WASHINGTON
LEGISLATIVE OFFICE

October 20, 2011

Hon. Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
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Dear Attorney General Holder:

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The American Civil Liberties Union is a national non-partisan advocacy organization with over half a million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the protection and advancement of civil liberties and individual rights under the U.S. Constitution and the Bill of Rights.

We write today to express our grave concerns about the overbroad investigative authorities the FBI has claimed under amendments to the Attorney General's Guidelines for Domestic FBI Operations (AGG), its surveillance activities conducted in violation of the Department of Justice's Guidance on the Use of Race by Federal Law Enforcement Agencies (Guidance on Race or Guidance), and the inappropriate exemption in the Guidance that permits the FBI to engage in racial and ethnic profiling in certain contexts. As we detail below, there is growing evidence, based on official government investigations and Freedom of Information Act (FOIA) records obtained by the ACLU, that the FBI is illegally and unconstitutionally targeting innocent Americans for investigation based upon their race, ethnicity, national origin, religion, and political activities protected under the First Amendment.

We urge you to curb these abuses by: **first**, amending the AGG to prohibit the FBI from undertaking "Preliminary Investigations" unless they are supported by articulable facts and properly limited in time and scope, and to eliminate the FBI's authority to conduct suspicion-less "Assessment" investigations; **second**, rescinding the exemption in the Guidance on Race that permits the FBI's use of racial and ethnic profiling in national security and border integrity investigations; and **third**, amending the Guidance on Race to prohibit profiling based on religion and national origin.

A. The Attorney General's Guidelines improperly permit the FBI to conduct investigations without an adequate factual basis to believe wrongdoing has occurred or will occur, and have inevitably resulted in abuses.

The AGG governing the FBI's investigative authorities were amended and expanded in 2002 and 2008. Numerous abuses under those expanded authorities have been documented. The 2002 amendments to the AGG expanded the time and scope of FBI "Preliminary Inquiries" (later re-named "Preliminary Investigations") on the basis of an extremely low threshold of suspicion: "information or an allegation indicating the existence" of circumstances constituting a federal crime or threat to national security. In 2005, a Department of Justice (DOJ) Inspector General audit of the FBI's compliance with the 2002 AGG amendments documented numerous violations, finding that a majority of the Preliminary Inquiries that extended beyond the initial approval period were not properly authorized.[1] The Inspector General also highlighted the FBI's use of a controversial new authority that allowed agents to conduct surveillance in public places without opening full investigations, finding that these activities could not be properly audited because the FBI failed to keep records of them.[2]

More troublingly, a nationwide FOIA campaign by the ACLU uncovered significant evidence that the FBI abused its expanded authority under the 2002 AGG amendments to spy on political advocacy organizations.[3] A 2010 DOJ Inspector General report confirmed this abuse.[4] The Inspector General reported that the FBI's predication for opening Preliminary Investigations against domestic advocacy groups, including peace groups and environmental organizations, "was factually weak" and often based on unpersuasive, "speculative, after-the-fact rationalizations," rather than contemporaneous documentation, as required.[5] Still, the Inspector General determined that because the AGG establishes a low "information or an allegation" standard for opening Preliminary Investigations, many of these fruitless and abusive FBI investigations of advocacy groups did not violate the AGG.[6]

Despite these documented abuses, the AGG were again amended by Attorney General Michael Mukasey in December 2008, just weeks before President Obama was sworn into office, to give the FBI significantly more latitude. The 2008 AGG removed *any* requirement of a factual predicate to justify a new type of investigation, called an "Assessment."[7] Rather than requiring objective information suggesting the possibility of misconduct, Assessments only require an FBI agent's subjective determination that he or she is acting with an authorized purpose to prevent crime or a threat to national security. Investigative activities allowed during these suspicion-less Assessments include such intrusive techniques as physical surveillance, commercial and law enforcement data base searches, FBI interviews, the recruitment and tasking of informants, and the inappropriate use of grand jury subpoenas for telephone or e-mail subscriber information.[8]

The FBI's use of its expanded Assessment authority raises significant civil rights and civil liberties concerns. The *New York Times* reported that the FBI opened 82,325 Assessments on individuals and groups from March 2009 to March 2011, yet only 3,315 of these Assessments developed information sufficient to justify opening preliminary or full investigations.[9] That so few Assessments discovered any "information or an allegation" that would meet even the low threshold for opening a Preliminary Investigation makes clear that

the FBI investigated tens of thousands of entirely innocent people under its Assessment authority.

