

July 27, 2010

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

We write to request further congressional oversight of the Federal Bureau of Investigation's ("FBI") operations pursuant to the 2008 Attorney General's Guidelines, which were implemented over congressional objections and threaten the constitutional rights of all Americans. In the wake of *The Washington Post* series exposing the secrecy and unaccountability of our nation's intelligence establishment,¹ the Senate Judiciary Committee has a responsibility to seek transparency into FBI operations and restore the Bureau's accountability.

I. Historical Background

The FBI guidelines were first promulgated in 1976 under the direction of then Attorney General Edward Levi, as part of an effort to stave off congressional intervention to stem the FBI's well-documented abuses of the COINTELPRO era. Since then, the guidelines have been periodically revised to diminish their protections, most recently and most significantly in December 2008. Revelations of renewed abuse of FBI investigative authorities demonstrate that the FBI and its intelligence activities require expanded oversight in order to protect Americans' civil rights and privacy.

Documented in over 14,000 pages of congressional testimony, the Church and Pike Committees revealed that, between 1956 and 1971, the FBI engaged in a sustained and coordinated campaign to hinder constitutionally-protected activism and neutralize political dissent. According to the Church committee, the FBI's activities "would be intolerable in a democratic society even if all of the targets had been involved in violent activity, but COINTELPRO went far beyond that . . . the Bureau conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights..."²

Unfortunately, these problems are back. FBI Joint Terrorism Task Forces ("JTTFs") around the country have engaged in political spying for nearly a decade.³ Meanwhile, audits by the Inspector General ("IG") of the Justice Department—in 2007, 2008 and again in 2010—revealed rampant FBI abuses of National

¹ See Dana Priest & William Arkin, *A Hidden World, Growing Beyond Control*, Washington Post (July 19, 2010); Priest & Arkin, *National Security Inc.*, Washington Post (July 20, 2010); Priest & Arkin, *The Secrets Next Door*, Washington Post (July 21, 2010).

² U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans* (April 26, 1976) ("Church Committee" Final Report).

³ See, e.g., ACLU of Colorado, *Spy Files Documents Reveal Political Spying by FBI's Joint Terrorism Task Force* (March 11, 2002), available at <http://www.aclu-co.org/spyfiles/fbifiles.htm>; OMB Watch, *FBI Documents Reveal Further Spying on Peace, Civil Rights Groups* (Sep. 6, 2005), available at <http://www.ombwatch.org/node/2654>;

Security Letters expanded by the PATRIOT Act.⁴ The IG also uncovered separate violations of the FBI Guidelines in 2005.⁵ Yet in 2008, then Attorney General Michael Mukasey issued a new set of Guidelines, prompting concerns from Senator Richard Durbin (D-IL) even before their implementation:

These guidelines would permit FBI surveillance of innocent Americans with no suspicion and on the basis of their race, religion or national origin. These guidelines will hinder the FBI's efforts to protect our national security and threaten the constitutional rights of American citizens.⁶

The 2008 Attorney General's guidelines create at least three problems ripe for congressional correction.

II. Assessments: Invitations to Profiling

The Mukasey Guidelines vastly expanded the investigatory authorities available to agents without any predicated facts or allegations, by expanding the Assessment tier of investigative activity. The 2008 Guidelines authorize a number of intrusive investigative techniques during Assessments, including pretext interviews, interviewing members of the public, recruiting and tasking informants, physical surveillance not requiring a court order, grand jury subpoenas for telephone or electronic mail subscriber information, and more.⁷

The Guidelines give FBI agents broad individual discretion to investigate Americans using these techniques without reasonable suspicion of wrongdoing, or supervisory approval or oversight. They also allow race to be used as a factor, among others, justifying scrutiny. Given the pressure on agents to identify unknown threats to national security before they emerge, such unchecked power invites abuse, including inappropriate profiling according to race, religion, national origin, or speech advocating a particular point of view.

These issues demand congressional oversight and are long overdue for correction. At a minimum, Congress should obtain and examine aggregate data about the number and type of FBI assessments, the number of individuals who have been targeted with these assessments and whether information gathered in the assessment led to the opening of predicated investigations. Demographic information about the targets of these investigations should also be evaluated in order to establish the empirical extent of profiling according to race, religion and national origin.

⁴ U.S. Dep't of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (March 2007), available at <http://www.justice.gov/oig/special/s0703b/final.pdf>; *A Review of the FBI's Use of National Security Letters* (March 2008), available at <http://www.justice.gov/oig/special/s0803b/final.pdf>; see also *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* (Jan. 2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>.

⁵ U.S. Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (Sep. 2005), available at <http://www.justice.gov/oig/special/0509/final.pdf>.

⁶ U.S. Senator Richard Durbin, *Statement on Announcement of New FBI Guidelines* (Oct. 3, 2008), available at <http://durbin.senate.gov/showRelease.cfm?releaseId=304117>.

⁷ U.S. Dep't of Justice, *The Attorney General's Guidelines for Domestic FBI Operations*, 19 (2008).

III. Undisclosed Participation: A Secret Policy Resurrecting COINTELPRO

The Bureau's contemporary "undisclosed participation" activities recall the worst of the FBI's abuses during the COINTELPRO era and expand upon them by including religious groups protected by the First Amendment's Free Exercise Clause among those whose rights it offends. The Bureau has also re-established the secrecy surrounding its operations, refusing to disclose to either the public or Congress the policy under which those investigations are authorized.

