



# Department of Justice

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**BEFORE THE**

**SELECT COMMITTEE ON INTELLIGENCE  
UNITED STATES SENATE**

**ENTITLED**

**“NEW ATTORNEY GENERAL GUIDELINES FOR DOMESTIC  
INTELLIGENCE COLLECTION”**

**PRESENTED**

**SEPTEMBER 23, 2008**

**Joint Statement of  
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United States Senate**

**“New Attorney General Guidelines for Domestic Intelligence Collection”**

**September 23, 2008**

Mr. Chairman, Vice Chairman Bond, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the Attorney General’s Guidelines for Domestic FBI Operations. We believe that these guidelines will help the FBI continue its transformation from the pre-eminent law enforcement agency in the United States to a domestic intelligence agency that has a national security mission and law enforcement mission.

The new guidelines provide more uniform, clear, and straightforward rules for the FBI’s operations. They are the culmination of prior efforts to revise the FBI’s operating rules in the wake of the September 11 terrorist attacks. They are consistent with and help implement the recommendations of several distinguished panels for the FBI to coordinate national security and criminal investigation activities and to improve its intelligence collection and analytical capabilities.

These guidelines will protect privacy rights and civil liberties, will provide for meaningful oversight and compliance, and will be largely unclassified. Consequently,

the public will have ready access in a single document to the basic body of operating rules for FBI activities within the United States. The guidelines will take the place of five existing sets of guidelines that separately address, among other matters, criminal investigations, national security investigations, and foreign intelligence collection. They are set to take effect on October 1, 2008.

We have greatly appreciated the interest of this Committee and others in these guidelines. Over the past six weeks, we have made a draft of the guidelines available for review to the Members and staff of this Committee, the House Permanent Select Committee on Intelligence, the Senate Judiciary Committee, and the House Judiciary Committee. We have provided briefings (and made the draft guidelines available for review) to a wide range of interested individuals and groups, including Congressional staff, public interest groups ranging from the American Civil Liberties Union (ACLU) to the Arab-American Anti-Discrimination Council (ADC) to the Electronic Privacy Information Center (EPIC), and a broad set of press organizations. The dialogue between the Department and these individuals and groups has been, in our view, both unprecedented and very constructive. We have appreciated the opportunity to explain why we undertook this consolidation, and we are amending the draft guidelines to reflect feedback that we have received.

#### **I. Purpose of the Consolidation Effort**

Approximately 18 months ago, the FBI requested that the Attorney General consider combining three basic sets of guidelines—the General Crimes Guidelines, which

were promulgated in 2002, the National Security Investigative Guidelines (NSIG), which were promulgated in 2003, and a set of guidelines that are called the Supplemental Foreign Intelligence Guidelines, which were promulgated in 2006.

This request was made for three primary reasons. First, the FBI believed that certain restrictions in the national security guidelines were actively interfering with its ability to do what we believe Congress, the 9/11 Commission, WMD Commission, and the President and the American people want the FBI to do, which is to become an intelligence-driven agency capable of anticipating and preventing terrorist and other criminal acts as well as investigating them after they are committed. The clear message to the FBI has been that it should not simply wait for things to fall on its doorstep; rather, it should proactively look for threats within the country, whether they are criminal threats, counterintelligence threats, or terrorism threats.

Second, the FBI believed that some of the distinctions between what an agent could do if investigating a federal crime and what an agent could do if investigating a threat to national security were illogical and inconsistent with sound public policy. Specifically, the FBI argued that there was not a good public policy rationale for (a) the differences that existed, and (b) the guidelines that governed national security matters to be more restrictive than those that governed criminal matters.

Third, the FBI concluded that having inconsistent sets of guidelines was problematic from a compliance standpoint. The FBI made its request for consolidation after the Inspector General had issued his report on the use of National Security Letters. That report helped crystallize for the FBI that it needed stronger and better internal

controls, particularly to deal with activities on the national security side, as well as a robust compliance program. The FBI argued that, from a compliance standpoint, having agents subject to different rules and different standards depending on what label they gave a matter being investigated was very problematic. The FBI asserted that it would prefer one set of rules because compliance with a single set of rules could become, through training and experience, almost automatic.

