

September 16, 2008

Dear Chairmen Conyers and Leahy, and Ranking Members Smith and Specter,

We, the undersigned organizations who care deeply about both individual rights and effective intelligence-gathering, are gravely concerned about reported changes to federal guidelines that would lower the bar for the FBI's law enforcement and intelligence investigations. We ask that you thoroughly question FBI Director Mueller this week about the extent of these changes and convene a hearing of civil liberties experts to discuss the implications of the guidelines once they become public and before they go into effect. It appears that fundamental changes will be made in the FBI and Department of Justice rules that govern criminal investigations and domestic intelligence gathering, and the implications of those changes require your dedicated oversight. We also ask that you prevent any funding from being used to implement these changes until the next Attorney General has a chance to review them.

According to various accounts, the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations are being amended to allow "assessments" of non-criminal activity, which may include collecting and datamining information about people not suspected of misconduct to create profiles on individuals and groups. Even in the absence of any particularized indication of criminality or risk to national security, FBI agents conducting an "assessment" would be authorized to misrepresent their identities to gather information, to task undercover informants to attend meetings, events, and even worship services, and to engage indefinitely in surveillance of homes, businesses and individuals. This major expansion of FBI investigative powers would undercut one of the longstanding purposes of the Attorney General's Guidelines: to ensure that law enforcement has some factual basis to support a suspicion of wrongdoing before it begins to investigate and intrude into Americans' private lives. Law enforcement is already permitted to check leads and conduct preliminary inquiries with the thinnest of predication; removing all nexus to illegal behavior or evidence of threat to national security will only encourage FBI agents to overreach.

The Administration no doubt claims that these tools will be subject to internal oversight, but history has proven time and again that without a connection to at least some indication of criminal activity, the government tends to abuse these powers, casting the net far too widely and intruding on the privacy of law-abiding individuals. And without any indication of criminality, it becomes all too easy for government agents to base their investigation on race, religion and the exercise of the First Amendment protected activities.

As the 9/11 Commission stated, when considering new authorities, the burden is on the executive to demonstrate that "(a) the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure

protection of civil liberties.”<sup>1</sup> It is unclear what security is enhanced by granting greater authority to collect and share information about innocent persons. It is imperative that Congress determine how these new authorities will work, conduct continued oversight, and work with the next Administration to ensure that the FBI focuses its investigations on criminals and terrorists. In the immediate future, it is critical that the Committees of oversight determine:

- What mechanisms are in place to prevent the FBI from conducting surveillance on individuals or organizations based in part on their race, religion or ethnicity?
- What will prevent the FBI from conducting surveillance based on race, religion, ethnicity or exercise of First Amendment protected activity in combination with otherwise innocent factors that the intelligence community has described as terrorist preplanning, such as drawing diagrams and taking pictures?
- What will prevent the FBI from using intrusive investigative techniques, such as having agents attend organizing meetings without any predication, to conduct “assessments” against those who are exercising their First Amendment rights peacefully?
- What will be done with information that does not reflect any criminal or terrorism acts and who will have access to it? How long will such information be retained?
- What resources will be diverted from other criminal and anti-terror efforts so that the FBI can devote resources to conduct “assessments” of innocent behavior?

Thank you for your consideration of our views. Because of the incredibly important nature of these changes, we encourage your committees to hold hearings after the guidelines become public to permit civil liberties experts to discuss the many constitutional and privacy concerns implicated by the amendments.

American Civil Liberties Union  
American-Arab Anti-Discrimination Committee (ADC)  
Arab American Institute  
Bill of Rights Defense Committee  
Brennan Center for Justice  
Center for Democracy and Technology  
Constitution Project  
Council on American-Islamic Relations  
Defending Dissent Foundation  
Electronic Frontier Foundation

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<sup>1</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION OF TERRORIST ATTACKS UPON THE UNITED STATES 423 (W.W. Norton & Co. 2004) (2004). 394-395

Friends Committee on National Legislation  
Liberty Coalition  
OMB Watch  
Open Society Policy Center  
OpenTheGovernment.org  
Privacy Activism  
Sikh American Legal Defense and Education Fund (SALDEF)  
U.S. Bill of Rights Foundation