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Before the Senate Select Committee on Intelligence

Revisions to the Attorney General Guidelines for FBI Investigations

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We very much appreciate the Committee holding the first hearing in many years on the rules governing FBI investigations, a subject of great importance to the civil liberties and security of the American people. We especially thank the Committee for the opportunity to provide comments on this issue. In the last seven years, there have been fundamental changes in the way the FBI operates. These far-reaching changes have been made without needed transparency and without sufficient congressional oversight to ensure that such important decisions affecting the relationship between Americans and their government are good decisions.

We urge the Committee to conduct additional inquiries on FBI authorities--and that it do so in collaboration with the Judiciary Committee, because the issue of the legal authorities to gather secret intelligence on Americans also falls squarely within the jurisdiction of the Judiciary Committee. (While we opposed the amendments to the Foreign Intelligence Surveillance Act enacted this summer, we appreciate the collaboration between this Committee and the Judiciary Committee on that bill.)

Summary.

The changes to the Attorney General Guidelines made in 2002-2003 and those now proposed eliminate any truly meaningful limit on the FBI's authority to collect information on Americans. The result of such unlimited authority is that:

- it is highly likely that the FBI's effectiveness in counterterrorism and crime-fighting will be diminished rather than enhanced;
- the FBI will amass billions of records and other information on millions of Americans who have never been suspected of any wrongdoing and this information will be kept for decades, if not permanently; and
- there are inadequate protections against political spying; to the contrary, the changes are quite likely to encourage--through various bureaucratic incentives--surveillance based on activities protected by the First Amendment, including Americans' political views and their religion, as well as discriminatory profiling.

In addition, all these changes to the Guidelines authorize the use of extremely intrusive surveillance techniques in an enormous variety of circumstances when the FBI has no basis to suspect individual wrongdoing. Allowing the recruitment of undercover informants in churches and mosques and allowing government agencies to infiltrate communities in disguise, when there is no reasonable basis to suspect that terrorist

activity is being planned by the targeted group or individual, is reminiscent of a Stasi secret police and not consistent with the legitimate and necessary role of the FBI in our democratic society.

Background.

As a preliminary matter, we want to set the record straight about the Justice Department's and FBI's outreach to civil liberties and community groups. We are disappointed that the outreach was not structured to permit a truly constructive dialogue. The Center for National Security Studies was not permitted to attend the single meeting with the Department and FBI in which the administration discussed the proposed changes. More significantly, groups that were included in that meeting, which was held last month after the Guidelines were almost final and agents were already being trained to implement them, only had temporary access to review the lengthy and complex document. Such an approach obviously limits the ability to comment on such changes. We also note that while this Justice Department has only rarely and recently met with civil liberties groups, it is not true that consultation is unprecedented. In the last 30 years, the Center has held innumerable meetings with Justice and FBI officials concerning how to meet the requirements of both national security and respect for constitutional rights.

As the Committee well knows, the Department has still refused to release publicly its proposed changes to the guidelines, and this failure makes it difficult to fully respond to the proposed changes.* (Apparently however, the Department provided an advance copy to some editorial writers, who would comment favorably on them. See *Washington Post*, "New Rules for the FBI" ("We've had a chance to review the guidelines...") September 29, 2008.)

This lack of transparency or meaningful consultation coupled with the fact of that the changes are being made at the end of the last year of this presidency support the need for the next administration to revisit and revise these Guidelines with a more open and consultative process. We also urge this Committee to hold additional public hearings on these issues next year.

Proposed Changes. The draft proposal as described contains at least two significant changes to the current Guidelines. First, it would allow the FBI to use three very intrusive surveillance techniques—recruitment of undercover informants, pretextual interviews, and unlimited physical surveillance—in much broader circumstances and more frequently than now permitted. Second, the proposal would substitute new after-the-fact audits and other internal reviews for the current oversight system, which requires advance approval from supervisors, FBI headquarters or the Justice Department for use of intrusive techniques against Americans, at least in some circumstances.