The Department agreed with the merits of undertaking this consolidation project, and the result is the draft guidelines we are discussing today. These guidelines retain the same basic structure of predicated investigations on the one hand, and pre-investigative activity on the other—currently called threat assessments on the national security side and prompt and limited checking of leads on the criminal side. The standard for opening a preliminary investigation has not changed and will not change.

The most significant change reflected in the guidelines is the range of techniques that will now be available at the assessment level, regardless of whether the activity has as its purpose checking on potential criminal activity, examining a potential threat to national security, or collecting foreign intelligence in response to a requirement. Specifically, agents working under the general crimes guidelines have traditionally been permitted to recruit and task sources, engage in interviews of members of the public without a requirement to identify themselves as FBI agents and disclose the precise purpose of the interview, and engage in physical surveillance not requiring a court order. Agents working under the national security guidelines did not have those techniques at their disposal. We have eliminated this differential treatment in the consolidated

guidelines. As discussed in more detail below, the consolidated guidelines also reflect a more comprehensive approach to oversight.

## **II. Uniform Standards**

The guidelines provide uniform standards, to the extent possible, for all FBI investigative and intelligence gathering activities. They are designed to provide a single, consistent structure that applies regardless of whether the FBI is seeking information concerning federal crimes, threats to national security, foreign intelligence matters, or some combination thereof. The guidelines are the latest step in moving beyond a reactive model (where agents must wait to receive leads before acting) to a model that emphasizes the early detection, intervention, and prevention of terrorist attacks, intelligence threats, and criminal activities. The consolidated guidelines also reflect the FBI's status as a full-fledged intelligence agency and member of the U.S. Intelligence Community. To that end, they address the FBI's intelligence collection and analysis functions more comprehensively. They also address the ways in which the FBI assists other agencies with responsibilities for national security and intelligence matters.

The issuance of these guidelines represents the culmination of the historical evolution of the FBI and the policies governing its domestic operations that has taken place since the September 11, 2001, terrorist attacks. In order to implement the decisions and directives of the President and the Attorney General, to respond to inquiries and enactments of Congress, and to incorporate the recommendations of national

commissions, the FBI's functions needed to be expanded and better integrated to meet contemporary realities. For example, as the WMD Commission stated:

[C]ontinuing coordination . . . is necessary to optimize the FBI's performance in both national security and criminal investigations . . . . [The] new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old "wall" between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very different FBI from the one we had on September 10, 2001. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 466, 452 (2005).)

To satisfy these objectives, the FBI has reorganized and reoriented its programs and missions, and the guidelines for FBI operations have been extensively revised over the past several years. For example, the Attorney General issued revised versions of the principal guidelines governing the FBI's criminal investigation, national security investigation, and foreign intelligence collection activities successively in 2002, 2003, and 2006.

Despite these revisions, the principal directives of the Attorney General governing the FBI's conduct of criminal investigations, national security investigations, and foreign intelligence collection have persisted as separate documents that impose different standards and procedures for comparable activities. Significant differences exist among the rules these separate documents set for core FBI functions. For example, even though activities that violate federal criminal laws and activities that constitute threats to the national security oftentimes overlap considerably, FBI national security investigations have been governed by one set of rules and standards, while a different set of rules and

standards has applied to the FBI's criminal investigations generally. These differences have created unfortunate situations where the same kind of activity may be permissible for a criminal investigation but may be prohibited for a national security investigation.

As an example of how the prior guidelines treated comparable activities differently based on how those activities were categorized, consider the question of what the FBI can do in public places. Under the multiple guidelines regime, the rules were different if the FBI received a tip that a building was connected to organized crime as opposed to a tip that the building was connected to a national security matter, such as international terrorist activity. The rules for how long the FBI could sit outside the building, or whether the FBI could follow someone exiting the building down the street, were different; specifically, more restrictive on the national security side and difficult to apply. It makes no sense that the FBI should be more constrained in investigating the gravest threats to the nation than it is in criminal investigations generally.

