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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General — Washington, D.C. 20530

April 5, 2004

Memorandum for Glenn A. Fine
Inspector General

Re: Constitutionality of Certain FBI Intelligence Bulletins

You have asked whether two Federal Bureau of Investigation ("FBI") intelligence bulletins violated the First Amendment or otherwise unconstitutionally blurred the distinction between lawful protest activity and illegal terrorist acts. *See* Memorandum for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Glenn A. Fine, Inspector General, *Re: Request for OLC Legal Assessment of Memoranda From FBI Special Agent Coleen Rowley* (Feb. 5, 2004).[1] We conclude that they did not.

I.

On October 15, 2003, the FBI issued Intelligence Bulletin no. 89 ("Bulletin 89"), which addressed one item labeled "Tactics Used During Protests and Demonstrations." The opening paragraph of Bulletin 89 advised that "mass marches and rallies against the occupation in Iraq" were scheduled to occur on October 25, 2003, in Washington, D.C., and San Francisco, and although the FBI had no information indicating that "violent or terrorist activities [were] being planned as part of these protests, the possibility exists that elements of the activist community may attempt to engage in violent, destructive, or disruptive acts." The next six paragraphs of the bulletin described "tactics [that] have been observed by U.S. and foreign law enforcement agencies while responding to criminal activities conducted during protests and demonstrations." The protest tactics identified in Bulletin 89 included, for example, Internet activity to recruit, raise funds, and coordinate activities; false documentation to gain access to secure facilities; marches, banners, and sit-ins; vandalism, physical harassment, and trespassing; drawing large numbers of police officers to a specific location in order to weaken security at other locations; use of homemade bombs; and intimidation of law enforcement through videotaping. The bulletin did not classify such protest tactics as lawful or unlawful, but rather identified them as "possible indicators of protest activity." Bulletin 89 concluded by stating: "Law enforcement agencies should be alert to these possible indicators of

[1] The FBI maintains that "neither intelligence bulletin violated the First Amendment ... and neither 'unconstitutionally blurred' the line between protected First Amendment activities and criminal conduct." Memorandum for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Valerie Caproni, General Counsel, Federal Bureau of Investigation, *Re: Memorandum from Inspector General Regarding Intelligence Bulletins* (Mar. 22, 2004). You have not provided us with your views on this issue.

protest activity and report any potentially illegal acts to the nearest FBI Joint Terrorism Task Force."

On November 15, 2003, the FBI issued Intelligence Bulletin no. 94 ("Bulletin 94"), which addressed two items, the second of which was labeled "Potential for Criminal Activity at Free Trade Area of the Americas (FTAA) Annual Meeting." That item concerned an annual meeting of foreign trade ministers to be held from November 16-21, 2003, in Miami. It noted that the FTAA annual meeting "[h]istorically . . . draws large scale demonstrations, both peaceful and by those individuals or groups who wish to disrupt the meeting," and stated that the upcoming meeting was "expected to attract anywhere from 20,000 to 100,000 demonstrators . . . . [m]any [of whom] are openly planning to disrupt the conference through violence rather than merely conducting organized demonstrations." The bulletin then referenced Bulletin 89 as providing "guidance on tactics used during protests and demonstrations" that could "assist . . . in preparations for the FTAA annual meeting." Bulletin 94 concluded by stating: "Law enforcement agencies that develop information regarding possible terrorist threats or threats of violent or destructive civil disturbance directed against the FTAA should forward this information to the nearest Joint Terrorism Task Force."

II.

We begin by clarifying the narrow scope of the question before us. You have asked whether Bulletin 89 or Bulletin 94 violated the First Amendment or otherwise unconstitutionally blurred the line between lawful protest activity and illegal terrorist acts. In addressing those questions, we confine ourselves to the text of the bulletins. We are in no position to assess how the bulletins were in fact implemented, and our advice therefore does not address that matter. Nor are we in any position to assess the factual accuracy of any of the assertions in the bulletins, and we therefore assume that they are true for purposes of this memorandum.

