

June 5, 2002

Chairman Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Orrin Hatch
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Senator Hatch:

The National Association of Criminal Defense Lawyers urges your committee to closely scrutinize the recent revisions to the Attorney General's guidelines governing criminal investigations. It is important that the rule changes do not outstrip their rationale. If they do, they will generate the same fear of and disrespect for law enforcement that led to the rules' adoption years ago.

Director Mueller's concern that FBI Field Offices have been micromanaged by FBIHQ may have some merit. But too little oversight of agents and field offices will permit, and may even encourage law enforcement tragedies. We remember too well rogue operations such as those of former Boston special agent John Connolly, who was convicted last week of obstructing justice and protecting mobsters James "Whitey" Bulger and Steve "The Rifleman" Flemmi. National oversight of the FBI and all its operations is needed; the FBI's history shows that clearly.

Sensitive matters, as handling criminal informants, interception of communications, and investigating persons exercising their First Amendment rights (including politicians and their staff, media organizations and their reporters, and churches and their leaders), require close national-level oversight. We disagree with General Ashcroft that the former rules created a "competitive advantage for terrorists." If terrorists enjoyed an advantage, it appears to stem from managerial and cultural weaknesses in our law enforcement and intelligence agencies. It was weakness too that led to abuse and in turn led to the oversight guidelines. It is important to note that the guidelines date to Attorneys General as disparate as Levi and Thornburg.

We feel strongly that more guidance and more oversight, not less, will help the FBI fight terrorism. Authority needs to be clearly defined and decision makers must be responsible for their decisions. And any rules changes should be limited to antiterrorism investigations. The fear of terrorism should not be a passkey that allows the FBI to unlock all of the safeguards in place to protect Americans' privacy and freedoms.

1. THE GUIDELINES CHANGES AFFECT ALL INVESTIGATIONS, NOT JUST TERRORISM INVESTIGATIONS. We are particularly concerned that the Attorney General has not limited the changes to counter-terrorism efforts but has decided to loosen the guidelines in non-terrorism investigations as well. “Data mining” of millions of credit records will create the largest database of activities of innocent citizens the world has ever known. Such an extreme approach harkens back to the day when the FBI indiscriminately monitored religious, political and social gatherings — tactics inimical to our cherished freedoms of association, religion and speech. Eliminating rules deemed necessary to prevent intrusive and wasteful domestic spying is a step in the wrong direction. Those who believe that such powerful tools will not be misused need to read the FBI memo, released last week by the Electronic Privacy Information Center, regarding a DCS1000 (“Carnivore”) software malfunction which captured e-mails of many innocent persons along with the targeted communications.

2. THERE HAS BEEN NO DEMONSTRATED NEED FOR GUIDELINES CHANGES. The Attorney General has not made the case for relaxing the standards. To the extent the FBI or some other agency could have prevented the 9/11 attacks, this appears to be the result of bureaucratic failure rather than an inability to “surf the net” or monitor religious services. The expansion of federal law enforcement power provided in the USA PATRIOT Act must be accompanied by safeguards that prevent abuses as those America experienced in the past.

3. CONGRESS SHOULD PLAY AN ACTIVE ROLE IN DETERMINING THE NEED FOR AND SCOPE OF ANY GUIDELINES CHANGES. To be sure, the FBI’s failings should be examined and addressed, but we believe Congress should be a partner in this process.

We have every confidence that, at the scheduled hearings on this matter, the Committee will fully explore the Attorney General’s asserted justifications for these changes, their broad scope, and their ramifications for innocent citizens and visitors to this country. Thank you for considering our views.

Sincerely,

Irwin Schwartz
NACDL President