

LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

- CHAPTER 1:** Eliminate Unnecessary Barriers To Legitimate Charitable Work
- CHAPTER 2:** Closing Guantánamo
- CHAPTER 3:** End Illegal Detention, Torture, and Rendition
- CHAPTER 4:** Prosecute Terrorist Suspects in Accordance with the Law
- CHAPTER 5:** Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.
- CHAPTER 6:** Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion
- CHAPTER 7:** Misuse of Immigration Detention Laws in Counterterrorism Efforts
- CHAPTER 8:** Revising Attorney General Guidelines on FBI Investigations
- CHAPTER 9:** Updating the Law Governing the Privacy of Electronic Communications
- CHAPTER 10:** Fusion Centers and the Expansion of Domestic Intelligence
- CHAPTER 11:** Promoting Government Transparency
- CHAPTER 12:** National Security Letters and Section 215 of the USA PATRIOT Act
- CHAPTER 13:** Reform of the National Security Surveillance Laws and Procedures
- CHAPTER 14:** Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents
- CHAPTER 15:** Reforming the State Secrets Privilege
- CHAPTER 16:** Reforming Watch Lists
- CHAPTER 17:** Assertion of Executive Authority in National Security Matters
- CHAPTER 18:** Executive Privilege and Congressional Oversight
- CHAPTER 19:** Signing Statements
- CHAPTER 20:** War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at www.constitutionproject.org, and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

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](mailto:lbradley@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](mailto:kgage@verizon.net)

301-587-7442

Center for Democracy & Technology

Gregory T. Nojeim

[gnojeim\(at\)cdt.org](mailto:gnojeim@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](mailto:bmonroe@constitutionproject.org)

202-580-6920

Council on American-Islamic Relations (CAIR)

Corey Saylor, National Legislative Director

[csaylor\(at\)cair.com](mailto:csaylor@cair.com)

202-384-8857 (c)

202-488-8787 (w)

Electronic Frontier Foundation (EFF)

Kevin S. Bankston
[bankston\(at\)eff.org](mailto:bankston@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](mailto:JesselynR@whistleblower.org)
202-408-0034 (ext. 107)

Liberty Coalition

Michael D. Ostrolenk, Co-Founder/National Director
www.libertycoalition.net
[mostrolenk\(at\)libertycoalition.net](mailto:mostrolenk@libertycoalition.net)
301-717-0599

Muslim Advocates

Shahid Buttar
[shahid\(at\)muslimadvocates.org](mailto:shahid@muslimadvocates.org)
415-692-1512

National Coalition Against Censorship

Joan E. Bertin, Esq., Executive Director
[bertin\(at\)ncac.org](mailto:bertin@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](mailto:hope.metcalf@yale.edu)
Ramzi Kassem
[ramzi.kassem\(at\)yale.edu](mailto:ramzi.kassem@yale.edu)
203-432-4800

OpenTheGovernment.org

Patrice McDermott
[pmcdermott\(at\)openthegovernment.org](mailto:pmcdermott@openthegovernment.org)
202-332-6736

**Open Society Policy Center
The Sikh Coalition**

Neha Singh
[neha\(at\)sikhcoalition.org](mailto:neha(at)sikhcoalition.org)
510-659-0900 (ext. 90)

South Asian Americans Leading Together

Priya Murthy
[priya\(at\)saalt.org](mailto: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](mailto:bj.olshansky(at)gmail.com)
650-736-2312

U.S. Bill of Rights Foundation

Dane vonBreichenruchardt, President
[usbor\(at\)aol.com](mailto: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

APPENDIX

Revising Attorney General Guidelines on FBI Investigations

I. Jurisdiction

- A. Executive Branch:** The Attorney General has the discretion to re-write the FBI investigative guidelines pursuant to Executive Order 12333, and 28 U.S.C. §§ 509, 510, 533 and 534.

The President has authority to amend Executive Order 12333 and/or to issue a new Executive Order and restate the goals, direction and/or responsibilities of the FBI with respect to its investigative efforts. (President Bush last amended Executive Order 12333 on July 30, 2008.)

The Attorney General has the discretion to revise the June 2003 Guidance Regarding the use of Race by Law Enforcement Agencies, to close the existing exemption for national security and border integrity.

- B. Legislative Branch:** The Senate and House Judiciary and Intelligence Committees have jurisdiction to create a legislative charter for FBI investigations, and/or can limit the use of specific investigative techniques through statute.

Congress has the authority to deny requested funds and/or to defund FBI activities. Appropriations are handled principally through the Commerce, Justice, Science and Related Agencies, with appropriations bills considered for markup by subcommittees of the same name in both chambers' full Appropriations Committees. Similarly, Congress can provide resources and authority to the General Accounting Office and the DOJ Inspector General to collect and analyze information on implementation of the Guidelines and to report on same.

