CHAPTER EIGHT
Revising Attorney General Guidelines on FBI Investigations

I. The Problem

In the last months of the Bush Administration the Department of Justice rewrote the Attorney General Guidelines (the "Guidelines") for FBI investigations, removing important restrictions on the FBI's investigative authorities and opening the door to racial profiling. The new Guidelines consolidated existing Guidelines governing FBI criminal investigations, national security investigations, and foreign intelligence collection operations, which the Bush Administration had already loosened considerably in 2002, 2003, and 2006, respectively. But the new Guidelines go much further by overturning longstanding limitations on FBI investigations of public demonstrations, and authorizing the FBI to conduct invasive "assessments" without having a factual predicate to justify an investigation of any kind.

Assessments require only an "authorized purpose," meaning that whenever the FBI claims it is acting to protect against criminal or national security threats, or simply to collect foreign intelligence, *FBI agents may investigate people or organizations they have no factual basis for suspecting of wrongdoing*. No supervisory approval is required before an agent may initiate an assessment, and there are no reporting requirements. The Guidelines allow the FBI to utilize a number of intrusive investigative techniques during assessments including unlimited physical surveillance, searching commercial databases, tasking informants to attend meetings under false pretenses and engage in other surveillance activities, and engaging in "pretext" interviews in which FBI agents misrepresent their identities in order to elicit information. These "assessments" could even be conducted against an individual simply to determine if he or she would be suitable as an FBI informant. Nothing in the new Guidelines protects entirely innocent Americans from being thoroughly investigated by the FBI. The new Guidelines explicitly authorize the surveillance and infiltration of peaceful advocacy groups in advance of demonstrations, thus threatening First Amendment activities, and they do not clearly prohibit using race, religion, or national origin as factors in initiating assessments.

The new Guidelines incorporate the 2003 Department of Justice ban on racial profiling in federal law enforcement, but that ban specifically exempts national security investigations. By removing the distinction between criminal and national security investigations, the new Guidelines seem to allow using race, religion, ethnicity and national origin as factors in determining who will be subjected to assessments or investigations. In testimony regarding the new Guidelines, FBI officials have confirmed that race, religion, ethnicity and national origin can be used as "a" factor in determining whether a person is subject to investigation, though not the "sole" factor.

The FBI has not had such unfettered authority since Attorney General Edward Levi wrote the first Attorney General Guidelines in 1976, after revelations that the FBI

had widely abused its investigative powers in targeting political opponents and civil rights activists for investigation. The Levi Guidelines were adopted to forestall legislative efforts to write a statutory charter limiting the FBI's investigative authority. Subsequent Attorneys General have revised or written new Guidelines several times over the years, often in response to new allegations of abuse, creating a constantly changing set of authorities that govern FBI investigative activities.

II. Proposed Solutions

A. Guiding Principles

1. Racial and ethnic profiling is unconstitutional, ineffective and counterproductive as an investigative technique, and it should be banned in all instances.

2. The FBI should be prohibited from initiating any intrusive investigative activity regarding a U.S. person absent information or an allegation that such person is engaged or may engage in criminal activity, or is or may be acting as an agent of a foreign power. A preliminary investigation opened upon such information or allegation should be strictly limited in scope and duration, and should be directed toward quickly determining whether a full investigation, based on facts establishing reasonable suspicion, may be warranted.

3. In each investigation, the FBI should be required to employ the least intrusive means necessary to accomplish its investigative objectives. The FBI should consider the nature of the alleged activity and the strength of the evidence in determining what investigative techniques should be utilized. Intrusive techniques such as recruiting and tasking sources, law enforcement undercover activities, and investigative activities requiring court approval should only be authorized in full investigations, and only when less intrusive techniques would not accomplish the investigative objectives.

4. The FBI should be prohibited from collecting or maintaining information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an authorized criminal or national security investigation, and there are reasonable grounds to suspect the subject of the information is or may be involved in the conduct under investigation.

5. All investigative activities conducted by the FBI should be properly documented in a manner that can be audited by internal inspectors and the Department of Justice Inspector General as well as to facilitate congressional oversight. The FBI should regularly report raw numbers regarding the number and type of investigations (including assessments) opened and closed each quarter, the number of individuals under investigation, the number of

U.S. persons under investigation, and the number of times specific investigative techniques were implemented.

6. Supervisory approval should be required for any level of investigation other than searches of public records and public websites, searches of FBI records, requests for information from other federal, state, local, or tribal law enforcement records, and questioning (but not tasking) previously developed sources.

B. Proposed Measures

1. Executive

a. The new President should direct the Attorney General to evaluate all FBI investigative activities and end any practices that are illegal, ineffective, or prone to abuse.

b. The incoming President should direct the Attorney General to immediately and thoroughly review the new Guidelines as well as all previous guidelines issued during the past eight years and to amend them to make them consistent with the guiding principles above.

c. The new President should direct the Attorney General to revise the Department of Justice ban on racial profiling in federal law enforcement to close the existing exemption for national security and border integrity.

d. The new President should work with Congress to pass the Ending Racial Profiling Act (HR 4611; S 2481).

e. The new President should work with Congress to establish a statutory investigative charter for the FBI that limits the FBI's authority to conduct investigations without specific and articulable facts giving reason to believe that an individual or group is or may be engaged in criminal activities, is or may be acting as an agent of a foreign power.

2. Legislative Changes

a. Pass the Ending Racial Profiling Act (HR 4611; S 2481).

b. Establish a legislative charter for the FBI, limiting the FBI's investigative authorities by requiring a factual predicate sufficient to establish reasonable suspicion before intrusive investigative techniques may be authorized, and prohibiting investigations based upon the exercise of First Amendment rights.

