists' claim of violated rights, saying, "there is no right to be let alone while assembling bombs in safe houses."[5] Through this process, our nation is best able to define—and redefine—the critical democratic balance.

Let us turn now to the FBI's use of informants to gather evidence of crime. This technique was upheld in 1966 in *Hoffa v.*

---

[5] United States v. Alejandrina Torres, 751 F.2d 875, 883 (7th Cir. 1984).

*United States*,[6] when the Supreme Court ruled that "the petitioner, in a word, was not relying on the security of the hotel room [when he divulged criminal information]; he was relying upon his misplaced confidence that Partin [the informant] would not reveal his wrongdoing."[7] This ruling affirmed that when you take someone into your confidence, you are assuming the risk that your conversation will be revealed. Therefore, no violation of the fourth amendment has occurred.

The use of informants has often been called the single most important tool in law enforcement. Even a cursory review will show why. Where can an investigation begin when a crime has been committed and there are no fingerprints, no evidence, no identified crime scene, and no eyewitnesses? Where do you turn? You look for informants, i.e., people who are in a position to provide information about the wrongdoing involved in that particular circumstance.

The FBI uses an astonishing variety of informants and cooperating witnesses. At one end of the spectrum may be someone deeply involved in crime like Philip LaRosa. Philip LaRosa was a counterfeiter who offered to be an informant for us as part of a plea agreement. Born in Sicily to a family with ties to La Cosa Nostra, LaRosa has deep knowledge of organized crime, and he has used that knowledge to assist us with some of our most comprehensive investigations. Following his work for us as an informant, he agreed to become a cooperating witness and to testify publicly. Most recently, his testimony has provided the linchpin for our "Buffalo Sicilian Connection" case—a heroin-trafficking case that began in Buffalo and led us, through the Mafia network, to Philadelphia, Baltimore, Miami, Newark, New York, San Francisco, Rockford, Illinois, and nine Italian cities. Thanks to Philip LaRosa's work, sixty-four top leaders were arrested in the United States, and twenty top leaders were arrested in Italy.

At the other end of the spectrum are the good citizens: those with reputations for honesty and fairness who give us information out of a laudable sense of duty. Terrence Hake is such a person. Terry Hake was a young assistant state's attorney in Chicago who was so disgusted with the corruption he had observed in the Cook County judicial system that he was seriously considering leaving the practice of law.

---

[6] Hoffa v. United States, 385 U.S. 293 (1966).

[7] *Id.* at 302 (footnote omitted).

We approached Terry and asked him to help us. We told him that we could not give him promises or guarantees of a secure future. We told him that his cooperation might well jeopardize personal and professional friendships—and might well destroy his reputation and a promising legal career in Chicago.

But Terry Hake said "yes"—he would not only help gather evidence, he would also testify in court. He wore a wire for three-and-one-half years—first pretending to be a corrupt prosecutor in a narcotics court, then to be a corrupt defense lawyer who became adept at fixing cases. As a result of his work, the FBI was able to prove systemic corruption in the largest big-city judicial system in the nation. Thanks to Terry, "Operation Greylord," as it is known, has been responsible for the conviction of thirteen county judges, forty-six lawyers, eight policemen, ten deputy sheriffs, and four court clerks—all individuals who betrayed the public trust for paltry amounts of money. To my mind, Terry Hake is a man who has set the highest possible standard of ethical conviction and dedicated action in the legal profession.

I would like to add that just two days ago, in Orlando, Florida, I presented Terry Hake with the highest award given by the Society of Former Special Agents: the Louis E. Peters Memorial Service Award. Watching Terry receive the award, I could not help but ask myself whether I as a lawyer would be willing to go through the five years he underwent—whether I would be willing to risk my own reputation, my own cherished standing in the legal community. The award commemorated to me the great significance of Terry Hake's undertaking, because here was a man willing to risk it all with no assurances that his work would succeed, and with the understanding that his personal safety would be in jeopardy.

Philip LaRosa and Terry Hake—and all the variously motivated informants in between—are essential and critical to our work because they provide inside information on criminal activity—and because they are often our only means of putting our undercover agents in contact with criminal organizations. At the same time, we are very careful that our management of informants is fair and beyond reproach. We safeguard our informants by protecting their confidentiality. But, because many are capable of working both sides of the street, we protect ourselves and the public by supervising them very closely. We keep records of what they have been instructed to do; what they have done; what they have been paid; and what they have produced. We are *always* ready to be held accountable.

