

August 12, 2008

The Attorney General of the United States
The Honorable Michael Mukasey
United States Department of Justice
950 Pennsylvania Avenue, NW
Room 4400
Washington, DC 20530-0001

Dear Mr. Attorney General:

As you know, the press has recently reported on the Department of Justice's forthcoming revised Investigative Guidelines (the "Guidelines") governing the Federal Bureau of Investigation (the "FBI") and the Guidelines' potential contours.¹ We write to convey our concerns about the process preceding the Guidelines' release and to request an opportunity to submit comments before the Guidelines take effect.

Drawn from interviews with at least six "senior FBI, Justice Department and other U.S. intelligence officials familiar with the new policy," one press report suggested that the Guidelines "would let agents open preliminary terrorism investigations after mining public records and intelligence to build a profile of traits that, taken together, were deemed suspicious."² This possibility is troubling for numerous reasons, including its departure from protections already eroded by the existing guidelines, only some of which require "information or an allegation indicating the possibility of criminal activity" to initiate a preliminary inquiry.³ Moreover, the FBI has a long and regrettable history of violating the liberties and privacy interests of law-abiding Americans.

The draft Guidelines described in the press could craft a system resembling the disgraced COINTELPRO program through which the FBI engaged in domestic spying on civil rights, anti-war and other activists, including Martin Luther King, Jr.⁴ The effort to correct the Bureau's historical oversteps included, among other things, the Guidelines set forth by then-Attorney General Edward Levi in 1976.⁵ However, subsequent revisions, including the 2002 revisions crafted by then-Attorney General John Ashcroft, and the further revisions currently being formulated, risk turning back the clock to the pre-Levi era when the FBI's intelligence activities were unrestrained and unaccountable. The risk

¹ See, e.g., Lara Lakes Jordan, *Race Profiling Eyed for Terror Probes*, ASSOCIATED PRESS, (July 2, 2008).

² Id.

³ Compare Dep't of Justice, *The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*, at 1 (May 30, 2002), available at <http://www.ignet.gov/pande/standards/prgexhibitg.pdf> with Dep't of Justice, *The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection*, at 3 (Oct 31, 2003), available at <http://www.cdt.org/security/usapatriot/031031nsiguidelines.pdf>.

⁴ See Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, at 85 (1976) (concluding that surveillance and interference with the work of Dr. King was "unjustified and improper").

⁵ See *FBI Statutory Charter: Hearings Before the Senate Committee on the Judiciary*, 95th Cong. Pt. 1, 20-26 (1978).

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persists of targets being selected for political purposes or on the basis of vastly overinclusive dragnets. For instance, a program by the FBI's San Francisco field office recommended by "top FBI counterterrorism officials" was ridiculed last year after seeking to identify suspected terrorists by tracing consumer data collected by local grocery stores and examining trends in purchases of falafel and other foods favored in the Middle East.⁶

In addition, taking cues from their federal counterparts, overzealous state and local law enforcement authorities have also sometimes politicized domestic intelligence operations. For instance, the 1985 Handschu consent decree curtailed vast surveillance and infiltration operations by the Bureau of Special Services operating with the New York Police Department ("NYPD").⁷ The NYPD also committed widespread surveillance of political activities as recently as 2004 through its RNC Intelligence Squad.⁸ In 2003, state authorities at the California Anti-Terrorism Information Center ("CATIC") circulated warnings of potential violence at peace demonstrations at the Port of Oakland, prompting a violent assault by the Oakland Police Department against peaceful longshore workers and anti-war activists.⁹

On July 9, 2008, you testified before the U.S. Senate Committee on the Judiciary that "the regulations, before they come out, will be made known to this committee...and certainly before their effective date will be reviewed with this committee."¹⁰ You also testified on July 23, before the U.S. House of Representatives Committee on the Judiciary, that "Members of Congress will be briefed on the guidelines before they go into effect."¹¹ In addition, during an interagency meeting with civil rights organizations on July 24, Assistant Attorney General for Civil Rights Grace Chung Becker promised to circulate a draft of the Guidelines with advocacy groups before they take effect.

We are pleased that you are committed to sharing the pre-release Guidelines with the U.S. Congress and community and civil liberties groups. In addition to such pre-release disclosure, we also urge you to allow sufficient time between the initial disclosure and the implementation of the final Guidelines for stakeholders to enjoy a meaningful opportunity to submit comments and suggestions, as well as for Congress to conduct essential oversight, including potential hearings. Because the Guidelines could

⁶ See Jeff Stein, *FBI Hoped to Follow Falafel Trail to Iranian Terrorists Here*, CONGRESSIONAL QUARTERLY (Nov. 2, 2007).

⁷ See generally, Frank J. Donner, *PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* (1990).

⁸ See Jim Dwyer, *City Police Spied Broadly Before G.O.P. Convention*, NEW YORK TIMES (March 25, 2007).

⁹ See Dana Hull, *Police Violence Shocks Activists, Others at Port of Oakland Protest*, SAN JOSE MERCURY NEWS (April 7, 2003).

¹⁰ Testimony of Attorney General Michael Mukasey, U.S. Senate Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (July 9, 2008).

¹¹ Testimony of Attorney General Michael Mukasey, U.S. House of Representatives Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (July 23, 2008).

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potentially expand the scope of the nation's chief investigative agency to an unprecedented degree, it is crucial that they are fully reviewed and considered by both Congress and the American people.

For additional information, please feel free to contact Muslim Advocates Counsel Shahid Buttar at your convenience at (415) 692-1512 or Shahid@MuslimAdvocates.org. We look forward to hearing from you.

Respectfully submitted,

American-Arab Anti-Discrimination Committee (ADC)
American Civil Liberties Union (ACLU)
The American Freedom Campaign
Arab American Institute (AAI)
Arab Community Center for Economic and Social Services (ACCESS)
Asian Law Caucus (ALC)
Bill of Rights Defense Committee
The Brennan Center for Justice at New York University School of Law
Buddhist Peace Fellowship
Center for Democracy & Technology (CDT)
Center for National Security Studies (CNSS)
CODEPINK: Women for Peace
Council on American-Islamic Relations (CAIR)
Defending Dissent Foundation
Electronic Frontier Foundation (EFF)
Equal Justice Society (EJS)
The Freedom and Justice Foundation
Global Exchange
Illinois Coalition for Immigrant and Refugee Rights (ICIRR)
Islamic Society of San Francisco
Liberty Coalition
Privacy Activism
Mexican American Legal Defense and Educational Fund (MALDEF)
Moroccan American Socio-Cultural Center
Muslim Advocates (MA)
Muslim Bar Association of New York (MUBANY)
Muslim Consultative Network
National Lawyers Guild (NLG)
New Jersey Immigration Policy Network (NJIPN)
Northwest Federation of Community Organizations
Rights Working Group
School of the Americas Watch (SOA Watch)
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Coalition
South Asian Americans Leading Together (SAALT)
South Asian Bar Association of Northern California
U.S. Bill of Rights Foundation