The rationales for these changes offered by Justice Department and FBI officials in their testimony last week failed to address crucial issues about this proposal. Instead,

* These comments were written before release of the new Guidelines on October 3, 2008.

they argued that the changes simply reflect consolidation and rationalization of the various Guidelines as amended in 2002 and 2003. In doing so, they failed to address the serious consequences of the far-reaching amendments in 2002 and 2003 that will be exacerbated by these additional changes. The effect of all these changes needs much more in depth examination by the Congress and more public explanation by the administration. Specifically, administration officials argued that the use of more intrusive techniques should be permitted in all circumstances because they are already permitted in criminal investigations under the 2003 guidelines. But this argument simply obscures, rather than illuminates, crucial questions concerning the role of the FBI in a democratic society, the government's authority to collect information on its citizens and whether there are adequate protections against abuse and misuse of such authority.

Government surveillance of Americans. The fundamental concerns about government collection of information on its citizens described by Senator Sam Ervin in 1974 are even greater in today's technologically advanced world:

[D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy makes it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.

Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom: the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words.¹

There is no doubt that the federal government made many mistakes before 9/11, that globalization has increased the vulnerabilities of the United States, that technology has outpaced the law in some areas, and that changes were needed after 9/11 to ensure more effective counterterrorism efforts. Recognizing that this is true, however, does not answer the question of what the needed changes are.

The FBI and Justice Department have not adequately explained how the Guidelines work. It is difficult to understand the real effect of the changes in the Guidelines since 2001 and the administration's testimony is not especially helpful. It is essential that the Congress and the public learn how the Guidelines actually work in practice in light of the incidents of FBI spying on peaceful activists; its failures to comply

¹ Senator Ervin, June 11, 1974, *reprinted in* COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE AND THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 S.3418, at 157 (Public Law 93-579)(Sept. 1976).

with applicable rules, not only in the case of National Security Letters, but also spying on journalists' telephone calls; and the amassing of literally hundreds of millions of records on Americans in the FBI's Investigative Data Warehouse.

We urge the Committee to ask the administration, publicly, about more specific hypotheticals of the kind that were mentioned at the hearing last week. We further urge the Committee to require an in-depth and specific explanation by the FBI and Justice Department of what it means that they now consider the FBI to be a pro-active intelligence agency: what is the FBI now being authorized to do that it was not authorized to do before? How is the mission of preventing terrorist attacks now understood differently? The answers to these questions are not clear, especially in light of the FBI's successful intelligence work before 9/11, for example, in preventing planned attacks on New York City targets resulting in the successful prosecution of the blind Sheik Rahman and other conspirators.

General Questions: In examining the Attorney General guidelines, this Committee should consider the following questions.

When should the FBI collect information on Americans? What should be the purpose and the trigger for such collection? How long and under what circumstances should the FBI be allowed to keep information?

What means of collection should the FBI be allowed to employ? What restrictions should exist on intrusive means of collection? While the Fourth Amendment requires a warrant for searches and seizures, there are other techniques almost equally intrusive, which courts have not held to fall within the Fourth Amendment protections, *e.g.*, the use of informants and pretextual activities by the FBI. The widespread use of secret informants and secret government agents gathering information on its own citizens has a long and unhappy history, even in well-established democracies. The use of such techniques *always* threatens the balance of power and the sense of trust between the government and those governed.

Are there adequate protections against targeting individuals or groups because they oppose government policies and against targeting minority groups or individuals on the basis of their politics, their religion or their race? No domestic intelligence agency in any democracy has avoided the temptation to do so.

Only after assuring that there are meaningful rules governing the predicate, scope, and methods of collection, and after prohibiting domestic spying does the issue of oversight arise in response to the question of how best to ensure that the agency complies with such rules?

Standards for FBI collection and retention of information on Americans. This administration has fundamentally changed the standards governing when the FBI may conduct surveillance of Americans.

