

October 5, 2011

Hon. Patrick Leahy, Chairman
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Hon. Charles Grassley, Ranking Member
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Hon. Sheldon Whitehouse, Chairman
Subcommittee on Crime and Terrorism
Senate Judiciary Committee
United States Senate

Hon. Richard Durbin, Chairman
Subcommittee on the Constitution,
Civil Rights and Human Rights
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Hon. Jon Kyl, Ranking Member
Subcommittee on Crime and Terrorism
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Hon. Lindsey Graham, Ranking Member
Subcommittee on the Constitution,
Civil Rights and Human Rights
Senate Judiciary Committee
Washington, DC 20510

Dear Senators:

We, the undersigned organizations, write to express our grave concern that Congress appears poised to allow the Federal Bureau of Investigation (FBI) to expand its power to collect intelligence information about the activities of law-abiding Americans without meaningful congressional oversight or input from other stakeholders. The expanded powers are enshrined in proposed changes to the FBI's Domestic Investigations and Operations Guide (DIOG). We urge the Judiciary Committee to request that the FBI postpone implementation of the changes to allow members to examine them at a hearing of the full Committee or, alternatively, a hearing of the Subcommittee on the Constitution, Civil Rights and Human Rights or of the Subcommittee on Crime and Terrorism.

The proposed changes to the DIOG, which remain secret, will reportedly permit agents to conduct investigative activity without maintaining records, to rifle through household trash for material with which to pressure individuals into becoming government informants, and to infiltrate political groups and religious congregations pursuing core First Amendment protected

activity without sufficient limiting guidelines or independent oversight to prevent abuse.¹ Such changes would go well beyond the permissive rules established by the 2008 Attorney General Guidelines, raising questions about their legitimacy and underscoring the need for exacting scrutiny by members of this Committee.

Three of the undersigned organizations (the Brennan Center, the Bill of Rights Defense Committee, and Defending Dissent) expressed similar concerns in a July 27, 2011, letter to Chairman Leahy and Ranking Member Grassley, in which we asked the Judiciary Committee to hold hearings before the new rules go into effect. We suggested that the Committee explore the proposed changes with specificity, and examine whether they are in fact necessary, consistent with existing Justice Department policy, and sufficiently protective of constitutional rights, including the First, Fourth, and Fourteenth Amendments.² As the date for the issuance of the new DIOG approaches, the urgency of our plea has increased.

The FBI has an exceedingly poor record of compliance with the rules to which it is subjected.³ In 2005, the Justice Department's Inspector General (IG) revealed that agents repeatedly failed to secure the proper authorization for the use of confidential informants⁴ and the initiation or extension of investigations,⁵ and failed to maintain mandatory documentation on surveillance of public gatherings and events.⁶ Similarly, a 2007 IG report found that the FBI consistently circumvented the rules governing National Security Letters and misled Congress about their use.⁷ In 2010, following media reports that the FBI had illegally targeted organizations on the basis of lawful First Amendment activities, the IG determined that agents had improperly collected and retained information, initiated investigations without adequate justification, and mislabeled such efforts as "terrorism investigations" to avail themselves of additional investigative powers.⁸ And most recently, the IG harshly criticized the FBI for unlawfully

¹ See Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES, June 12, 2011 at A1.

² A copy of the letter is attached. It is also available online at: http://www.brennancenter.org/page/-/Justice/LNS/Hearings_Needed_Before_DIOGs_Implemented.pdf.

³ See generally, EMILY BERMAN, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS (2011), available at http://www.brennancenter.org/content/resource/domestic_intelligence_new_powers_new_risks/.

⁴ U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 92-93 (2005) (noting problems with 104 of 120 confidential informant files examined—a noncompliance rate of 87%).

⁵ *Id.* at 172.

⁶ *Id.* at 173.

⁷ U.S. DEP'T OF JUSTICE, FBI, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS xvi-xviii, xxxi-xxxii, xxxiv-xl (2007).

⁸ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 62, 107, 122, 140 (2010).

acquiring thousands of telephone numbers⁹ and found that agents routinely cheated on the exam designed to ensure their fluency with the rules governing investigative activity.¹⁰

Given this context, the prospect of a significant expansion of the FBI's investigative and intelligence-collection powers being put into effect with no public oversight by the Judiciary Committee is alarming. To forego such oversight is simply to invite more abuses and missteps like the ones described above. We therefore urge you to request that the FBI postpone implementation of the new DIOG until members can fully evaluate its implications at an open hearing with full disclosure of the proposed rule changes.

If you have questions or would like further information about the proposed changes to the DIOG, please contact Michael Price at (212) 646-8335 or michael.price@nyu.edu.

Sincerely,

Brennan Center for Justice at NYU School of Law
Bill of Rights Defense Committee
Defending Dissent

American Civil Liberties Union
American Muslim Voice
Casa Esperanza
Center for Constitutional Rights
Center for Financial Privacy and Human Rights
Center for Media and Democracy
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
Council on American-Islamic Relations (CAIR)
Demand Progress
DownsizeDC.org
Fellowship of Reconciliation
Government Accountability Project
Muslim Legal Fund of America
South Asian Americans Leading Together (SAALT)

CC: Senate Judiciary Committee

⁹ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS 165, 9-134 (2010).

¹⁰ U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, INVESTIGATION OF ALLEGATIONS OF CHEATING ON THE FBI'S DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (DIOG) EXAM 1-2, 30-33 (2010).