

The Need for a Coordinated Response to Global Crime

THE end of the Cold War meant a significant change in the nature of the foreign threats to U.S. security. The principal worry of most Americans is no longer a devastating military offensive from abroad, but rather more insidious assaults which hit closer to home, threatening lives and property and creating a climate of fear.

The bombing of the World Trade Center and the thwarted attacks against other targets in New York City demonstrated that terrorist acts are no longer risks that Americans confront only abroad. The use of chemical agents in the attack on the Tokyo subway heightened the concern that similar attacks could occur here. International drug cartels continue to pump enormous quantities of cocaine and heroin into the United States, destroying countless lives, raising public health costs, and contributing to a large percentage of the criminal acts committed in this country. The breakup of the former Soviet Union and increased efforts by other countries to obtain weapons of mass destruction and related technologies have resulted in greatly increased trafficking in illicit materials, leading many Americans to worry more now about the possibility of a nuclear explosion than during the Cold War.

Most of these threats to our security stem from foreign groups whose activities are not limited by governmental or national boundaries. Some operate with the support or tolerance of a government; others do not. Some are organized groups with far-flung operations; others are independent actors.

International terrorism, narcotics trafficking, trafficking in weapons of mass destruction, and international organized crime are sometimes called “non-traditional” or “transnational” threats. Recognizing the vagueness of these labels, however, the Commission has chosen to refer to these activities as “global crime.” In using the term “global crime,” we recognize that not all such activities constitute violations of U.S. criminal laws. Nor do we mean to imply that they should be treated only as law enforcement matters. Indeed, the opposite is true, as we discuss below.

The Commission believes that global crime will pose increasing dangers to the American people in the years ahead as its perpetrators grow more sophisticated and take advantage of new technologies. These threats also affect U.S. interests in other ways, for example, by undermining the stability of friendly governments or even requiring the commitment of U.S. military forces.

Recognizing the increasingly menacing nature of these threats, the President has issued separate directives specifically identifying international terrorism, narcotics trafficking, proliferation of weapons of mass destruction, and international organized crime as threats to national security, and creating separate interagency working groups under the auspices of the National Security Council to share information with regard to them.

A growing number of U.S. departments and agencies now have responsibility for combating global crime. The Department of Justice, the Federal Bureau of Investigation

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(FBI), and the Drug Enforcement Administration have historically been the lead agencies in U.S. efforts to protect our citizens against transnational wrongdoers, but the Departments of State and Defense, as well as the Intelligence Community, have been given increasingly larger roles since 1980.¹

While each of these agencies' roles is important, their overlapping responsibilities have led to conflicts in mission and methods. These conflicts have been most visible between the intelligence and law enforcement communities—where disagreements came to a head in the early 1990s over the BNL and BCCI investigations—but they are not unique to them. In the Commission's view, these internecine squabbles between agencies seriously undermine the country's ability to combat global crime in an effective manner and must be ended.

The departments and agencies have taken a number of substantial actions in the last year to work out their differences. The Commission, however, is convinced that even more needs to be done.

In the view of several Commission witnesses, the U.S. Government has relied too heavily on law enforcement as the primary response to international wrongdoers, to the detriment of other possible actions. In the words of one witness, a former Attorney General, "when the law enforcement juggernaut gets going, everyone else gets out of the way."

Law enforcement can be an extremely powerful weapon against terrorism, drug trafficking, and other global criminal activity. But it may not be the most appropriate response in all circumstances. Often the perpetrators have sought sanctuary in other countries and cannot be brought to trial. Compiling proof beyond a reasonable doubt—the standard in criminal cases—may be even more difficult with respect to global crime. Diplomatic, economic, military, or intelligence measures, in many cases, can offer advantages over a strict law enforcement response, or can be undertaken concurrently with law enforcement.

Some who spoke to the Commission believe that it is improper for the Executive branch to subordinate law enforcement interests to other policy considerations, such as the impact on foreign relations, protection of intelligence sources and methods, or implications for the use of U.S. forces. They argue that if a foreign group or individual has violated U.S. law or threatens to violate U.S. law, they should be dealt with as criminals regardless of the other considerations involved.