The Senate and House Judiciary Committees have jurisdiction to review the Ending Racial Profiling Act (currently HR 4611, S 2481) and to send the proposed legislation to the House and Senate floors for a vote.

II. Status of Actions

- A. Executive Branch:** Attorney General Edward Levi created the first FBI Domestic Security Guidelines in 1976. As noted, these Guidelines were created to forestall the creation of a statutory charter after revelations of widespread FBI surveillance of civil rights and activists through its counterintelligence programs. The Levy Guidelines were successful in forestalling the creation of a statutory charter in part because Congress understood that the Guidelines and any changes thereto would be subject to Congressional review and oversight. When later Attorney Generals amended the Levy Guidelines (prior to 2002), they did so each time with such consultation and oversight.

On May 30, 2002, Attorney General John Ashcroft issued revised Guidelines, but this time without Congressional consultation or oversight. The 2002 Ashcroft Guidelines greatly expanded the FBI's data collection authority and loosened parameters for investigations. Attorney General Ashcroft revised the Guidelines again in 2003, and the Guidelines were further revised in 2006.

Attorney General Mukasey proposed the current Guidelines in August 2008, and issued them on September 29, 2008. The Guidelines will become effective on December 1, 2008.

B. Legislative Branch

Guidelines: The House Judiciary Committee held a hearing on the Guidelines on September 16, 2008 and the Senate Judiciary Committee heard testimony on the proposed Guidelines on September 17, 2008. On September 23, 2008, Senators Dick Durbin (D-IL), Edward Kennedy (D-MA) and Russ Feingold (D-WI) wrote to Attorney General Mukasey expressing concern regarding the Guidelines. The Senators asked the Attorney General to revise the Guidelines (1) to prohibit profiling on the basis of race, religion, ethnicity, national origin and religion; and (2) to require a factual predicate for the basis for initiating assessments. The Senators also asked the Attorney General to include protections in the Guidelines for United States persons about whom information is collected, retained and shared. (That same day the Senate Intelligence Committee held a hearing on the Guidelines, with John D. Rockefeller IV (D-W VA) presiding.)

The Guidelines, as issued on September 29, 2008, do not contain the modifications requested by Senators Durbin, Kennedy and Feingold.

On October 3, 2008, John Conyers (D-MI) (Chairman of the House Judiciary Committee), Robert C. "Bobby" Scott (D-VA) (Chairman of the House Crime, Terrorism and Homeland Security Subcommittee) and Jerold Nadler (D-NY) (Chairman of the House Constitution, Civil Rights and Civil Liberties Subcommittee) called on the Department of Justice to postpone the effective date of the Guidelines until the new Administration had the opportunity to review and approve them.

Statutory Charter: There has not been recent activity regarding a statutory charter for the FBI. In 2002, Senator Patrick Leahy (D-VT) introduced the FBI Reform Act, which would have at least strengthened Congressional (and also Department of Justice) oversight of the FBI, but this bill did not reach the full Senate for a vote despite passing the Senate Judiciary Committee by a unanimous vote.

Ending Racial Profiling Act: Senator Russ Feingold (D-WI) and House Judiciary Chairman John Conyers (D-MI) introduced the Ending Racial Profiling Act in the Senate (S 2481) and House (HR 4611), respectively. S2481 has been

referred to the Senate Judiciary Committee, but the Committee has not taken action on the bill. Likewise, JR 4611 has been referred to the House Judiciary Committee, but the Committee has not taken action on that bill.

- C. Judicial Branch:** As of October 29, 2008, there is no pending litigation and there are no court decisions regarding the new Guidelines.

In promoting the Guidelines, Attorney General Mukasey indicated that the FBI would abide by the Department of Justice's June 2003 "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies" ("DOJ Guidance"), which addresses past judicial decisions by recognizing the United States Supreme Court's well-settled position that "all racial classifications by a government actor are subject to the 'strictest judicial scrutiny'" (quoting *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 224-25 (1995)). The DOJ Guidance goes on to state that "the legality of particular, race-sensitive actions taken by federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand. In absolutely no event, however, may federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination." DOJ Guidance. The DOJ Guidance emphasizes that "[i]n investigating or preventing threats to national security . . . Federal law enforcement officers *may not consider race or ethnicity except to the extent permitted by the Constitution and the laws of the United States.*" DOJ Guidance (emphasis added). In this regard, while the Supreme Court has recognized that race may be a potential factor considered (but not the sole factor) in government action in the national security context, *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003), the Court likewise strongly cautioned that that the "use of race to advance that objective must be narrowly tailored." 539 U.S. at 352. The use of race as a factor, even a small factor, is never permissible when not narrowly tailored. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), the Court struck down the use of race when used as a "tie-breaker" to determine which students would fill open slots at oversubscribed Seattle schools. In light of the potential threat to individual civil liberties brought about by the changes in the new Guidelines, the DOJ must take care to ensure it does not overstep the bounds of the Constitution.