Even if people are found to be innocent after an Assessment or Preliminary Investigation, the FBI claims the authority to retain indefinitely all personal information collected during those investigations. A 2009 FBI Counterterrorism Division "Baseline Collection Plan" obtained by the ACLU through FOIA reveals the broad scope of information the FBI gathers during Assessments and retains in its systems: identifying information (date of birth, social security number, driver's license and passport number, etc.), telephone and e-mail addresses, current and previous addresses, current employer and job title, recent travel history, whether the person lives with other adults, possesses special licenses or permits or has received specialized training, and whether the person has purchased firearms or explosives.[10]

Moreover, according to FBI documents obtained by the ACLU, innocence may not protect a person from continuing FBI scrutiny and surveillance after an Assessment has concluded. According to the FBI's Baseline Collection Plan, it is implementing a so-called "disruption strategy," which permits FBI agents to continue using investigative techniques such as "interviews, or source-directed operations to effectively disrupt subject's activities" even if the FBI finds no threat exists.[11] During the Hoover-era, the FBI also implemented a similar "disruption strategy," in which it used overt interviews and source-directed operations to stifle First Amendment-protected activity.[12] History shows, therefore, that any such claimed FBI authority to engage in "disruption" is subject to abuse, raising critically important (and so far unanswered) questions about how that authority is being implemented and overseen today.

B. The FBI is improperly investigating American communities on the basis of race, ethnicity, national origin, and religion.

The Guidance on Race prohibits race from being used "to any degree" in routine law enforcement decisions, absent a specific description of a suspect.[13] However, Attorney General Ashcroft created a loophole in the Guidance, permitting the FBI to use racial and ethnic profiling in national security and border integrity investigations, which we believe is unconstitutional. Information obtained by the ACLU through FOIA indicates that the FBI is also wrongfully exercising this authority in routine law enforcement in violation of the Guidance.

In December 2008, the FBI issued an internal manual called the Domestic Investigation and Operations Guide (DIOG), which was later obtained by advocacy organizations through FOIA litigation.[14] The DIOG included disturbing details about how the FBI is using race- and ethnicity-based profiling. The DIOG authorizes FBI agents to collect and analyze racial and ethnic demographic information to identify and "Geo-map" concentrated ethnic communities and the location of ethnic oriented businesses and facilities "if these locations will reasonably aid in the analysis of potential threats and vulnerabilities" and assist in "intelligence analysis."[15] The DIOG also allows the FBI to collect and track "specific and relevant ethnic behavior" and "behavioral characteristics reasonably associated with a particular criminal or terrorist element of an ethnic community."[16]

The DIOG authorizes the FBI to engage in racial and ethnic mapping activities as part of an intelligence program it calls "Domain Management," which is not limited to national security and border integrity issues; it applies also to ordinary law enforcement investigations. Indeed, the DIOG misstates the Guidance on Race's prohibition on using race by stating that the Guidance prohibits "investigative and intelligence collection activities . . . based *solely* on race, ethnicity, national origin or religious affiliation" (emphasis added).[17] The FBI's interpretation that it may use race as a factor in criminal law enforcement activities, so long as it is not the sole factor, flies in the face of the Guidance's clear statement that race cannot be used "to any degree."

In 2010, the ACLU issued FOIA requests to FBI field offices throughout the United States to obtain information about how the FBI is using racial and ethnic data collected through its Domain Management program. The documents we have started to receive confirm our worst fears. Although often heavily redacted, these documents, obtained from a number of different field offices, demonstrate that FBI analysts are using improper and crude racial stereotypes regarding the types of crimes committed by different racial and ethnic groups and then collecting demographic data to map where people of those racial or ethnic groups live. The FBI's racial mapping program is racial profiling on an industrial scale: entire racial and ethnic communities are being targeted for intelligence collection.

For instance, a Detroit FBI field office memorandum entitled "Detroit Domain Management" asserts that "because Michigan has a large Middle-Eastern and Muslim population, it is prime territory for attempted radicalization and recruitment" by State Department-designated terrorist groups originating in the Middle East and Southeast Asia.[18] Based on this generalized and entirely unsubstantiated assertion of a threat, the Detroit FBI sought to open a "Domain Assessment" in Michigan "for the purpose of collecting information and evaluating the threat." Collecting information about the entire Middle-Eastern and Muslim communities in Michigan, and treating those communities as suspect, is an unjust, unconstitutional violation of civil rights and an affront to religious freedom and American values.

Unfortunately, this type of targeting based on broad-brush racial, ethnic, religious and national origin stereotyping appears in many different types of Assessments focusing on a broad array of groups.