The Commission believes otherwise. Under the Constitution, the President has responsibility not only to enforce the laws but also to conduct foreign policy and provide for the common defense. The Commission concludes that it is appropriate, and in fact essential, for the President to weigh various competing policy interests in determining the most effective response to global criminal activity. This does not mean that anyone other than the Attorney

¹ For example, the Department of State has declared combating international terrorism, narcotics trafficking, proliferation, and global organized crime as top priorities for the Administration's foreign policy, and has established a new Bureau of International Narcotics and Law Enforcement Affairs, headed by an Assistant Secretary, to direct the Department's efforts. The Defense Department, which historically had been prohibited by the Posse Comitatus Act from engaging in law enforcement, was authorized in 1989 to collect information about international narcotics trafficking. DoD also created an office for drug enforcement support.

General or law enforcement officials should direct law enforcement investigations or prosecutions on a day-to-day basis. But a decision needs to be made at a policy level whether to give priority to law enforcement, or to intelligence, or to other policy options.

4-1. The Commission recommends that the President by Executive Order reaffirm that global criminal activities such as terrorism, narcotics trafficking, organized crime, and proliferation of weapons of mass destruction are national security matters and require a coordinated, multi-agency response. A law enforcement approach alone is inadequate.

The recently created NSC working groups are fostering broader interagency exchanges of information on different types of global crime, but the Commission believes that these groups do not provide the necessary strategic direction to attack these activities in a systematic and comprehensive way. These working groups are not convened at a sufficiently high level to set overall strategies or to settle interagency differences. Moreover, at the working level, law enforcement agencies, unaccustomed to participating in the NSC framework, are often passive participants in the working groups' activities.

The NSC Deputies Committee has, when necessary, provided a useful forum for sorting out interagency differences over global criminal activity, but it is used on an *ad hoc* basis and does not provide significant or continuing strategic direction. The Commission believes a high-level group is needed to direct and coordinate the U.S. Government's efforts, including law enforcement efforts, to combat global crime.

4-2. The Commission recommends that the President create by Executive Order a Global Crime Committee of the National Security Council to direct the U.S. Government's actions against transnational activities that threaten the national security. The Committee should include, at a minimum, the Secretaries of State and Defense, the Attorney General, and the Director of Central Intelligence. The Committee should be chaired by the National Security Advisor.²

A. The Global Crime Committee should identify as specifically as possible those transnational groups or activities that require a coordinated response, and a list of such groups or entities should be submitted to the President for certification. Not all global crime involving terrorism, drug trafficking, organized crime, or weapons proliferation necessarily constitutes a national security threat. By specifying those groups or activities that do pose national security threats, the Committee would alert the various departments that their activities with respect to these threats should be conducted in coordination with other departments and agencies.

² The Commission considered recommending that the Vice President chair the Global Crime Committee, or that the Committee be co-chaired by the Deputy Attorney General and Deputy Secretary of State. It was noted that the Commission on the Roles and Missions of the Armed Services recently recommended that the Vice President chair an interagency committee on weapons proliferation. On balance, however, we believe that the most effective chairman of the Committee would be the National Security Advisor. We note that the Special Review Board (the Tower Commission) recommended that the National Security Advisor chair senior-level committees of the NSC system.

- B. The Committee should establish an overall strategy for dealing with global crime, once certified; monitor implementation by the executive departments and agencies; determine the appropriate approach to specific types of global crime; and resolve operational and policy differences among the various departments and agencies. If such differences cannot be resolved by the Committee, they should be decided by the President.**

- C. A senior member of the NSC staff should be appointed as a Global Crime Committee Coordinator. The Coordinator should be assisted by a small staff detailed from appropriate agencies who are experts on different types of global crime and applicable legal requirements. Together, they should manage the coordination process and serve as advisers to the Committee and the President; they should not adjudicate disputes between departments and agencies, which should be the function of the Committee.**

The Global Crime Committee will operate effectively only with the active participation of law enforcement agencies. For this reason, the Commission considered recommending that the Committee be established outside of the NSC structure. The Commission concluded, however, that because the NSC is already statutorily responsible for the “integration of domestic, foreign, and military policies relating to the national security,” the Committee should be situated under the aegis of the NSC.³ Recognizing that global crime, previously viewed as law enforcement problems, have become national security matters, the Commission believes that the Attorney General should participate in meetings of the NSC when it considers global crime matters.

Intelligence Community–Law Enforcement Cooperation

Historically, intelligence and law enforcement agencies have operated largely in separate spheres. Law enforcement agencies were concerned with criminal activity inside the United States, while intelligence agencies concentrated on the plans and capabilities of foreign governments. As criminal activity has become more global in nature, however, and as more U.S. criminal statutes have been given extraterritorial application, law enforcement agencies have become increasingly interested in information about criminal activities outside the United States. At the same time, collection and analysis of information about global crime also has become a priority for the Intelligence Community.