Since the adoption of the Levi Guidelines in place of a statutory charter for the FBI, the basic notion had been that the FBI must have some kind of factual predicate before it could conduct secret surveillance and collect information on Americans. One of the key protections in the Guidelines was the requirement that the FBI's surveillance must have some nexus to criminal activity, including preventing future crimes and specifically terrorist attacks. At the same time, it has always been recognized that there are certain national security threats requiring FBI attention that do not fit neatly into a criminal investigation model—*e.g.*, circumstances when the government may be more interested in identifying foreign spies than in prosecuting them. For decades, the Attorney General Guidelines have contemplated and provided rules for just such investigations. The Guidelines outlined the specific circumstances when the FBI could investigate without a criminal predicate and specific rules about what collection techniques could be used. Even so, there were abuses where the FBI investigated groups because of their opposition to government policy, such as the 1980's investigation of CISPEs and other groups opposed to the Reagan administration's Central American policy. And there will always be difficult questions, for example about investigating anti-abortion groups like Operation Rescue in the context of trying to solve and prevent the murder of clinic doctors.

However, in the past several years, the standards governing the FBI's collection, retention and use of information have been substantially weakened by regulatory and statutory changes, for example, in the statutes governing use of National Security Letters. At the same time, the administration has made a fundamental shift in the framework for FBI surveillance. The new framework is not tied to the existence of a factual nexus to criminal activity or specific national security threats. Instead this administration has adopted a framework that which authorizes surveillance so long as the government's "purpose" is legitimate, *e.g.*, to gather foreign intelligence or address national security threats. But substituting this framework allows virtually unfettered collection of information about Americans. The only remaining prohibition is that the government may not gather information for an illegitimate purpose, which of course no government agency would ever own up to.

This administration has thus replaced the fundamental notion that that there must be a limiting principle for FBI surveillance, *e.g.*, some nexus to past or future criminal activities—with an "intelligence" paradigm that seeks to collect as much information as possible on the theory that the information might be useful some day. Such a paradigm might make sense when an agency's mission is to know as much as possible about the world or even perhaps to know as much as possible about the technological vulnerabilities of critical infrastructure, but when applied to the government's collection of information about its citizens, it is fundamentally inconsistent with the constitutional understanding that a limited government is essential for the preservation of liberty, as described by Senator Ervin.

The expansion of the FBI's power to collect information on Americans without any individualized suspicion has been accomplished through changes made by Attorney General Ashcroft to the Guidelines in 2002 and 2003, including the authorization of

“threat assessments,” which would be furthered by the changes proposed now. The overall effect has been to authorize the FBI to gather much more information on many more Americans in many more circumstances without any individualized suspicion or even much of a factual predicate about the existence of any specific threat. And the result is massive databases on millions of Americans.

Use of Intrusive Techniques. At the same time that the Guidelines have been weakened to allow much broader targeting and collection on Americans, they have also allowed the use of extremely intrusive techniques in much broader circumstances, with approval of the appropriateness of such techniques at much lower levels of government. Now the Department and the FBI seek to recruit undercover informants, use pretextual interviews and conduct 24 hour surveillance of Americans virtually whenever it wishes. It could do so on the claim that it is attempting to determine whether to recruit the target as a potential source. Rather than acknowledging the dangers to a democratic society in the widespread use of such techniques, the administration simply argues that such techniques should be allowed in all circumstances because they are allowed in criminal investigations. Such argument overlooks the fundamental protection provided by the fact that a criminal investigation is predicated on the existence of facts giving reason to suspect that a crime has been or is about to be committed and that the individual being investigated has some nexus to such criminal activity.

Political, religious and racial targeting.

There is also a perennial risk that government surveillance will focus on minorities, dissenters, or those whose religion or ethnic background is “different.” This risk is exponentially compounded when the Attorney General and the Director of National Intelligence direct the FBI that the threat of international terrorism, identified mainly in terms of the avowed religion of the 9-11 terrorists, must be the first priority in every FBI office throughout the country. It is a crucial, but difficult task to identify and locate the few individuals who may be in the United States planning another attack. The tempting, but ineffective approach is to simply deem suspicious entire communities, all Americans of a particular faith, all Americans with a Middle Eastern or Southeast Asian background or all Americans who actively oppose the administration’s policies in the Middle East. This of course makes countless innocent people suspects. Nevertheless, and despite the lip service paid to prohibiting investigations based “solely” on religion, the changes in the Guidelines reflect an approach that largely embraces doing just that in practice.

