SENATE JUDICIARY COMMITTEE

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Oversight Letters

September 12, 2008 – *Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General to Chairman Patrick Leahy and Ranking Member Arlen Specter, re: declining request to provide copies of the Attorney General's proposed guidelines for the Federal Bureau of Investigation's investigative activities*

September 10, 2008 – *Letter from Chairman Patrick Leahy and Ranking Member Arlen Specter to Attorney General Michael Mukasey, re: requesting that the Department of Justice provide the Judiciary Committee with copies of the Attorney General's proposed guidelines for the Federal Bureau of Investigation's investigative activities*

August 20, 2008 – *Letter from Senators Russ Feingold, Edward Kennedy, Richard Durbin and Sheldon Whitehouse to Attorney General Michael Mukasey, re: concerns with proposed guidelines for the Federal Bureau of Investigation's investigative activities*

August 20, 2008 – *Letter from Principal Deputy Assistant Attorney General Keith B. Nelson to Chairman Patrick Leahy, re: postponement of signing of new guidelines for investigative activities of the Federal Bureau of Investigation*

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May 15, 2008 – *Letter from Chairman Patrick Leahy and Ranking Member Arlen Specter to Attorney General Michael Mukasey, re: cooperation between the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives*

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 12, 2008

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

We write in response to your request that the Department provide members of the Committee with copies of the Attorney General's proposed guidelines for the Federal Bureau of Investigation's (FBI) investigative activities in advance of the Committee's hearing next week. We appreciate your continued interest in the development and implementation of these guidelines.

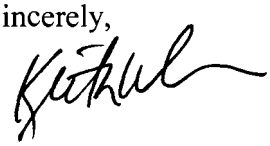
As we indicated in our August 20 letter to you, we believe there is great value in harmonizing processes across the spectrum of the FBI's investigative responsibilities. Moreover, we remain cognizant that any changes to investigative procedures must protect and uphold core civil and constitutional rights.

To this end, over the past month we have engaged in consultation with congressional staff and numerous members of the civil rights community. We have made, and continue to make, the proposed guidelines available for review by Members and congressional staff, and we have conducted several briefings to address any questions or concerns. These consultations have afforded us valuable insights, and undoubtedly will result in changes to the proposed guidelines.

Indeed, these changes are ongoing, and the guidelines have yet to be finalized. Consequently, as the deliberative process continues, the Department is unable to provide copies of the proposed guidelines until they are signed by the Attorney General. However, we are pleased to continue to offer the guidelines for your review, and would be happy to brief you or your staff again at any time, including next week in advance of the hearings.

If you have any further questions or concerns, please do not hesitate to contact us.

Sincerely,



Keith B. Nelson
Principal Deputy Assistant Attorney

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

September 10, 2008

The Honorable Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

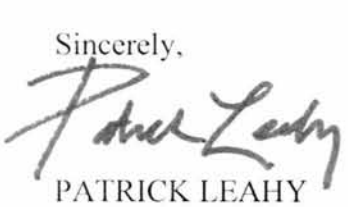
Dear Attorney General Mukasey:

We write to request that you provide the Judiciary Committee with copies of the Attorney General's proposed new guidelines for the investigative activities of the Federal Bureau of Investigation (FBI) prior to our September 17 oversight hearing with FBI Director Robert Mueller.

We are grateful for the efforts you have made to discuss your plans with us, and for the efforts the Department of Justice (DOJ) has made to brief congressional staff on the guidelines and allow them to review the draft text. In its August 20 response to our letter requesting a delay in your approval and implementation of these guidelines, DOJ pointed to the September 17 hearing with Director Mueller as a key component of your plan to explain the new guidelines to the Committee. However, if Committee members do not have a copy of the proposed guidelines to prepare for and use at the hearing with Director Mueller, a meaningful exchange will be impossible. The complex and important issues that these guidelines raise, including the need for flexibility and clarity in investigations and concerns about ensuring protections of civil liberties and privacy, requires a specific and informed discussion that references the precise language, not generalities.

We understand that the Chairman of the House Judiciary Committee and the chairs of several of its subcommittees have requested that Director Mueller provide copies of the guidelines before his September 16 appearance before that committee. We share their request to provide copies of the guidelines to us no later than noon on Monday, September 15, so that we may prepare for and make best use of Director Mueller's appearance before the Senate Judiciary Committee.

Sincerely,



PATRICK LEAHY
Chairman

ARLEN SPECTER
Ranking Member

cc: Honorable Robert S. Mueller, III

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

August 20, 2008

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

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 20, 2008

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

We write in response to your letter of August 18, 2008, requesting a brief delay in signature of new Attorney General guidelines governing the domestic activities of the Federal Bureau of Investigation (FBI). The effort to bring together different sets of Attorney General guidelines, including those that govern criminal investigations, national security investigations, and the collection of foreign intelligence, is critical for the Department of Justice. We believe that all interests would be best served by the FBI having one consolidated and harmonized set of guidelines that provides clear and consistent guidance to agents.