Increasingly overlapping interests in the same foreign groups and activities have caused conflicts between the two communities. Tensions result, in part, from their very different missions, goals, and legal authorities.

³ Section 101 of the National Security Act provides that “The function of the [National Security] Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.”

The mission of intelligence agencies is to collect, analyze, and disseminate intelligence to their consumers. Human sources and technical collection systems can be developed only over long periods of time and often at great cost. They are easily compromised and, when compromised, often cannot be replaced. Accordingly, intelligence agencies are by nature reluctant to permit consumers, including law enforcement agencies, to use intelligence in any way that might result in the loss of a source or collection method.

The mission of law enforcement agencies, in contrast, is to investigate and prosecute individuals who violate U.S. laws. Like intelligence agencies, law enforcement agencies want information about global crime, but as a means to a different end: the arrest and conviction of criminals. Law enforcement's need for intelligence may not always be compatible with the methods of the Intelligence Community.

Continuing Sources of Conflict

There are a number of specific areas of conflict between the two communities. Three stand out. First, there remains a mutual reluctance to share sensitive information. Law enforcement agencies, especially the FBI, have complained that intelligence agencies, citing the need to protect intelligence sources and methods, do not disseminate important intelligence reports or, more often, disseminate them with such onerous restrictions on their use that they are valueless to investigators and prosecutors.

Similarly, intelligence agencies complain that law enforcement organizations refuse to share information about terrorism, narcotics trafficking, and organized criminal activities collected in the course of domestic criminal investigations. With largely unfettered access inside the United States and armed with enforcement powers, law enforcement officials often can collect information about individuals involved in global criminal activities more easily than intelligence agencies operating clandestinely overseas. Much of this information is potentially useful to the Intelligence Community, but law enforcement agencies are reluctant to share it lest it leak or be used in a way that would taint the prosecution's case.

A second source of conflict involves the intelligence agencies' refusal to accept direct collection tasking from law enforcement agencies. CIA and NSA interpret their legal authorities as permitting them to engage in intelligence collection only for a "foreign intelligence" purpose⁴. Accordingly, while they invite law enforcement agencies to request information about specific targets, NSA and CIA will only go forward with the collection if they independently determine that the requested collection has a valid—in the view of NSA, a principal—"foreign intelligence" purpose. In almost all instances, requests for information about specific individuals involved in terrorism, narcotics

⁴ The so-called law enforcement "proviso" of the National Security Act of 1947, as amended, provides that CIA shall have "no police, subpoena, law enforcement powers, or internal security functions." The legislative history of the proviso is sparse, but it is generally agreed that Congress intended the restriction to prevent the CIA both from infringing on the FBI's domestic jurisdiction and from developing into a secret police force. The proviso clearly prohibits the CIA from directly exercising law enforcement powers, such as arresting a criminal suspect or seizing an illicit narcotics or arms shipment. It is less clear that it limits CIA from providing assistance to law enforcement agencies, such as collecting information at the request of law enforcement agencies. In practice, CIA has generally been willing to conduct collection requested by a law enforcement agency if it determines that some valid foreign intelligence justification exists for the collection. (continued)

trafficking, organized crime, and weapons proliferation are deemed to have foreign intelligence value. The intelligence agencies' refusal to accept direct collection tasking, however, makes them appear to be unresponsive to the needs of law enforcement agencies and makes law enforcement reluctant to make further requests.

A third source of tension is an increased effort by law enforcement agencies, principally the FBI, to expand their activities overseas, both to engage in liaison with foreign law enforcement agencies, and to develop independent sources of information about global criminal activities that can be used more easily by investigators and prosecutors. Law enforcement agencies are hesitant to provide details about these overseas activities to intelligence and State Department officials because of concerns about leaks and possible tainting of their investigations.

Recent Initiatives

During the last two years, the intelligence and law enforcement communities have taken a number of significant actions to resolve their differences. A Joint Intelligence Community–Law Enforcement working group was formed in 1995 to devise solutions to the specific flashpoints between the two communities. Composed of experienced lawyers and other officials from all of the affected agencies, the working group has been meeting on a weekly basis and appears to have made significant progress in addressing problems.

A separate task force has been addressing the relationship between intelligence and law enforcement representatives stationed overseas, specifically focusing on the appropriate division of duties, guidelines for keeping each other informed, and mechanisms to resolve differences that may arise. At the same time, the Departments of State and Justice have been attempting to negotiate a Memorandum of Understanding to govern the relationship between U.S. Chiefs of Mission and law enforcement officials posted overseas.

