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CAIR
CALIFORNIA

November 16, 2011

Director Robert Mueller
FBI Headquarters
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001
Phone: (202) 324-3000
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RE: Questions Regarding FBI JTTF Arrangements with Bay Area Law Enforcement Agencies

Dear Director Mueller:

This Thursday, November 17th, you are scheduled to return to San Francisco and deliver a speech at the Commonwealth Club titled "Changing Threats in a Changing World: Staying Ahead of Terrorists, Spies and Hackers." While this is certainly a worthy topic, many of the FBI's tactics, its trainings on the subject, and the policies it relies upon are the subject of heated national debate and controversy. The outcome of this debate will have important ramifications not only for our national security, but also for the rights and liberties that are core to our national identity.

As civil rights organizations, we continue to participate in this national debate, but on the occasion of your speech in San Francisco, we write today to raise **local** concerns and questions about the role of the FBI in our community and about its work with our local law enforcement agencies in your Joint Terrorism Task Force (JTTF). Specifically, as you return to San Francisco to discuss threats in a changing world, **we hope you will make time to also respond to the threats to local civil rights posed by FBI practices in the Bay Area.** These rights are core to **our** identity as Californians, and our commitment to fully protecting them is a reflection of our values in the Bay Area.

Far too often, the FBI has appeared unconcerned with the distinct rights of Californians and with the values of Bay Area communities as reflected in the policies of our local law enforcement agencies. Over the last six months, our organizations -- the ACLU of Northern California (ACLU-NC), the Asian Law Caucus, and the San Francisco Bay Area office of the Council on American-Islamic Relations (CAIR-SFBA) -- have met with local FBI officials and exchanged correspondence in an attempt to resolve the concerns outlined in this letter. In some cases, the local FBI Special Agent in Charge (SAC) has simply refused to answer our questions. In other cases, she has said that FBI Headquarters prevents her from considering the solutions we have proposed. **We are now appealing directly to you to help us obtain answers and to find solutions that strike a proper balance between the federal prerogatives of the FBI and the solemn obligation of local agencies to fully protect the rights of the communities they serve, as defined by the California Constitution and as spelled out in their own policies.**

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I. THE CALIFORNIA CONSTITUTIONAL RIGHT TO PRIVACY

Nearly 40 years ago, California voters overwhelmingly established privacy as an inalienable right in our state constitution.¹ Since then, the California courts and state Department of Justice have consistently emphasized that this explicit right to privacy provides more protection against unwarranted intelligence gathering than federal standards.² That means that **state and local officers may not gather intelligence in the absence of reasonable suspicion of criminal activity**. As a now transformed, intelligence-driven national security agency, the FBI no longer relies on that traditional law enforcement standard. Instead, under the Attorney General's Guidelines set forth in 2008, the FBI may now engage in a variety of intelligence gathering practices -- surveillance, infiltration, use of informants, etc. -- all without any particular suspicion of wrongdoing or criminal predicate.³

Previously, stronger protections against unwarranted intelligence gathering in California were acknowledged in the FBI JTTF agreements with local agencies. Provisions were included that made clear local agencies would apply their own local rules to their officers assigned to the JTTF. However, in 2007, agencies were asked to sign a new standard JTTF Memorandum of Understanding (MOU) with the FBI which not only eliminated those provisions and listed federal policies exclusively as the "controlling documents,"⁴ it also claimed for the first time that only the FBI could authorize the public release of the MOU itself.⁵ In the Bay Area, until these MOUs were finally released earlier this year, **these operated as secret agreements between the FBI and local agencies**. And, unlike the prior arrangements, the MOUs purported to put local officers -- assigned to the JTTF but paid for by local taxpayers -- under the complete control of the FBI, accountable only to FBI policies and FBI supervision.⁶ There was no public discussion of this change. To our knowledge, no civilian official much less elected or appointed representatives charged with overseeing local law enforcement were informed of this change given the new prohibition on public release of the agreement.

¹ Article I, Section 1, California Constitution.

² *White v. Davis*, (1975) 12 Cal.3d 757. *Criminal Intelligence Systems: A California Perspective*, California Department of Justice (2003). *California Attorney General's Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities*, California Department of Justice Division of Law Enforcement Bureau of Investigation and Intelligence (2007).