We appreciate your interest in this important subject, and look forward to continuing to work with you and your staff as we approach the guidelines' effective date. As you note, FBI Director Mueller is scheduled to testify on September 17th, 2008, and we welcome the opportunity to explain in detail to the American people and Members of this Committee the importance of our efforts to revise and harmonize the Attorney General guidelines. In consideration of your request, the Attorney General will not sign the guidelines prior to the September 17, 2008 hearing.

We do believe, however, that it is critical that these guidelines become effective on our planned effective date of October 1, 2008. To that end, please consider us at your disposal prior to the hearing and the implementation date to provide additional briefings. Although we have not traditionally worked with Congress in developing Attorney General guidelines, and as you note in your letter, we are not obligated to do so, we appreciate the laudable and thoughtful suggestions we have already received, and we believe that the final guidelines will be a better product as a result of our discussions.

Your letter also notes that these guidelines represent an important step toward our shared goal of improving the FBI's intelligence capabilities; we agree. Since the horrific attacks of September 11, 2001, the FBI has evolved from its traditional law enforcement role with some Intelligence Community activities into a flexible and efficient member of the Intelligence Community capable of fulfilling its mandate to be an intelligence driven agency.

The Attorney General has explained the basic premise of the consolidation effort: there should be one set of rules governing investigating or gathering intelligence about a particular activity, regardless of the activity's label. For example, international terrorism can currently be investigated under three different sets of guidelines—each with its own different procedures. We do not believe that available methods should depend on the label given the investigation. Nor should the guidelines be more restrictive for national security investigations.

We fully appreciate and share your concern about the potential civil liberties implications of the consolidated guidelines. We think the opportunity to explain to your staff our approach to these sometimes difficult issues and why we believe that the oversight mechanisms reflected in the consolidated guidelines afford appropriate protections for our civil rights and civil liberties has been helpful. Moreover, those protections will be enhanced by internal FBI policies that are being written to implement the AG guidelines. Finally, we also plan to discuss the draft guidelines with a broad group of organizations prior to signature and anticipate that they will have valuable input into the guidelines as well.

We look forward to continuing to work with you and your staff. In the meantime, and as we discussed with your staff, we will continue to train FBI employees in preparation for the October 1, 2008 implementation date.

Sincerely,

Keith D. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

August 18, 2008

The Honorable Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Mukasey:

We write to request a brief delay in your approval of the proposed new guidelines for the investigative activities of the Federal Bureau of Investigation (FBI). We are grateful that you have contacted us personally to discuss your plans. We also appreciate that the Department of Justice (DOJ) has recently briefed congressional staff on the guidelines and allowed them to review the draft text, although we would have preferred to retain a copy of the documents. The revisions to the guidelines represent an important step towards our shared goal of improving the FBI's intelligence capabilities. The guidelines also reflect a laudatory effort to ensure that front-line agents are given clear rules to follow in pursuit of their investigations. Nevertheless, efforts to harmonize the rules governing criminal and national security matters also raise potential civil liberties concerns, given the broader latitude currently given to investigators to consider race and ethnicity in national security matters, as outlined in DOJ's June 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

The important aims of the guidelines, and their potential implications for civil liberties, require a meaningful dialogue between Congress and DOJ. Notwithstanding the work of our staff, Congressional consultation is difficult during the recess period. Moreover, these issues are sufficiently important to merit a public hearing. After all, although prior consultation on such guidelines is not mandatory, the level of public and Congressional confidence in the guidelines will inform later legislation and oversight activities.

The Senate Judiciary Committee has scheduled a hearing with FBI Director Mueller for September 17, 2008. This presents an opportunity to explore the potential impact of the new guidelines on both the FBI's intelligence collection efforts and Americans' civil liberties. Accordingly, we request that you wait until the guidelines have been subjected to such further review before finalizing them.

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

Arlen Specter

ARLEN SPECTER
Ranking Member

cc: Honorable Robert S. Mueller, III

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NICHOLAS A. ROSSI, *Republican Chief Counsel*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

August 11, 2008

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Director Mueller:

We were disappointed to learn that, in 2004, the Federal Bureau of Investigation (FBI) misused so-called "exigent letters" to obtain the telephone records of reporters working in the Jakarta, Indonesia, bureaus of *The Washington Post* and *The New York Times*. While we commend you for personally apologizing to the newspapers on behalf of the FBI, and for personally bringing this matter to the Committee's attention, we expect to receive a more complete accounting of this violation of the Justice Department's guidelines intended to protect privacy and journalists' First Amendment rights.