Similarly, under the prior guidelines, human sources—that is, “informants” or “assets”—could be tasked proactively to ascertain information about possible criminal activities. Those same sources, however, could not be proactively tasked to secure information about threats to national security, such as international terrorism, unless the FBI already had enough information to predicate a preliminary or full investigation.

The consolidated guidelines we are discussing today carry forward and complete this process of revising and improving the rules that apply to the FBI's operations within the United States. The new guidelines integrate and harmonize these standards. As a result, they provide the FBI and other affected Justice Department components with

clearer, more consistent, and more accessible guidance for their activities by eliminating arbitrary differences in applicable standards and procedures dependent on the labeling of similar activities (“national security” versus “criminal law enforcement”). In addition, because these guidelines are almost entirely unclassified, they will make available to the public the basic body of rules for the FBI’s domestic operations in a single public document.

### **III. Coordination and Information Sharing**

In addition to the need to issue more consistent standards, the FBI’s critical involvement in the national security area presents special needs for coordination and information sharing with other DOJ components and Federal agencies with national security responsibilities. Those components and agencies include the Department’s National Security Division, other U.S. Intelligence Community agencies, the Department of Homeland Security, and relevant White House agencies and entities. In response to this need, the notification, consultation, and information-sharing provisions that were first adopted in the 2003 NSIG are perpetuated in the new guidelines.

#### **IV. Intelligence Collection and Analysis**

Additionally, the new guidelines carry out a significant area of reform by providing adequate standards, procedures, and authorities to reflect the FBI's character as a full-fledged domestic intelligence agency—with respect to both intelligence collection and intelligence analysis—and as a key participant in the U.S. Intelligence Community.

In relation to the collection of intelligence, legislative and administrative reforms expanded the FBI's foreign intelligence collection activities after the September 11, 2001, terrorist attacks. These expansions have reflected the FBI's role as the primary collector of intelligence within the United States—whether it is foreign intelligence or intelligence regarding criminal activities. Those reforms also reflect the recognized imperative that the United States' foreign intelligence collection activities inside the United States must be flexible, proactive, and efficient in order to protect the homeland and adequately inform the United States' crucial decisions in its dealings with the rest of the world. As the WMD Commission stated in its report:

The collection of information is the foundation of everything that the Intelligence Community does. While successful collection cannot ensure a good analytical product, the failure to collect information . . . turns analysis into guesswork. And as our review demonstrates, the Intelligence Community's human and technical intelligence collection agencies have collected far too little information on many of the issues we care about most. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 351 (2005).)

The new guidelines accordingly provide standards and procedures for the FBI's foreign intelligence collection activities that are designed to meet current needs and

realities and to optimize the FBI's ability to discharge its foreign intelligence collection functions.

In addition, enhancing the FBI's intelligence analysis capabilities and functions has consistently been recognized as a key priority in the legislative and administrative reform efforts following the September 11, 2001, terrorist attacks. Both the Joint Inquiry into Intelligence Community Activities and the 9/11 Commission Report have encouraged the FBI to improve its analytical functions so that it may better "connect the dots."

[Counterterrorism] strategy should . . . encompass specific efforts to . . . enhance the depth and quality of domestic intelligence collection and analysis . . . . [T]he FBI should strengthen and improve its domestic [intelligence] capability as fully and expeditiously as possible by immediately instituting measures to . . . significantly improve strategic analytical capabilities . . . . (Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 351 & H.R. Rep. No. 792, 107th Cong., 2d Sess. 4-7 (2002) (errata print).)

A "smart" government would *integrate* all sources of information to see the enemy as a whole. Integrated all-source analysis should also inform and shape strategies to collect more intelligence . . . . The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to "connect the dots." (Final Report of the National Commission on Terrorist Attacks Upon the United States 401, 408 (2004).)

The new guidelines accordingly incorporate more comprehensive and clear authorizations for the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The guidelines will allow the FBI to do a better job of being an intelligence-driven agency.

