

July 2, 2002

Attorney General Bill Lockyer
1300 I Street, 1730
P.O. Box 944255
Sacramento, CA 94244

Re: Protecting Californians' Constitutional Right to Privacy Against Federally-
Encouraged Intelligence Abuses

Dear Attorney General Lockyer,

As this letter will detail, on behalf of the 50,000 California members of the American Civil Liberties Union, we are requesting that you take immediate steps to ensure that intelligence-gathering practices carried out in this state – whether by state, local or federal law enforcement officers – fully respect Californians' state constitutional right to privacy. Without action from the California Department of Justice, we fear this precious state constitutional right will be compromised by intelligence activities encouraged by new federal policies.

As you know, on May 30th long-standing federal guidelines designed to protect Americans from abusive and inappropriate intelligence gathering by the FBI were suddenly and unilaterally loosened – in many ways, gutted in our view – by U.S. Attorney General John Ashcroft. Just ten days later, the *San Francisco Chronicle* published a remarkable special report based on previously-secret FBI intelligence documents – obtained only after 17 years of litigation – detailing how the FBI's "war on communism" led the agency to drift far from legitimate law enforcement concerns into politically-motivated spying and smear campaigns at the University of California. These revelations highlight dangers to our freedoms posed by under-controlled and overzealous intelligence tactics - dangers that are as real today as they were then.

In the last few days, some of California's top elected officials – from State Senate President Pro Tem John Burton to Congresswoman Nancy Pelosi – have spoken out on the importance of ensuring that these unconscionable intelligence practices of the past not be repeated in the current fight against terrorism. Just two weeks ago, U.S. Senator Dianne Feinstein wrote FBI Director Robert Mueller with regards to the *San Francisco Chronicle* expose –

Bob, these allegations are serious, and could not come at a worse time. It is vital that we have a strong FBI that enjoys the confidence and trust of the American people. If there are things we need to do to tighten safeguards or to prevent a return to past misdeeds, we must do them now. . . .

The recent release of revised FBI guidelines has led to understandable concern that a more powerful FBI must remain accountable and corruption-free. . . . What

safeguards are now in place to ensure that the FBI does not focus on political aims in the future?

(June 18, 2002, letter as quoted in “Feinstein Demands Answers from FBI,” *San Francisco Chronicle*, June 23, 2002.)

While the ACLU is pleased that our public officials are raising these concerns, we are concerned that, to date, there has been no public recognition of the unique problems and threats created in California by Attorney General Ashcroft’s new intelligence policies. California has a long and proud tradition of treasuring, exercising and taking specific steps to *protect* our constitutional freedoms. Thirty years ago this November, California voters incorporated an explicit and strong right to privacy into our state constitution.

In short, California has drawn a line with respect to privacy, political and associational rights that government must not cross even with the best of intentions. Yet, some of the intelligence practices now openly encouraged by the new federal guidelines cross that long-standing state line.

THE NEW F.B.I. GUIDELINES

Without congressional hearings or input – much less approval – or any public debate, Attorney General Ashcroft last month eliminated or significantly loosened a number of key provisions in the guidelines controlling FBI intelligence practices. Most chillingly, the new guidelines encourage a “fishing expedition” approach to intelligence gathering by permitting near standardless monitoring of political and religious activities – without requiring any particular belief or suspicion that evidence related to terrorism or crime generally might be obtained. The federal government is now claiming the right to send agents to religious services, political rallies and organizing meetings open to the public to monitor who says what and to see who is associating with whom.

CALIFORNIA CONSTITUTIONAL RIGHT TO PRIVACY

As we celebrate the 30th anniversary of our state constitutional right to privacy this year, we need to remember the larger environment in which this right was created. That era was in many ways defined by unchecked law enforcement and intelligence abuses – including the infiltration and disruption of the civil rights and anti-war movements. While the massive scope of those abuses was not yet fully exposed -- and, in fact, is *still* being documented to this day – there was growing public concern about government intrusions into personal autonomy and liberty when state voters went to the polls in November 1972.

In 1972, the FBI opened 65,000 new domestic intelligence files.¹ And, in 1972, Californians voted overwhelmingly (63% to 37%) to insert an explicit right to privacy in the state constitution and to take a stand against the, “ ‘proliferation of government snooping and data collecting [that] is threatening to destroy our traditional freedoms.’ ” *White v. Davis* (1975) 13 Cal.3d 757, 774 (quoting the ballot argument in favor of the initiative).

One of the fundamental goals of this new state constitutional right was to prevent law enforcement from spying on individuals and organizations or gathering information on them in the absence of some evidence of their involvement in criminality. The first California Supreme Court case to interpret the privacy amendment recognized this fundamental goal and held that the police infiltration of classes and political associations at UCLA violated the constitutional right to privacy in the absence of any compelling state interest. *White v. Davis* was not limited, however, to police infiltration into classrooms – the court also noted that the “routine stationing of covert, undercover police agents in university classrooms *and association meetings, both public and private*, constitutes ‘government snooping’ in the extreme.” *White v. Davis* 13 Cal.3d at 775-776 (emphasis added). While 25 years old, *White v. Davis* retains its value as precedent and continues to be cited with approval by the California Supreme Court. See also *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 21 (emphasizing that the “principal focus” of the privacy amendment was to protect against government information gathering, use, and dissemination) and *Loder v. City of Glendale*, 14 Cal.4th 846, 891-892 (1997).

