



SENATORS RAISE CONCERNS OVER ATTORNEY GENERAL GUIDELINES FOR FBI INVESTIGATIONS

August 20, 2008

Washington, D.C. – Today, U.S. Senators Russ Feingold (D-WI), Ted Kennedy (D-MA), Richard Durbin (D-IL), and Sheldon Whitehouse (D-RI) raised concerns over new rules regarding FBI investigations. In a letter to Attorney General Michael Mukasey, the Senators who are all members of the Senate Judiciary Committee, urged the Attorney General not to finalize the new Attorney General Guidelines that govern FBI investigations until members of congress, experts and others have had the chance to provide input on the new rules.

The text of the letter read:

The Honorable Michael Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Dear Attorney General Mukasey:

We understand that you intend to finalize and sign next week the draft Attorney General Guidelines intended to govern FBI criminal, national security and foreign intelligence investigations. We have a number of questions and concerns about the guidelines, and urge you not to sign them until members of Congress, experts in the relevant fields, and affected communities have had a full opportunity to provide detailed input to the Department of Justice.

You stated at the most recent Senate Judiciary Committee hearing on Oversight of the Department of Justice, in reference to these new guidelines, "I think the regulations, before they come out, will be made known to this committee, will be reviewed with this committee." Making the draft guidelines available to congressional staff for only a few hours at a time over the course of a week and a half – during the August congressional recess when many staff and members are out of town – does not constitute the kind of meaningful and robust consultation that we believe is called for, and that might help improve the guidelines.

Before you sign the guidelines, we urge you to make them available publicly, and to solicit input not only from members of Congress but also from national security and civil liberties experts outside the government and from affected communities. Given the importance of these guidelines, providing a period of time for public comment would be a reasonable and responsible way to move forward and achieve the best possible end result.

While our access to the draft Attorney General Guidelines has been limited, we want to note some of our initial concerns and questions, which highlight the need for additional time and consultation:

- The guidelines permit the FBI to use a variety of intrusive investigative techniques to conduct "assessments" of possible criminal activity, national security threats or foreign intelligence collection – without any initial factual predication. We are concerned about the extent to which such authority might, for example, permit the FBI to conduct long-term physical surveillance of an innocent American citizen; interview such an individual's neighbors and professional colleagues, including based on a "pretext" or misrepresentation; recruit human sources to provide information on that individual; or conduct commercial database searches on that individual – all without any basis for suspicion. Moreover, the mechanisms that the FBI intends to use for approval and oversight of these new investigative tools have not been shared with Congress and yet

are critical to understanding how these tools could be employed. We are particularly concerned that the draft guidelines might permit an innocent American to be subjected to such intrusive surveillance based in part on race, ethnicity, national origin, religion, or on protected First Amendment activities.

- The guidelines permit the collection of foreign intelligence information inside the United States, through both “assessments” and predicated “full investigations,” with little explicit protection for information gathered about United States persons. The definition of “foreign intelligence” is broad, and covers any information relating to the activities of a foreign government, organization or person. We are concerned about the extent to which the FBI may be permitted to gather or use information about Americans under the rubric of foreign intelligence gathering when there is no suspicion of a crime, threat to national security, or any other wrongdoing.
- The draft guidelines include broad information-sharing provisions with few constraints. While there is no doubt that our intelligence agencies must share important threat information with one another, we have serious questions about the scope of information sharing as it relates to U.S. persons who are under no suspicion of wrongdoing.

As you know, Attorney General guidelines were first implemented in the wake of the FBI abuses of the 1960's and 1970's, and serve as one of the most important bulwarks against future abuses. We appreciate your recognition that Congress should be consulted concerning revisions to these guidelines. The briefings that have taken place during the past week and a half were an important first step, and we thank you for providing them. We ask, however, that you delay giving your final approval to the guidelines until members of Congress, the public, and the relevant experts have had an opportunity to fully analyze the draft, ask questions, and provide the Department with suggestions and input. Thank you for considering our request, and we look forward to your response.

Sincerely,

RUSSELL D. FEINGOLD
United States Senator

EDWARD M. KENNEDY
United States Senator

RICHARD J. DURBIN
United States Senator

SHELDON WHITEHOUSE
United States Senator

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