The administration’s testimony makes clear that the Guidelines, for example, would allow the targeting and collection of information about Pakistani-Americans as a group, even when there is no basis for suspecting wrongdoing by any individual in that group. While the FBI claims that this will not happen because it will only collect information when it determines that there is a “fit” between the threat and the targeted individual or group, the Guidelines fail to include this restriction or spell out the criteria for determining the existence of such a “fit.” To the contrary, the requirement being eliminated – that there be a nexus between suspected criminal activity and the targeted individual and group -- did precisely spell out and require such a “fit.”

This approach does not serve security interests.

There is no evidence that such an approach would, in fact, be useful in protecting against national security threats. There is no doubt but that the FBI must be pro-active and energetic in seeking to prevent additional terrorist attacks and that it should use intelligence capabilities, intelligence analysis, and information from as a variety of sources in the effort to do that. We applaud this Committee for working to require the FBI to be smarter in its analysis. But the new Guidelines are not about *smarter* analysis or collection, they are simply about *more* collection. And by weakening the requirements that collection be tied to specific facts and that there be some nexus, there is every reason to fear that broader collection will be less, not more, useful for counterterrorism and other national security surveillance. More scarce counterterrorism resources will be needed to analyze ultimately useless and irrelevant information about Americans. On the other hand, requiring targeted and predicated collection, instead of massive and indiscriminate collection would not only better protect privacy and First Amendment rights, it would substantially increase the likelihood that the government could identify and obtain the specific information needed to prevent terrorist acts.

Recommendations:

The Congress should initiate a comprehensive review of domestic surveillance and intelligence.

We urge this Committee to undertake a comprehensive review of domestic surveillance/intelligence authorities in collaboration with the Judiciary Committee and the relevant Committees in the House. A comprehensive review is needed as to whether the changes made in the past seven years are in fact necessary and effective or whether other approaches would be more effective and less threatening to the balance of power between the government and the people.

Review and revise the Guidelines.

We urge the Committee to work with the next Administration to amend the Guidelines to ensure that FBI surveillance is effective, targeted and consistent with constitutional protections. The rules need to ensure that the government's domestic surveillance and intelligence activities target terrorists, not minorities or political dissenters. The Guidelines should enable the FBI to effectively identify, locate and prosecute those who are planning terrorist attacks acting consistently with constitutional protections for individual privacy and liberty and the law.

We respectfully suggest that a review of the Guidelines begin with an examination of what should be the standards and criteria that must be met before the FBI can collect information on Americans, keep it indefinitely and make it available for any "authorized" use by numerous government agencies.

In particular, domestic surveillance and intelligence activities should to the greatest extent possible collect and retain information on individuals only when there is some degree of predication, *i.e.*, some reason to believe that the individual is involved in

some way with criminal activities, including plotting terrorist attacks. The authority for “threat assessments” should be revised accordingly.

In addition, the Guidelines should ensure that the FBI collects no more information on Americans than is necessary; it should use the least intrusive means to do so; and should operate with the greatest possible degree of transparency consistent with law enforcement and national security necessity. *Compare* E.O. 12333 sec. 2.4 (requiring the use of “least intrusive collection techniques feasible”).

Require a Warrant for use of undercover informants in places of worship or other First Amendment-protected gatherings. The Committee should also examine the feasibility of requiring a judicial warrant based on probable cause before the FBI uses a confidential informant to infiltrate houses of worship or other places where people are exercising First Amendment rights.

Protection against religious and racial profiling in surveillance and against political spying.

The Guidelines should structure investigations and oversight mechanisms to ensure the elimination of religious and racial profiling in FBI surveillance and intelligence activities and ensure that First Amendment-protected activities do not trigger FBI surveillance.

Remedies for abuses. The Committee should also consider how best to afford remedies to individuals who are improperly targeted and surveilled including assurances that government files will not be maintained as a result of such wrongful surveillance.

Conclusion.

Thank you again for the invitation to submit our views on these very important matters. We appreciate your consideration of them.