STATE, LOCAL AND FEDERAL IMPLICATIONS OF FEDERAL GUIDELINES

The changes in FBI intelligence guidelines are anything but “just” federal issues. As you know, in recent years – but especially since last September 11th -- there has been a major push by the federal government to create Joint Terrorism Task Forces (JTTFs) to coordinate and expand intelligence-gathering practices. JTTFs made up of state, local and federal officers will soon be coordinating joint intelligence operations (if they are not already) out of the four regional FBI Field Offices covering all of California. The FBI characterizes these as seamless, fully-integrated, joint efforts. As FBI Director Mueller told the annual meeting Police Executives Research Forum three weeks before the expanded FBI guidelines were announced – “(W)hen we work together side-by-side, we don’t see agencies or jurisdictions or even uniforms.”

While that attitude and multi-agency cooperation may be laudable and may provide certain efficiencies, the constitutional rights provided by any jurisdiction must not be sacrificed in the process. It is critical that state and local officers who may have already formed close working partnerships with the FBI now recognize that, as a matter of law, there are certain intelligence activities now encouraged by federal leadership in Washington, DC, that are, in fact, *prohibited* by the California constitution. Steps must

¹ Intelligence Activities and the Rights of Americans, Book II, Final Report of the Select Committee to Study Government Operations With Respect to Intelligence Activities, 94th Congress (1976), page six – Chaired by Senator Frank Church.

be taken immediately to ensure that these JTTF intelligence activities – which are often led and directed by the FBI – not lead to violations of Californians’ privacy rights.

The dangers are exacerbated by the resurrection (after a ten-year hiatus) of a state-level intelligence coordination and analysis apparatus, the California Anti-Terrorism Information Center (CATIC), that according to Director Mueller, is “working closely” with the FBI. Sadly, in prior eras, some of the intelligence practices of California entities mirrored the abuses of the FBI (and may have been carried out in a joint manner). Today, it is essential for the state to ensure that its own role in understandable increases in intelligence gathering and coordination be pursued in strict compliance with the California constitution – not according to mere administrative dictates issued by Attorney General Ashcroft in Washington.

STEPS TO PROTECT CALIFORNIA PRIVACY RIGHTS

Therefore, the California affiliates of the ACLU respectfully ask you to take the following steps to ensure that Californians’ privacy rights are protected.

1. In the absence of direction from the California Department of Justice, we fear that state and local officers are now at great risk of merely following the FBI’s lead into intelligence practices that violate state constitutional privacy rights. These officers deserve immediate warning that state law – *not* Attorney General Ashcroft – defines what conduct is permissible within California. An informational bulletin issued by your office to law enforcement agencies statewide would help avoid potential confusion on this point and is necessary to protect California privacy rights.
2. In addition, the California Department of Justice should at least strongly encourage FBI agents to adhere to state constitutional privacy protections when gathering intelligence in the state. In fact, since the FBI is utilizing considerable state and local resources in its joint intelligence efforts, the state should not hesitate to ask the FBI to respect state privacy rights in return. Also, in announcing his new guidelines on May 30th, Attorney General Ashcroft claimed that the new intelligence policies were consistent with “community policing” goals. If that’s the case, surely the FBI should respect state community standards – particularly those adopted by voters as constitutional rights – when carrying out their work.
3. Should the FBI be less than responsive to California’s request under #2 above and should the federal government claim the “right” to violate state constitutional privacy protections, it will become necessary to reconsider how the state shares, handles, stores, analyzes and disseminates intelligence information obtained by the FBI. If the FBI is using intelligence-gathering methods that violate state law – for example, by monitoring strictly lawful political expression or religious practices – state and local officials must not become tainted by the “spoiled fruit” of the FBI’s unconstitutional tactics. (Of course, this material is likely to have

limited practical value in any event if it is not somehow related to possible criminality.) Special steps, structures and procedures will be necessary to insulate CATIC and other state and local entities from material collected by the FBI in violation of California constitutional rights.

We hope you agree that it is critical for state officials to proactively address these concerns. History teaches us that merely *hoping* that federal intelligence practices will respect the rights of Californians would put those rights at intolerable risk. The ACLU believes it would be more prudent to take these steps now to protect these rights than to learn possibly years later the cost to our privacy rights that has been paid by the lack of timely action.

Thank you for your attention to these matters. Please let us know if you have any questions or if we can be of any further assistance.

Sincerely,

Dorothy Ehrlich, Executive Director of the ACLU of Northern California
Ramona Ripston, Executive Director of the ACLU of Southern California
Linda Hills, Executive Director of the ACLU of San Diego