³ Section II.A.4, *The Attorney General's Guidelines for Domestic FBI Operations* (2008).

⁴ Section IV, "Controlling Documents," *Joint Terrorism Task Force Standard Memorandum of Understanding*, (2007).

⁵ Section IX, "Records, Reports and Information Sharing," *Joint Terrorism Task Force Standard Memorandum of Understanding*, (2007). Also, the bottom of each page of the MOU claims, "This document is the property of the FBI and is loaned to your agency. Neither it nor its contents may be released without authorization by FBI Headquarters."

⁶ Various sections of *Joint Terrorism Task Force Standard Memorandum of Understanding between Federal Bureau of Investigation and The San Francisco Police Department* (2007), including IV.B, V.B., VI.A.4., and others.

In San Francisco, when the MOU was finally released in April,⁷ police officials insisted they wanted it to be explicitly clear that their officers working with the JTTF would be held to stricter local standards designed to guard against unnecessary intelligence gathering, avoid entanglements with federal immigration enforcement, prevent profiling and provide supervisory accountability and civilian oversight. Our organizations met with the SFPD command staff and crafted a proposed addendum to the MOU to memorialize this desire. However, when presented to the local FBI, we were told that FBI Headquarters would not permit any such addendum or other modifications to the standard MOU.⁸

1. If that statement is true, why does the FBI insist that its local agency "partners" in the JTTF agree to standard terms dictated unilaterally by the FBI? Since the terms of the MOU fail to acknowledge the duty of local officers to avoid various practices now authorized by the FBI, but that nonetheless violate state and local civil rights protections, how does the FBI propose that local agencies adequately assure the communities they serve that their officers are not involved in practices that violate local standards? Will the FBI change its standard JTTF MOU to re-establish full local control over local officers and to ensure that state and local civil rights protections are not compromised in JTTF assignments? If not, why not? If so, when?

II. THE PORTLAND MODEL OF J.T.T.F. PARTICIPATION

Earlier this year, the federal government endorsed legislation enacted by the Portland City Council that authorized its police officers to participate in JTTF briefings and investigations without an MOU, be subject at all times to local control and civilian oversight and be accountable to stricter state and local intelligence gathering restrictions.⁹ The US Attorney for Oregon publicly testified that it was the FBI's suggestion to pursue this arrangement without an MOU and praised the measure's "sensible and effective civil rights protections."¹⁰ We have repeatedly asked the local FBI SAC -- in person and in two subsequent letters -- since the federal government supported this protection for state and local civil rights in JTTF assignments in Portland, would it take a different position on the same issue in the Bay Area? And, if so, why? She has refused to answer those questions instead insisting that she could interpret and apply SFPD policies herself in making assignments of particular cases to the SFPD officers in the JTTF.¹¹

⁷ April 4, 2011, letter from San Francisco Police Department (SFPD) to ACLU-NC and Asian Law Caucus providing the SFPD's JTTF MOU with the FBI pursuant to a California Public Records Act request.

⁸ May 9, 2011, meeting between ACLU-NC and local FBI.

⁹ *Joint Terrorism Task Force (JTTF) Resolution* adopted unanimously by City Council April 28, 2011, Resolution #36859, Portland Binding City Policy BCP-PSF 7.01.

¹⁰ Testimony of U.S. Attorney for Oregon, Dwight Holton, to Portland City Council, April 28, 2011. See also U.S. Attorney for Oregon press release of the same date.

¹¹ September 23, 2011, letter from ACLU-NC, Asian Law Caucus, CAIR-SFBA and 26 other community, legal and civil rights organizations to SAC Stephanie Douglas. September 28, 2011, letter from SAC Douglas in response. September 30, 2011, follow-up letter from ACLU-NC, Asian Law Caucus and CAIR-SFBA to SAC Douglas requesting replies to the initial inquiries made a week prior.

2. Since the federal government in Portland endorsed local control and oversight and full application of state and local civil rights protections to local JTTF assignments, will the FBI take a contrary position in the Bay Area? If so, why should San Francisco or other Bay Area cities be asked to accept less protection for civil rights and less control and oversight of its own police resources when working with the FBI than what was agreed to in Portland? If the Portland Police Chief retains the authority to decide whether his officers' work on any given JTTF matter would be consistent with state and local civil rights protections, why shouldn't the SFPD Chief interpret his own policies in the same manner -- rather than the FBI trying to do that for him?