3. **Legislative Appropriations (Solutions w/Funding Requests)**
   a. Enact legislation to de-fund any FBI activities that use race, religion, ethnicity or national origin as a criterion for investigation, except where there is a specific subject description.

   b. Enact legislation to de-fund any FBI activities that chill the free exercise of First Amendment rights.

III. Allies*

American Library Association
Lynne E. Bradley, Director
lbradley(at)alawash.org
202-682-8410
The ALA Policy Manual: The Rights of Library Users and the USA Patriot Act (52.4.5) *available at* http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf

Bill of Rights Defense Committee (BORDC)
Kit Gage
kgage(at)verizon.net
301-587-7442

Center for Democracy & Technology
Gregory T. Nojeim
gnojeim(at)cdt.org
202-637-9800 (ext 113)
The Internet in Transition, *available at* http://www.cdt.org/election2008/

Common Cause
Sarah Dufendach, Vice President for Legislative Affairs
www.commoncause.org
202-736-5709

The Constitution Project
Becky Monroe
bmonroe(at)constitutionproject.org
202-580-6920

Council on American-Islamic Relations (CAIR)
Corey Saylor, National Legislative Director
csaylor(at)cair.com
202-384-8857 (c)
202-488-8787 (w)

Electronic Frontier Foundation (EFF)
Kevin S. Bankston
bankston(at)eff.org
415-436-9333 (ext.126)

Essential Information
John Richard or Robert Weissman
202-387-8034

Government Accountability Project
Jesselyn Radack, Homeland Security Director
JesselynR(at)whistleblower.org
202-408-0034 (ext. 107)

Liberty Coalition
Michael D. Ostrolenk, Co-Founder/National Director
www.libertycoalition.net
mostrolenk(at)libertycoalition.net
301-717-0599

Muslim Advocates
Shahid Buttar
shahid(at)muslimadvocates.org
415-692-1512

National Coalition Against Censorship
Joan E. Bertin, Esq., Executive Director
bertin(at)ncac.org
212-807-6222
Fax: 212-807-6245

National Litigation Project of the Lowenstein International Human Rights Clinic, Yale Law School
Hope Metcalf
hope.metcalf(at)yale.edu
Ramzi Kassem
ramzi.kassem(at)yale.edu
203-432-4800

OpenTheGovernment.org
Patrice McDermott
pmcdermott(at)openthegovernment.org
202-332-6736

Open Society Policy Center
www.opensocietypolicycenter.org
202-721-5600

The Sikh Coalition
Neha Singh
neha(at)sikhcoalition.org
510-659-0900 (ext. 90)

South Asian Americans Leading Together
Priya Murthy
priya(at)saalt.org
301-270-1855

Stanford Law School - Mills International Human Rights Clinic
Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director
Kathleen Kelly, Clinical Teaching Fellow
bj.olshansky(at)gmail.com
650-736-2312

U.S. Bill of Rights Foundation
Dane vonBreichenruchardt, President
usbor(at)aol.com
202-546-7079

* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

IV. Counter-Arguments and Rebuttal

Proponents of the new guidelines will likely maintain that these changes help transform the FBI into a domestic intelligence agency. The fact that the new Guidelines will only take effect less than two months before the end of the Administration casts doubt on the contention that the new Guidelines are necessary to enable the FBI to carry out its responsibilities. A new administration that will have to implement these guidelines should carefully review them, rather than accepting a policy choice made by an outgoing administration in its waning days. Moreover, even as the FBI plays an important role in national security matters, it still must maintain its longstanding and vital role in investigating crime. The recent financial crisis and the dearth of agents to investigate corporate fraud and other financial crimes presents a compelling example of the critical role played by the FBI in many areas that profoundly affect the lives of Americans and the well-being of the United States.

Proponents of the new guidelines also favor one set of rules for all types of FBI activities. They maintain that a single set of guidelines is more sensible and facilitates better compliance by agents. It is noteworthy that they advance this argument even as the new guidelines reduce significantly the requirements for supervisory approvals and other internal checks on investigative powers. Nonetheless, the principal benefits of a single set of guidelines can be maintained while remedying the serious substantive failings of the current guidelines.

V. Recommended Documents for Further Information

a. Letter from ACLU to Judiciary Leadership regarding inquiry into the use of racial profiling by the FBI (July 9, 2008), *available at* http://www.aclu.org/racialjustice/racialprofiling/35920leg20080709.html

b. Letter from ACLU to Department of Justice Inspector General (Sept. 22, 2008), *available at* http://www.aclu.org/images/general/asset_upload_file505_36884.pdf

c. EPIC Attorney General Guidelines Page: http://epic.org/privacy/fbi/

d. CDT Attorney General Guidelines Page: http://www.cdt.org/security/usapatriot/guidelines.php

e. Coalition letter to Attorney General Mukasey (Aug. 12, 2008), *available at* http://www.brennancenter.org/page/-/Justice/20080812.Letter.to.AG.Mukasey.on.FBI.Guidelines.pdf

f. Coalition letter to House and Senate Judiciary Committee (Sept. 16, 2008), *available at* http://www.brennancenter.org/page/-/Justice/20080916.Coalition.Letter.AG.Guidelines.pdf

g. ACLU Report, "History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement," *available at* www.aclu.org/safefree/spying/29902pub20070529.html

h. *Why the Supreme Court Got It Wrong When It Rejected a Government Whistleblower's First Amendment Claim*, FINDLAW (June 7, 2006) *available at* http://writ.news.findlaw.com/commentary/20060607_radack.html