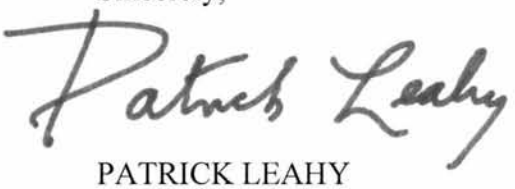
The FBI's misuse of "exigent letters" first came to light in March 2007, as part of a congressionally-mandated Inspector General (IG) audit of National Security Letters (NSLs). In addition to uncovering problems with NSLs, the IG found that the FBI had misused "exigent letters" to obtain records from telephone companies. The letters claimed that the records were being requested due to "exigent circumstances" and that subpoenas or NSLs would follow. According to the IG, however, "the FBI used the exigent letters in non-emergency circumstances, failed to ensure that there were duly authorized investigations to which the requests could be tied, and failed to ensure that NSLs were issued promptly after the fact."

We recognize that, after the March 2007 report, you ended the FBI's practice of using "exigent letters." We also appreciate that, according to an IG audit earlier this year, the "FBI and the Department have made significant progress" in implementing corrective actions. Nevertheless, the new revelations about the improper collection of reporters' phone records -- combined with the general reports on the misuse of NSLs and exigent letters -- create a troubling impression of deliberate wrongdoing or serious negligence at the FBI. Together, these revelations underscore the importance of vigorous congressional oversight and suggest that additional legislation may be needed.

If nothing else, these new findings suggest a pressing need for the legislation we have cosponsored with a bipartisan group of Senators to create a qualified privilege for reporters, the "*Free Flow of Information Act of 2008*." Our bill includes a provision designed to limit the government's ability to collect the telephone records of reporters. In most cases, this provision would require a court to balance the government's need for the information against the public's interest in newsgathering and the free flow of information. Moreover, with rare exceptions, a federal court may compel the disclosure of such records from a phone company only after the reporter is given notice and an opportunity to be heard. This judicial review requirement would preclude a unilateral determination of exigent circumstances or investigative need by the FBI or any executive branch agency.

In future congressional hearings, we plan to ask you about the misuse of exigent letters and the possible need for additional legislation. We also look forward to the IG's follow-up report on this topic. Before then, however, we request that the FBI fully brief Committee staff on the incidents involving reporters for *The New York Times* and *The Washington Post*, so that we can have a more substantive and constructive discussion of the matter in the very near future.

Sincerely,



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Chairman

ARLEN SPECTER
Ranking Member

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NICHOLAS A. ROSSI, *Republican Chief Counsel*

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

May 15, 2008

The Honorable Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Mukasey:

We are greatly disturbed by the reports in the *Washington Post* about continued in-fighting between the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) after legislation ordered them to be integrated under the Department of Justice and to work in cooperation. We have three major concerns:

1. The lack of coordination poses a direct threat to our national security, as noted by Michael A. Mason, former head of the FBI's Washington Field Office, who was quoted as saying that he worries about a potential attack "where the ball got dropped . . . because information wasn't passed or shared." This is reminiscent of the substantial evidence indicating the attacks of 9/11 might have been prevented had the FBI and CIA shared information, especially the now-famous memo from the FBI's Phoenix Field Office, which practically laid out a blueprint of the hijackers' plans and yet went unheeded.

2. Successive Attorneys General have apparently failed to provide proper supervision and leadership of the two agencies. Again, as noted by Mr. Mason, "[a] lot of these things require a little adult supervision from the Justice Department or Congress, which will resolve a lot of the food fights these two agencies find themselves in." It is the responsibility of the Attorney General in the first instance to manage organizations within the Justice Department, and it is the responsibility of the Directors of the FBI and the ATF to act constructively and foster cooperation. If the Attorney General cannot successfully manage this situation, he should then seek assistance from Congress.

3. The *Post* article further notes that, "the rival law enforcement agencies have fought each other for control, wasting time and money and causing duplication of effort." Even in this era of budget cuts, Congress has continued to increase funding for national security, making such reports of wasted resources especially troubling.

As Chairman and Ranking Member of the Justice Department's primary oversight committee, we cannot accept the status quo. We request that you inform us of the full extent of the disputes between the FBI and the ATF and the steps you are taking to resolve these continuing turf battles. Also, please advise us of the measures you are implementing to ensure that resources are not wasted on duplicative programs administered by the two agencies. We look forward to your reply.

Sincerely,

PATRICK LEAHY
Chairman

ARLEN SPECTER
Ranking Member