The FBI functions under strict attorney general guidelines and FBI regulations that specifically spell out our day-to-day responsibilities in using informants. If agents discover an informant is involved in criminal activity, they must deal with it and report it to their supervisor immediately. I want to emphasize that informants are *not* used by the FBI to circumvent legal or ethical restrictions. They are given specific instructions *not* to participate in acts of violence, *not* to use unlawful techniques to get information, and *not* to commit criminal acts. If they violate our rules, they will be subject to prosecution.

Let me turn now to our third sensitive investigative technique: the undercover agent. Our agents have been often glamorized, and they have also been criticized, depending on one's perspective. But to those of us in law enforcement who see wrongs that need to be corrected, these agents are invaluable and necessary instruments of justice.

In major criminal investigations, undercover agents have discipline, control, and staying power. We have trained them to understand and respect the law's requirements; we can trust them implicitly to carry out their demanding responsibilities over a long investigation; and we can count on their credibility on the witness stand. It is an unbeatable combination—and one that is fully sanctioned by the courts.

Just in the past year, we have dismantled several heroin-trafficking organizations—including the one where Philip LaRosa acted as our informant—by setting up a bogus food import business that offered to serve as a conduit for drugs. In Florida, we dismantled seven Colombian cocaine-trafficking organizations that used our undercover agents as communications experts—they bought beepers, cellular phones, and short-wave radios from us, and they hired us to electronically sweep their boats and homes for wiretaps. In yet another three-year undercover operation, agents posed as money-launderers and were able to work their way into the inner sanctum of Colombian money-laundering syndicates—and finally to arrest the leadership as well as seize their assets. The investigation, thus far, has resulted in 114 indictments, and the seizure of $22.5 million in cash, 2,100 pounds of cocaine, 22,000 pounds of marijuana, fifty-four automobiles, expensive residences, and $1 million in other assets.

The length, complexity, and sensitive nature of undercover projects, however, all call for extremely careful and comprehensive planning and control. Indeed, the procedure for requesting such

an operation is formidable. Each project originates in a field office as a "scenario." Then, it goes up the approval chain—first locally, then in Washington through a "substantive desk" and the undercover and sensitive operations unit. Thereafter, it is tested by the criminal undercover operations review committee.

If the proposal is approved by this last committee, it is given to the head of our criminal investigative division, or, in particularly sensitive circumstances, to me for final approval. No operation is approved for more than six months, and extensions are granted only after committee review.

Once in place, we monitor undercover operations closely to ensure fairness and full compliance with legal requirements and the attorney general's guidelines. Our recent investigation of commodities fraud in Chicago is a perfect example of this kind of operation.

For many years, there has been concern about fraudulent practices in our nation's commodities exchanges—but commodities fraud is difficult to detect and to trace among the labyrinths of the two-and-one-half-trillion-dollar operation—and it is difficult to bring to prosecution. Even to understand that a law has been broken, you must understand completely the complex world of the commodities marketplace. How, then, could we even begin to initiate an investigation?

It is public knowledge that we used extraordinary means to detect extraordinary fraud. Two special agents of the FBI were exhaustively trained in the specialized field of futures trading. They appeared on the floors of the Chicago Board of Trade and the Chicago Mercantile Exchange as runners and phone clerks, then worked their way up the system until they bought their own seats and traded in the pits.

Over time, they gathered evidence through surveillances of and participation in illegal trades. Finally, on August 3, 1989, as a result of the concerted effort of the FBI and the Commodities Futures Trading Commission, the Department of Justice, and representatives of the Internal Revenue Service and the Postal Inspection Service, forty-six traders were indicted on charges ranging from defrauding customers to tax evasion. Following public disclosure of the case, our agents interviewed over five hundred people, served over five hundred subpoenas, and collected over one million documents. Even more importantly, reforms are underway in the commodities markets that will help prevent further systemic fraud in our national marketplace.

In all the cases I have talked about tonight, I have tried to show you how the FBI serves the ends of justice by strictly following our statutes, guidelines, rules, and regulations; by striving for fairness; and by seeking always to balance the concerns of liberty and order. Supreme Court Justice Robert Jackson once observed that "the choice is not *between* order and liberty. It is between 'liberty *with* order' and anarchy without either."[8] The Bill of Rights was never meant to be a suicide pact. The protections it affords must be rationally applied if we are to prevail against criminals who seek to frustrate the very liberties our constitution was designed to secure. The FBI's lawful, intrusive techniques can, with proper management and oversight, maintain the social order we *must* preserve without jeopardizing the individual freedoms of our citizens.

[8] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).