To be an intelligence-driven agency, the FBI needs to be asking questions. What is the threat within our environment? To give an example, without the new guidelines, if the question were asked of a Special Agent in Charge (SAC) of an FBI field office, “Do you have a problem of theft of high technology or theft of classified information within your domain?” the answer would be phrased in terms of how many cases were open. But the number of cases open is a reflection only of what has already been brought to the FBI’s attention; it is not an accurate measure of the true scope of a given risk.

The new guidelines will allow the FBI fundamentally to change who it approaches in answering the types of questions that we believe this Committee and the American people would like it to be answering. If a field office is seeking to assess whether it has a substantial threat within its area of responsibility of theft of classified or sensitive technology, it might begin the analytic work necessary to reach a conclusion by considering whether there are research universities in the area that are developing the next generation of sensitive technology or doing basic research that will contribute to such technology and considering whether there are significant defense contractors in the area. From there, the field office should compare those potential vulnerabilities with specific intelligence regarding the intentions of foreign entities to unlawfully obtain sensitive technology.

If an SAC determines that, within his or her area of responsibility, sensitive technology is being developed at a local university that is of interest to foreign powers, the SAC should then determine whether there are individuals within the field office’s area of responsibility that pose a threat to acquire that technology unlawfully. In this

example, a logical place to start would be to look at the student population to determine whether any are from or have connections to the foreign power that is seeking to obtain the sensitive technology.

Under existing guidelines, agents are essentially limited to working overtly to narrow the range of potential risks from the undoubtedly over-inclusive list of students with access. They can talk to existing human sources, and they can ask them: “Do you know anything about what’s going on at the school? Do you know any of these students?” If the agent does not have any sources that know any of the students, then the assessment is essentially stopped from a human source perspective, because recruiting and tasking sources under the national security guidelines is prohibited unless a preliminary investigation is open. Similarly, the agent also cannot do a pretext interview without a preliminary investigation open, but the agent does not have enough information at that point to justify opening a preliminary investigation. An overt interview in the alternative may be fine in a wide range of scenarios, but could result in the end of an investigation by tipping off a potential subject of that investigation.

At the end of the day, the inability to use techniques such as recruiting and tasking of sources, or engaging in any type of interview other than an overt one, was inhibiting the FBI’s ability to answer these types of intelligence-driven questions.

The ability to use a wider range of investigative techniques at the assessment stage, prior to the opening of a predicated investigation, is a critical component of the FBI’s transformation into an intelligence-driven organization. Since 2003, we have had the ability to conduct threat assessments to answer questions such as whether we have

vulnerabilities to or a problem with the theft of sensitive technology in a particular field office. With the new consolidated guidelines, the FBI will now have the tools it needs to ascertain the answer to those questions more efficiently and effectively.

## **V. Oversight and Privacy and Civil Liberties**

The new guidelines take seriously the need to ensure compliance and provide for meaningful oversight to protect privacy rights and civil liberties. They reflect an approach to oversight and compliance that maintains existing oversight regimes that work and enhances those that need improvement.

As a result of the stand up of the National Security Division, and the reports by the Inspector General on the use of National Security Letters, the Department and the FBI have been engaged in extensive efforts to reexamine and improve our oversight and compliance efforts in the national security area. Our assessment has been that oversight in the criminal arena is provided through the close working relationship between FBI agents and Assistant U.S. Attorneys (AUSAs), as well as the oversight that comes naturally in an adversarial system for those investigations that ripen into prosecutions. Oversight on the national security side is different because of more limited AUSA involvement and because ultimate criminal prosecutions are less frequent in this area.

Traditionally, on the national security side, oversight was accomplished through two primary means: notice and reporting to then-Office of Intelligence Policy and Review, now a part of the National Security Division, and through filings with the FISA Court. We believe that conducting oversight in this manner was not as effective as the

system set forth in the new guidelines. The prior oversight system was based primarily on reporting and generated many reports from the FBI to the Department that did not provide meaningful insight into the FBI's national security investigations. Thus, the Department's oversight resources were not focused on those activities that should have been the highest priority—namely, those activities that affected U.S. persons. Moreover, to the extent that the process relied in part in filings with the FISA court for more in-depth oversight, it was under-inclusive. Many national security investigations proceed without ever seeking or obtaining an order from the FISA Court. The guidelines establish an approach to oversight that focuses the Department's oversight efforts on protecting the civil liberties and privacy rights of Americans in all national security investigations.