Since 2008, FBI agents, state and local law enforcement agents cooperating with them through JTTFs, and informants have infiltrated groups pursuing various constitutionally protected purposes. Faith institutions, activist groups advocating for causes as varied as pro-life and pro-choice stances on reproductive rights, environmental causes, opposition to the death penalty, foreign policy objectives, and animal rights have all been affected.⁸

Not only have these covert domestic operations remained unaccountable to any independent or judicial review, but the mobilization of civil society in these various sectors has demonstrably suffered as a result. Reports around the country of informants infiltrating mosques,⁹ for instance, have dramatically diminished participation by Muslim Americans in faith networks.

IV. Domain Assessment: Institutionalized Profiling

The FBI's Domestic Investigations and Operations Guide ("DIOG") includes a section on "domain assessment," institutionalizing profiling *per se* by investigating and locating geographic concentrations of ethnic minorities around the United States for the purposes of allocating law enforcement resources. A similar program was proposed by the City of Los Angeles in 2007, and rejected due to public outrage.

The program is no less offensive at the federal level. Surveillance, monitoring, and law enforcement resource allocation decisions stigmatize communities singled out for scrutiny on the basis of race, religion or national origin, to the same extent as discriminatory harassment and baseless arrest.

⁸ See Democracy Now!, *The Return of COINTELPRO: FBI Launches Nationwide Surveillance Of Activists Ahead of GOP Convention* (Aug. 19, 2004), available at http://www.democracynow.org/2004/8/19/the_return_of_cointelpro_fbi_launches; Max Solie, *The Return of COINTELPRO: Government Infiltration of Activist Groups* (Aug. 12, 2009), available at <http://www.constitutioncampaign.org/blog/?p=99>; Thomas R. Cincotta, *Platform for Prejudice* (March 2010), available at http://www.publiceye.org/liberty/matrix/reports/sar_initiative/sar-full-report.pdf; see also *id.* at 22 (recommending that Congress and the courts "Restore Constitutional Checks and Balances" to domestic intelligence activities).

⁹ See, e.g., Paul Vitello and Kirk Semple, *Muslims Say F.B.I. Tactics Sow Anger and Fear*, N.Y. Times (Dec. 17, 2009); Salvador Hernandez, *FBI denies claim by alleged informant*, Orange County Register (Dec. 8, 2009); Elliott McLaughlin, *FBI planting spies in U.S. mosques, Muslim groups say*, CNN (March 20, 2009) (noting that 10 U.S. organizations representing Muslim communities "claim the FBI has sent undercover agents posing as worshippers into mosques, pressured Muslims to become informants, labeled civil rights advocates as criminals and spread misinformation."),

V. Opportunities for Congressional Action

We urge Congress to hold hearings to better understand the standards under which FBI agents initiate investigations of First Amendment protected activity in the context of speech and political activism, as well as religious activity and practice.

In considering the potential necessity of legislation to protect civil rights and civil liberties, Congress should not grant the FBI guidelines artificial legitimacy, nor should the Bureau be afforded credibility that it has not only failed to earn, but actively undermined. Just this year, the Chairman of the House Judiciary Committee called for the FBI's General Counsel to be replaced given the wanton abuse of not just National Security Letters (NSLs) uncovered by Inspector General reports in 2006 and 2008, but also the further abuse of an entirely new investigative authority (known as "exigent letters," promising NSLs that often never arrived) invented by the FBI.¹⁰ As a repeat offender, the Bureau is long overdue for intervention by Congress.

Enacted in the wake of abuses that prompted a sustained national outrage, the Attorney General's FBI Guidelines have shrunk to a shadow of their original protections. Rather than impose meaningful constraints on potentially politicized investigations and prosecutions, or intrusions by Bureau agents into constitutionally protected activity, today's guidelines invite—rather than constrain—these sorts of abuses.

For more information about the concerns raised in this letter, please contact Shahid Buttar at the Bill of Rights Defense Committee (shahid@bordc.org or 202-316-9229).

Respectfully submitted,

A Better Way Foundation
American Muslim Voice
Arab American Action Network
Arab American Institute (AAI)
Asian American Justice Center
Asian American Legal Defense and Education Fund (AALDEF)
Asian Law Caucus
Bill of Rights Defense Committee (BORDC)
Casa de Maryland
Center for Constitutional Rights (CCR)
Center for Democracy & Technology (CDT)
Center for Media and Democracy
Center for Torture Accountability
Chicago Committee to Defend the Bill of Rights (CCDBR)
Civil Liberties Defense Center (CLDC)
Council on American-Islamic Relations (CAIR)

¹⁰ Rep. John Conyers, Jr., *FBI Broke the Law and General Counsel's Office... Must Face Consequences* (April 14, 2010), available at <http://judiciary.house.gov/news/100414.html>; see also *supra* note 3.

The Culture Project
Defending Dissent Foundation
Desis Rising Up and Moving (DRUM)
Ella Baker Center for Human Rights
Equal Justice Alliance
Global Network Against Weapons & Nuclear Power in Space
Government Accountability Project
Grassroots America
Illinois Coalition for Immigrant and Refugee Rights (ICIRR)
Jeannette Rankin Peace Center
La Raza Centro Legal
Mercer County (NJ) Coalition for Civil Liberties
Muslim Legal Fund of America
Muslim Public Affairs Council (MPAC)
Muslim Solidarity Committee
National Association of Criminal Defense Lawyers (NACDL)
New Jersey Immigration Policy Network (NJIPN)
One America (formerly Hate Free Zone)
Pax Christi Metro DC-Baltimore
Peace Action Montgomery
Peace Thru Justice Foundation
Political Research Associates
Progressive Democrats of America
Project SALAM
School of the Americas Watch
South Asian Americans Leading Together (SAALT)
Strength Through Peace
United for Peace & Justice (UFPJ)
United Sikhs
WarisaCrime.org