III. F.B.I. J.T.T.F. QUESTIONING ABOUT POLITICAL AND RELIGIOUS VIEWS

These stark differences in standards play out in concrete ways in various JTTF activities. For example, all of our organizations have repeatedly represented clients locally who have been questioned by the FBI and JTTF about their political and religious beliefs in interviews disconnected from any particular suspicion or concern. California's strong right to privacy prohibits local agencies from participating in this practice. In contrast, **the FBI teaches this sort of ideological questioning as a valuable intelligence gathering technique even when based on no suspicion at all.**

For example, the ACLU-NC and Asian Law Caucus obtained in Freedom of Information Act litigation the textbook *Terrorism & Political Islam*¹² that was reportedly distributed to FBI field offices nationwide.¹³ One chapter, "Counterterrorism Interview and Interrogation Strategies", was authored by two FBI Supervisory Special Agents (SSAs) and suggests interview subjects be asked questions like "What do you think about the situation in Iraq?" "What do you think about the situation in Palestine?" "What do you think about governments such as Israel and Egypt that are allies of the United States?" "What do you believe Muslims should do to be in Allah's favor?" The textbook instructs that, "By asking these questions, officers can gauge, almost quantitatively, where an individual stands. A person answering with a patriotic and pro-Western stance could potentially evolve into a street informant or concerned citizen." Through this sort of interview, "the investigator has potentially determined where one individual in the community stands on a variety of political and religious issues."¹⁴

¹² Full title – *Terrorism, & Political Islam -- Origins, Ideologies, and Methods – A Counterterrorism Textbook 2nd Edition*. The Foreword explains in part that the textbook “. . . will serve as the cornerstone for key discussions by our Special Agents, Intelligence Analysts, Staff Operations Specialists and other professional Support personnel as they begin their formal training. . . . This book was prepared as an investment in the FBI's Counterterrorism workforce.” Pages vi – vii. Available at: http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_fbi_use_of_anti-arab_and_anti-muslim_counterterrorism_training_materials.pdf.

¹³ “FBI Calls in the Army to Fix its Counterterrorism Training,” *Wired Danger Room*, November 3, 2011.

¹⁴ “Counterterrorism Interview and Interrogation Strategies: Understanding and Responding to the Domestic Threat,” *Terrorism & Political Islam*, pg. 378.

Of course, **under civil rights protections provided by the California constitution and under local police policies, where one "stands on a variety of political and religious issues" is no business of law enforcement at all** unless there is an actual criminal investigation based on reasonable suspicion and that information is relevant to the investigation. The fact that the FBI now considers this sort of ideological questioning appropriate, does not make it any less **inappropriate** for local officers assigned to the JTTF.

The textbook suggests through these sorts of interview questions, "officers can begin determining an individual's ideological stance. The spectrum can range from a person loyal to the United States who desires to be an honest and reliable informant for law enforcement on the one end, or at the other end of the spectrum one who is militant and preparing to carry out jihad." By way of illustration, the FBI authors include a line graph "continuum represent(ing) the spectrum of an individual's ideology." The continuum provided moves from "Potential Source" on one end towards "Empathizer," to "Financier," and then to "Militant Believer" on the other end.¹⁵ No other categories are listed -- ignoring that loyalty should not be correlated to one's willingness to be a source or informant for the FBI and JTTF, nor to one's constitutionally protected views about international affairs or religion.

These sorts of interviews are by now a well-established manifestation of the FBI's current intelligence-led approach to its national security mission. The theory is apparently that asking about the political and religious beliefs of large numbers of people who are not suspected of anything in particular might eventually result in leads that could actually be investigated.¹⁶ **This approach turns traditional law enforcement standards on their head.** Local police agencies pursuing a public safety mission -- needing the trust and cooperation of the communities they serve and directly accountable to local standards and values -- depend on actual investigations based on some suspicion of criminality to form the basis for any intelligence gathering. Neither the public nor public officials in the Bay Area agreed that our officers assigned to the FBI's JTTF could abandon their standards and operate as intelligence-driven national security agents.