Both the working group and special task force report to an Intelligence Community–Law Enforcement Policy Board, which was established in March 1995. Co-chaired by the Deputy Director of Central Intelligence and the Deputy Attorney General, the Board meets quarterly to consider and resolve significant policy differences that arise between the two communities. In addition, the Deputy Attorney General and Deputy Director of Central Intelligence have begun to meet on a bi-weekly basis in order to keep each other directly informed on major operational issues and to address disputes that have not been resolved at the working level.

NSA is not subject to the law enforcement proviso of the National Security Act. Executive Order 12333 provides that NSA is authorized to collect signals intelligence “for national foreign intelligence purposes” in accordance with guidance from the DCI. NSA construes E.O. 12333, as well as certain judicial decisions, as prohibiting it from engaging in collection for the principal purpose of law enforcement. Thus, in contrast to the CIA, NSA will engage in collection requested by a law enforcement agency only if it determines that the *principal* purpose is to collect foreign intelligence.

Conclusions and Recommendations

While most Commission witnesses advocated improving cooperation between intelligence and law enforcement, this view is not shared by everyone. Recalling the domestic abuses of the 1960s and 1970s, some critics remain leery about encouraging greater intelligence involvement in law enforcement activities. Others are concerned that forcing intelligence agencies to provide more direct support to law enforcement will open them up to stricter judicial scrutiny and criminal discovery procedures, which will ultimately hamper their collection activities and risk disclosure of sources and methods.

Notwithstanding these concerns, the Commission is persuaded that improved cooperation between law enforcement and intelligence is desirable, and, indeed, is essential. While mindful of the potential risks of closer links, the Commission believes that the increasing threats to our national security from global crime require the two communities to work together. In the Commission's view, cooperation can be enhanced in ways that would not threaten the civil liberties of Americans or the efficacy of intelligence functions. While the recent initiatives taken by the two communities to improve cooperation are to be applauded, the Commission concludes that more needs to be done.

A Single Spokesperson for Law Enforcement

In the view of many witnesses, a significant impediment to better cooperation between the two communities is the decentralization of law enforcement activities in the U.S. Government. Responsibility for law enforcement activities is split principally between two cabinet departments: the Justice Department and the Treasury Department. The Attorney General is responsible for the FBI, the Drug Enforcement Administration, the Immigration and Naturalization Service, and the Marshals Service.⁵ The Secretary of the Treasury is responsible for the Secret Service, the Customs Service, and the Bureau of Alcohol, Tobacco, and Firearms. A still extant 1968 Executive Order directs the Attorney General to "coordinate the criminal law enforcement activities of all federal departments and agencies," but successive Attorneys General have never been able to exercise this authority fully.

As a result, there is no single coordinator for the law enforcement community. Whether the issue concerns formulating an overall U.S. response to global crime, facilitating cooperation with the Intelligence Community, or coordinating law enforcement activities abroad, there is no single focal point within the law enforcement community authorized to represent its views. This makes policy decisions more difficult and coordination more cumbersome.

⁵ The activities of the Department of Justice itself are highly decentralized. The Department includes 94 U.S. Attorneys offices and 56 FBI field offices across the United States. This makes coordination with the Intelligence Community very difficult. The Commission urges the Justice Department to increase its efforts to monitor its cases across the country that may involve national security issues.

4-3. The Commission recommends that the President designate the Attorney General as the focal point and spokesperson for the law enforcement community for purposes of formulating the nation’s law enforcement strategy for responding to global crime, facilitating cooperation with the Intelligence Community, and coordinating law enforcement activities abroad.

Legal Authorities

The Commission does not believe that significant changes in the Intelligence Community’s legal authorities are required in order to improve cooperation between intelligence and law enforcement.

Nevertheless, some clarification of existing law would be helpful. Lack of clear legal authorities has resulted in confusion—inside individual intelligence agencies, between different intelligence agencies, and within the law enforcement community—regarding what activities intelligence agencies can conduct to support law enforcement. Applicable Executive Orders should be revised both to clarify specifically what is prohibited and what is permitted and to ensure that various Intelligence Community agencies are governed by the same rules.

The Commission believes that the Intelligence Community may be taking too restrictive a view regarding whether intelligence assets can be tasked by law enforcement agencies to collect information overseas about other than “U.S. persons,” i.e. U.S. citizens or aliens admitted to the United States for permanent residence. The law enforcement proviso of the National Security Act was intended to prevent the CIA from infringing on the domestic jurisdiction of the FBI and from becoming a national secret police that might be directed against U.S. citizens. These concerns are not present when the Intelligence Community collects against foreign nationals overseas.