The new guidelines accomplish oversight on the national security side in a number of ways. The guidelines require notifications and reports by the FBI to the National Security Division concerning the initiation of national security investigations and foreign intelligence collection activities in various contexts. They also authorize the Assistant Attorney General for National Security to requisition additional reports and information concerning such activities. Additionally, many other Department components and officials are involved in ensuring that activities under the guidelines are carried out in a lawful, appropriate, and ethical manner, including the Justice Department's Office of Privacy and Civil Liberties and the FBI's Privacy and Civil Liberties Unit, Inspection Division, Office of General Counsel, and Office of Inspection and Compliance. A significant component of the oversight that will be provided by the

National Security Division will come in the form of “National Security Reviews,” which are the in-depth reviews of national security investigations that the National Security Division and the FBI’s Office of General Counsel commenced following the Inspector General’s report on National Security Letters in 2007.

Moreover, the new guidelines carry over substantial privacy and civil liberties protections from current investigative guidelines. They continue to prohibit the FBI from investigating or maintaining information on United States persons in order to monitor activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. In connection with activities designed to collect foreign intelligence in response to Intelligence Community requirements, where the lawful activities of U.S. persons can be implicated, the guidelines require the FBI to operate openly and consensually with U.S. persons, if feasible. Additionally, as the Attorney General emphasized when he testified before the Senate Judiciary Committee, the guidelines prohibit practices (such as racial or ethnic “profiling”) that are prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

The issue of how investigators may take race, ethnicity, or religion into account during an investigation is a difficult question, but it is not a new question. We have long recognized that it is not feasible to prohibit outright the consideration of race, ethnicity or religion—the description of a suspect may include the race of the perpetrator, and groups (such as Aryan Brotherhood, La Cosa Nostra, or the IRA) that are under investigation may have membership criteria that tie to race, ethnicity, or religion. But it is also the case that it cannot be, and should not be, permissible to open an investigation based only on an

individual's perceived race, ethnicity, or religion. We believe that the balance struck in 2003 in this regard—reflected in the Attorney General's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies—is the appropriate one, and we have not changed that balance.

These guidelines continue to require notice to appropriate Department officials when investigations involve domestic public officials, political candidates, religious or political organizations, or the news media. Moreover, as a matter of FBI policy, the FBI imposes higher levels of approval on many activities that have an academic nexus, reflecting the American tradition of academic freedom in our institutions of higher learning.

Finally, these guidelines operate in conjunction with numerous privacy and civil liberties officials and components within the FBI and Department of Justice. As mentioned earlier, the vast majority of the new guidelines will be made available to the public, thereby providing the public with more ready access to the rules governing FBI activities within the United States. Before the consolidated guidelines take effect, the FBI will carry out comprehensive training to ensure that their personnel understand these new rules and will be ready to apply them in their operations. Indeed, this training is already underway. The FBI is also developing appropriate internal policies to implement and carry out the new guidelines. These policies cannot afford agents or supervisors more flexibility than the guidelines themselves but can, and in several cases do, set forth additional restrictions.

## **VI. Conclusion**

Over the last seven years, the FBI has altered its organizational structure, and the Attorney General has issued new policies to guide the FBI as it seeks to protect the United States and its people from terrorism, intelligence threats, and crime, while continuing to protect the civil liberties and privacy of its citizens. The changes reflected in the new guidelines are necessary in order for the FBI to continue its important transformation to being an intelligence-driven organization. We believe that using intelligence as the strategic driver for the FBI's activities will improve its ability to carry out its national security, criminal law enforcement, and foreign intelligence missions.

Thank you again for the opportunity to discuss these issues with you, and we will be happy to answer any of your questions.