3. What steps, if any, has the FBI taken to ensure its state and local partners in the JTTF do not participate in these sorts of interviews? Does the FBI have a policy that local JTTF officers in the Bay Area may not be assigned to interviews involving questioning about political and religious views in the absence of reasonable suspicion of criminality? If not, why not? To reinforce local JTTF officers' accountability to stronger state and local civil rights protections, will you encourage local JTTF partner agencies to take the same step SFPD took earlier this year by requiring its officers to reveal their identity as local officers in interviews with members of the public rather than to misleadingly claim only

¹⁵ *Id.*, pg. 378.

¹⁶ For example, see April 14, 2011, speech by Mark Giuliano, Assistant Director, FBI Counterterrorism Division to the Washington Institute for Near East Policy Stein Program on Counterterrorism and Intelligence in Washington, DC. "We have transformed and continue to transform from a reactive, investigative led model to a proactive, intelligence-led one where intelligence drives our investigative strategies. . . ." Available at: <http://www.fbi.gov/news/speeches/the-post-9-11-fbi-the-bureaus-response-to-evolving-threats> .

that they are members of the JTTF or federal agents (per their cross-designated, deputized status)?

IV. ISLAMAPHOBIC F.B.I. TRAININGS

We appreciate that the FBI has launched a three-phase review of its training materials in the wake of recent disclosures about content in a variety of contexts that perpetrated offensive stereotypes about Muslims and, as you have stated, did not reflect the values of the FBI.¹⁷ We appreciate the stated goal of this review is to remove any training material that is inaccurate, offensive or inappropriate. We further appreciate that the SACs in the field offices have been asked to identify any questionable training materials that have been in use in their regions.

However, we have been unable to determine what, if any, steps will be taken to address the damage already done when local officers assigned to the JTTF have been subjected to training that the FBI now finds to be inappropriate. For example, it has been reported that the on-line orientation manual that is part of the mandatory JTTF orientation course includes sweeping generalizations about Sunni Muslims and other broad-based assertions about Islam. We have twice made written inquiries of the local FBI SAC about the implications of this material for local officers assigned to the local JTTF.¹⁸ She has not answered our questions. We hope you will.

4. Will the FBI determine which local officers (if any) assigned to the JTTF have been subjected to FBI training based on inappropriate and crude stereotypes? Will local officials be notified if their officers have been subjected to this training? If not, why not? Will these officers be re-trained appropriately? What other specific steps will be taken to ensure that their actions in the JTTF or, in the future, when they return to Bay Area local law enforcement duties do not continue to be adversely impacted by any stereotypes promulgated previously by the FBI?

Our strong constitutional right to privacy and other local protections reflect the desires and decisions of Californians over many decades. The federal government may have, for the time being, chosen very different policies, tactics and training for the FBI, but **our** state and local protections against surveillance without suspicion, ideological questioning without cause and trainings based on stereotypes remain intact. Adhering to these standards strengthens the relationship between local law enforcement and the communities they serve which, in turn, enhances public safety. We have no objection to local agencies being the FBI's "partners" in the JTTF. We only object to the FBI insisting that in order to do so these agencies must fundamentally redefine their partnerships

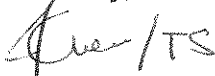
¹⁷ "Counterterrorism Training Material Review, September – November, 2011," FBI document available at: <http://talkingpointsmemo.com/documents/2011/11/fbi-counterterrorism-training-review-memo.php?page=1> .

¹⁸ September 23, 2011, letter from ACLU-NC, Asian Law Caucus, CAIR-SFBA and 26 other community, legal and civil rights organizations to SAC Stephanie Douglas. September 30, 2011, follow-up letter from ACLU-NC, Asian Law Caucus and CAIR-SFBA to SAC Douglas requesting replies to the initial inquiries made a week prior.

with their communities by not applying their own state and community standards to their own officers.

Thank you for considering our questions and concerns. We look forward to receiving a response.

Sincerely,



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Police Practices Consultant, ACLU of Northern California



Veena Dubal
Staff Attorney, Asian Law Caucus



Zahra Billoo
Executive Director, Council on American-Islamic Relations – San Francisco Bay Area

cc. Melinda Haag, U.S. Attorney for Northern California
Stephanie Douglas, Special Agent in Charge, FBI San Francisco Division
Jane Kim, Member San Francisco Board of Supervisors