At the same time, the need to combat global crime most effectively requires that the capabilities of the Intelligence Community be harnessed to support law enforcement agencies as efficiently and effectively as possible. The Intelligence Community’s interpretation of the law as requiring an independent finding of a “foreign intelligence” purpose (a *principal* foreign intelligence purpose, in NSA’s view) before conducting any collection requested by a law enforcement agency is, in our view, overly mechanistic. The Intelligence Community should be permitted to collect information overseas at the request of a law enforcement agency so long as a U.S. person is not the target of the collection or the subject of the potential prosecution.⁶

⁶ Allowing intelligence agencies to engage in collection for a law enforcement purpose would not necessarily subject them to discovery requests that might jeopardize sources and methods. If the information collected is used for “lead” or “tip-off” purposes only, and is not used as a factual element in support of a search warrant, arrest warrant, or indictment, the intelligence agency would generally not be considered part of the “prosecution team” whose files are subject to discovery searches.

4-4. The Commission recommends that the President by Executive Order clarify that intelligence agencies with collection capabilities may collect information about non-U.S. persons outside the United States at the request of a U.S. law enforcement agency.

Sharing of Information

Despite the recent progress made to improve the working relationships between the two communities, the Commission remains concerned that they will continue not to exchange relevant information about global crime. Although each has legitimate concerns, both practical and legal, about how information it collects may be used (or misused) by the other, the Commission believes the U.S. Government simply cannot wage an effective fight against global crime unless the two communities pool their information resources.

The Intelligence Community needs to relax restrictions, to the greatest extent possible consistent with protection of sources and methods, on the dissemination and use of intelligence by law enforcement agencies in conducting investigations. Similarly, law enforcement agencies should share information they collect with intelligence agencies in an appropriate manner consistent with applicable legal restrictions. Although there are certain legal restrictions on disclosure of information obtained in the course of a law enforcement investigation, such as grand jury secrecy rules, the bulk of investigative information collected by law enforcement agencies about groups and individuals engaged in global criminal activities can be legally provided to the Intelligence Community.

In the Commission's view, procedures can be crafted to allow the passage of relevant information in a manner that neither taints a potential prosecution nor jeopardizes sources and methods. Effective cooperation would be facilitated by detailing more law enforcement personnel to intelligence agencies, and vice versa.

4-5. The Commission recommends that the Global Crime Committee develop improved procedures to ensure increased sharing of relevant information between the law enforcement and intelligence communities.

Overseas Coordination

The Commission also has concerns about expansion of the FBI's overseas activities. The Commission recognizes that the growing internationalization of criminal activity requires the FBI to maintain closer ties with foreign law enforcement services, necessitating the posting of more FBI representatives to foreign capitals. But the Commission believes the functions of these representatives principally should be limited to liaison with the host government and to participating, where appropriate, in joint law enforcement operations (such as counternarcotics or counterterrorism cases) where the U.S. has an interest.

In our view, the FBI should not conduct *unilateral* law enforcement operations in other countries (such as developing and recruiting clandestine sources) without the knowledge and approval of the host government, except in rare and compelling circumstances. The risk of political embarrassment to the United States, as well as the potential for conflicting with the operations of intelligence agencies, is simply too high.

To the extent that the FBI and other law enforcement agencies do engage in activities—either liaison or operations—in foreign countries, the Ambassador should be kept informed of these activities, as required by existing law, and the activities should be coordinated, in accordance with applicable policy, with intelligence officials.⁷ Keeping an Ambassador informed of such activities does not mean that the Ambassador will have authority to make prosecutorial decisions; it does mean that the Ambassador will have an opportunity to assess the political impact of U.S. law enforcement activities on the host country relationship as well as to reduce the possibility for conflict with intelligence activities. If conflicts arise that cannot be resolved in the field, these should be elevated to more senior departmental officials, and, as appropriate, to the Global Crime Committee or the President.

4-6. The Commission recommends the Global Crime Committee develop guidelines to govern the coordination of law enforcement activities overseas, incorporating the principles set forth in this report.

⁷ Pursuant to 22 U.S.C. 3927, the Ambassador is responsible for supervising all non-military Executive branch activities in his or her country and must be kept “fully and currently” informed of all such activities, including those of law enforcement officials.