The applicability of the First Amendment here is not obvious. The intelligence bulletins, by their terms, did not purport to proscribe or regulate the expressive conduct of the protestors. Bulletin 89 merely provided information to various law enforcement agencies (including local agencies that may have little experience with large-scale demonstrations) about protest tactics that had been observed by U.S. and foreign law enforcement agencies "while responding to criminal activities conducted during protests and demonstrations." Although this guidance was provided in the context of specific demonstrations in Washington, D.C., San Francisco, and Miami, the protest tactics identified in the bulletins were generic and not linked to the content of those particular protests or to the viewpoints of the protestors. The bulletins, furthermore, did not authorize or encourage law enforcement agencies to take any action against the protestors. Instead, law enforcement agencies were asked to "be alert" to these "possible indicators of protest activity" and to "report" to the nearest FBI Joint Terrorism Task Force "potentially *illegal acts*" or "information regarding possible *terrorist threats* or *threats of violent or destructive civil disturbance*." (Emphasis added.)

"Illegal acts," "terrorist threats," and "threats of violent or destructive civil disturbance" do not fall within the protection of the First Amendment. The Supreme Court repeatedly has held that the Constitution does not protect "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("[V]iolence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'").[2] The evident purpose of the bulletins was to warn against, and obtain information about, such unprotected activity. Bulletin 89 distinguished "extremist" protest activities (e.g., "physical harassment" and "use of weapons") from "[t]raditional" protest activities (e.g., "marches" and "banners"); and Bulletin 94 explained that the FTAA annual meeting historically brought "peaceful" demonstrators as well as "individuals or groups who wish[ed] to disrupt the meeting." By seeking "reports" from local law enforcement agencies only on potentially illegal acts or threats of violence, the bulletins were limited to criminal activity that falls outside the scope of the First Amendment. Neither bulletin, furthermore, purported to restrict the message or expressive conduct of the protestors. Because the bulletins did not address protected speech activity and did not directly regulate the protestors, they raise no core First Amendment concerns. Indeed, even if the reporting requested by the bulletins had not been limited to illegal acts, terrorist threats, and threats of violent or destructive civil disturbance, it is doubtful that the mere monitoring and reporting of lawful protest activity, without more, would raise any substantial First Amendment problems.

It nonetheless might be argued that the bulletins, by requesting surveillance of public protests for possible unlawful activity, will deter protestors from exercising their First Amendment rights.[3] The Supreme Court has recognized that "constitutional

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[2] As used in the bulletins, the term "threats" does not appear to refer to communications, but rather to general indicators of impending danger or harm. In any event, true communicative "threats" are not entitled to First Amendment protection, either. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (First Amendment does not protect "[t]rue threats," or statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (First Amendment does not protect advocacy of violence or unlawfulness "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (First Amendment does not protect "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[3] The bulletins, which were disseminated only to law enforcement agencies, stated that they should not "be released to the media, the general public or over non-secure Internet servers." As such, the protestors at the identified demonstrations were likely unaware of—and therefore could not claim to have been "chilled" by—the bulletins. On November 25, 2003, however, after the identified demonstrations had occurred and in response to a November 23, 2003, *New York Times* article regarding Bulletin 89, the FBI posted Bulletin 89 on its website and discussed it in a public letter to the Executive Editor of the *Times*. Therefore, any conceivable claim that the bulletin had a "chilling" effect (as opposed to the surveillance itself, which presumably would have occurred even in the absence of the bulletin) would be limited to those planning to protest after Bulletin 89 had been made public.

violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (internal quotation marks and citation omitted). The Supreme Court has also stated, in the context of addressing a Fourth Amendment claim, that the government's warrantless, covert, electronic surveillance relating to domestic security matters implicated First Amendment "values" because "the fear of unauthorized official eavesdropping [might] deter vigorous citizen dissent and discussion of Government action in private conversation." *United States v. United States Dist. Court for the Eastern District of Michigan*, 407 U.S. 297, 313-14 (1972) ("*Keith*"). But in the only case in which such a First Amendment claim was actually presented, the Supreme Court held that a "subjective 'chill'" allegedly stemming from the government's "collection of information about public activities" was insufficient to state a cognizable injury. *Laird v. Tatum*, 408 U.S. 1, 6, 13 (1972). Plaintiffs in *Tatum* alleged that the "data-gathering system" implemented by the Army in the late 1960s as part of its role in quelling local civil disorders was "broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" and had "a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights." *Id.* at 10, 13. The Supreme Court held that because the Army had not exercised a power that was "regulatory, prospective, or compulsory in nature," the alleged "indirect effect" on plaintiffs' First Amendment rights was not an injury recognized under Article III of the Constitution. *Id.* at 11-14.

