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FBI Seeks Sweeping New Powers

by AZIZ HUQ

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Lame-duck administrations with **abysmal poll ratings** and no legislative agenda attract little attention. But to ignore the Bush Administration at this point is perilous: in its waning days, the Administration is turning the Federal Bureau of Investigation into a domestic intelligence agency with sweeping powers to profile and spy on law-abiding Americans.

In July, the Associated Press **reported** that Attorney General Michael Mukasey was overhauling rules that govern when the FBI can begin an investigation. In a speech last week in Portland, Mukasey acknowledged this and explained that the new guidelines would yield a "more flexible, more proactive, and more efficient" bureau.

FBI guidelines matter because Congress has never enacted a comprehensive statute governing the bureau, even though the FBI last month **marked** its hundredth anniversary.

The FBI's birth in 1908 was an accident unanticipated by Congress: it was born because Attorney General Charles Bonaparte, frustrated by a Congressional appropriations rider precluding him from borrowing agents from Treasury to conduct investigations, hired ten former US Secret Service agents as investigators.

For the next hundred years, the bureau staved off efforts by Congress to create a constraining legislative framework. After the Church Committee investigations of the 1970s revealed massive FBI surveillance of civil rights leaders and activists, Congress seriously debated such a statute.

But then-Attorney General Edward Levi pre-empted that effort by issuing guidelines defining what facts could trigger an investigations, when confidential informants could be sent in and other hot-button questions. Political will on the Hill for confrontation evaporated.

While the Levi guidelines have been watered down by Reagan, Bush I and Bush II attorneys general, they nevertheless still provide a critical brake on the bureau: by giving rules to trigger an investigation, deciding when incognito FBI agents can attend public meetings, and for informants' usage--all matters the Constitution does not regulate. The rules provide the sole barrier between the people and open-ended surveillance.

While the new guidelines have yet to be released, Mukasey's Portland speech raises serious concerns.

The new rules, for example, would allow the FBI to open an investigation based on a person's race plus his or her travel history. In his Portland speech, Mukasey made much of the fact that no investigation can begin "simply based on somebody's race, religion, or exercise of First Amendment rights." But this is cold comfort if the bureau focuses on Muslim, Arab and South Asian communities, whose members frequently travel overseas (as anecdotal evidence and common sense suggest); for these groups, the new rules discards any restraint on surveillance.

Moreover, the new rules would allow the FBI to open investigations based on its own "**threat assessment**" and profiles constructed from public databases and informants' tips. This invites the targeting of dissident groups--a **trend already visible** at the state and local level.

Simultaneously with the guidelines changes, the Administration is stealthily unfurling a gamut of other regulatory changes to shift federal and local law enforcement dramatically from an investigative to an intelligence-gathering role.

In past year, the Administration has injected upward of \$2 million to develop a **network of 15,000-plus informants** in the United States. It has ramped up its **internal data-mining efforts**, and taken a forward-leaning position on its authority to conduct **secret searches**, or black-bag operations, in the United States.

Compounding these concerns, the bureau is aggressively recruiting local and state law enforcement into its open-ended data collection efforts.

In June, the bureau issued **guidance** to local law enforcement agencies about "suspicious activity" to be recorded and shared with federal authorities. The list includes First Amendment-protected activities, such as expressing "extremist views" and "affiliation" with "extremist organizations." Proposed **new regulations** would loosen limits on federal-state information sharing by eliminating the requirement that agencies state a reason to know information.

Further, as a pair of superlative reports by the ACLU (**here** and **here**) demonstrate, the federal government has recently initiated the creation of a nationwide network of "fusion centers," where federal and state law enforcement authorities sit together and share information.

Any one of these changes can get lost in the hype of convention season. Standing alone, any one change might seem innocuous, even sensible. Marshaled together, however, these stealth changes portend a dramatic redirection of America's law enforcement agencies--the inking of a new national surveillance state with tendrils trailing down into every precinct and station house of the land.

About Aziz Huq

Aziz Huq directs the liberty and national security project at New York University's Brennan Center for Justice. He is co-author of ***Unchecked and Unbalanced: Presidential Power in a Time of Terror*** (New Press, 2007). He is a 2006 recipient of the Carnegie Scholars Fellowship and has published scholarship in the *Columbia Law Review*, the *Yearbook of Islamic and Middle Eastern Law*, and the New School's *Constellations Journal*. He has also written for *Himal Southasian*, *Legal Times* and the *American Prospect*, and appeared as a commentator on *Democracy Now!* and NPR's *Talk of the Nation*. **more...**