Tatum therefore did not address the merits of plaintiffs' First Amendment claim, but Justice Marshall—who dissented in *Tatum*—later wrote an in chambers opinion rejecting a similar "chilling" claim. *See Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1315-20 (1974) (Marshall, J., in chambers). The Socialist Workers Party ("SWP") there argued that the attendance of government informants at the National Convention of the Youth Socialist Alliance would "chill free participation and debate, and may even discourage some from attending the convention altogether." *Id.* at 1316. After determining that the "specificity of the injury claimed" by SWP was sufficient to confer Article III standing, Justice Marshall held that the alleged "chilling effect" could not justify an injunction against the government's undercover investigation, which was "limited" in scope and "entirely legal." *Id.* at 1318, 1320. A similar analysis can be found in *Fifth Avenue Peace Parade Comm. v. Gray*, 480 F.2d 326, 333 (2d Cir. 1973), where the Second Circuit Court of Appeals followed *Tatum* and held non-justiciable plaintiffs' allegation that the FBI's investigation of their Vietnam war protest had an unconstitutional "chilling" effect. "Beyond any reasonable doubt," the court stated, "the FBI had a legitimate interest in and responsibility for the maintenance of public safety and order during the gigantic demonstration planned for Washington, D.C.": "No matter how peaceful the intent of its organizers, the assemblage of the vast throng planning to protest the Vietnamese action and to express their sincere and conscientious outrage, presented an obvious potential for violence and the reaction of the Government was entirely justifiable. That reaction was not to deter, not to crush constitutional liberties but to assure and to facilitate that expression and to minimize catastrophe." *Id.* at 332.

The case law is sparse in this area, but to the extent that it is on point, it supports our conclusion that the FBI bulletins did not violate the First Amendment by "chilling" expressive conduct. In contrast to the intrusive surveillance found to violate the Fourth Amendment in *Keith*, or the undercover operation at issue in *Socialist Workers Party*—neither of which was held to violate the First Amendment—the bulletins here did not mandate any systematic, covert, or electronic surveillance. Instead, the bulletins simply requested reports from various protests on observed public acts that might be illegal, such as "threats of violent or destructive civil disturbance." *Cf. Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."). Given the limited nature of such public monitoring, any possible "chilling" effect caused by the bulletins would be quite minimal and substantially outweighed by the public interest in maintaining safety and order during large-scale demonstrations. *Cf. University of Pennsylvania v. EEOC*, 493 U.S. 182, 200 (1990) (First Amendment not implicated where alleged burden on speech is speculative, remote, and attenuated). We therefore discern nothing in the bulletins—which focused upon unprotected criminal activity without imposing any burdens on the protestors—rising to the level of a First Amendment violation.

Nor do we read the FBI bulletins to have improperly blurred the distinction between lawful protest activity and illegal terrorist acts. The bulletins listed "possible indicators of protest activity" and requested reports only on potentially "illegal acts" or "terrorist threats." Neither bulletin purported to offer guidance on the constitutional line between protected and unprotected activities, and we do not think that the bulletins fairly can be read to indicate that all of the identified protest tactics (e.g., "sit-ins" or "banners") were unlawful. And far from encouraging law enforcement agencies to police lawful expressive activity, the bulletins did not recommend any action against the protestors. Indeed, the FBI, in issuing these and other intelligence bulletins, may reasonably expect the policing law enforcement agencies to perform their duties in conformance with the Constitution. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) (members of the Executive Branch "are sworn to uphold the Constitution, and they presumably desire to follow its commands"). In any event, even if the bulletins could be read to have somehow blurred the line between protected and unprotected activity, it is doubtful that the mere monitoring and reporting of lawful activity, without more, would raise any constitutional problems.

Please let us know if we may be of further assistance.

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