- A 2009 Atlanta FBI Intelligence Note purports to identify potential threats from "Black Separatist" groups and documents population increases among "black/African American populations in Georgia" from 2000 to 2007.[19] While significant portions of this document are redacted, other portions reveal the FBI is focusing improperly on First Amendment-protected activity by members of Georgia's African American community, such as non-violent community protests after police shootings and community members' support of a congressional candidate.

- Two 2009 San Francisco FBI memoranda state that "San Francisco domain is home to one of the oldest Chinatowns in North America and one of the largest ethnic

Chinese populations outside mainland China," and justify the opening of an investigation involving racial and national origin mapping because "[w]ithin this community there has been organized crime for generations."[20] The memoranda similarly justify mapping of the "sizable Russian population" in the region by referencing the existence of "Russian criminal enterprises" in San Francisco.

- Several documents from FBI offices in Alabama, New Jersey, Georgia and California indicate the FBI is conducting overly-broad Assessments that include tracking communities based on race and national origin to examine threats posed by the criminal gang Mara Salvatrucha (MS-13).[21] While MS-13 certainly represents a criminal threat meriting law enforcement concern, documents received by the ACLU reveal that the FBI is using the fact that MS-13 was originally started by Salvadoran immigrants to justify broad Assessments targeting a variety of Hispanic communities. A September 2008 Intelligence Note produced by the Newark, New Jersey FBI office claims "MS-13 is comprised of members from Central American countries," yet the "Domain Team" collected population data for individuals from other Spanish-speaking countries, including Mexico, Cuba, the Dominican Republic, Colombia, and from the U.S. territory of Puerto Rico.[22] The Mobile, Alabama FBI's Intelligence Note contradicts the Newark FBI's assertion regarding the ethnic composition of the gang, noting that while "MS-13 members are typically Salvadorans, Guatemalans, and Honduran nationals or first-generation descendants… MS-13 has been known to admit Mexicans, Dominicans, *and non-Hispanic individuals*" (emphasis added).[23]

Targeting entire communities for investigation based on erroneous racial and national origin stereotypes is not just unconstitutional, it produces flawed intelligence. The FBI should focus on actual criminal suspects and national security threats, not entire ethnic communities.

C. The FBI's planned expansion of its authorities is inappropriate and will only lead to further civil liberties violations.

Rather than narrowing the FBI's authority in the face of clear evidence of abuses, including from the Justice Department's own Inspector General, the FBI is attempting to unilaterally broaden it. On May 19, 2011, the FBI met with the ACLU and other advocacy organization to announce its plan to amend the DIOG to allow agents to engage in entirely suspicion-less, pre-Assessment searches on individuals through law enforcement and commercial databases, and to allow agents to search through people's discarded garbage during Assessments to evaluate potential informants. The 2008 AGG do not authorize the FBI to conduct pre-Assessment investigative activity and do not list so-called "trash covers" among the authorized investigative techniques available to agents even during Assessments. The FBI appears, therefore, to lack authority for these new activities, which would violate even the few limitations imposed by the 2008 AGG. Yet, according to a document obtained by the ACLU through FOIA, it appears that since at least November 2010, the FBI has already been training its agents to implement these authorities and conduct pre-Assessment state and local law enforcement and commercial data base searches.[24] Modifying the DIOG to authorize activities the FBI has already employed in violation of the AGG is inappropriate and displays an utter lack of internal controls.

We urge you to investigate the FBI's compliance with the 2008 AGG, to put an immediate end to suspicion-less Assessment investigation authority, and to ensure that Preliminary Investigations only take place if they are supported by articulable facts and properly limited in time and scope. We also urge you to prohibit race-based investigations like Domain Management Assessments from occurring in the future by enforcing the Guidance on Race and rescinding its exemption permitting the FBI to use racial and ethnic profiling in national security and border integrity investigations. Finally, we urge you to amend the Guidance to prohibit profiling based on religion and national origin.

Protecting the United States from crime and terrorism does not require violating the rights of innocent people. Requiring the FBI to focus on real threats, supported by objective evidence, would be a far more effective method of protecting our communities than collecting detailed dossiers about innocent Americans.

Thank you for your attention to this matter. If you have any questions or need further information please contact ACLU Policy Counsel Michael German at (202)544-1681 or mgerman@dcaclu.org.

Sincerely,

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Endnotes:

[1] Dep't of Justice, Office of Inspector General, The Federal Bureau of Investigation's Compliance with Attorney General's Investigative Guidelines 172 (2005), *available at* http://www.justice.gov/oig/special/0509/final.pdf.
[2] *Id.* at 192.
[3] American Civil Liberties Union, FOIA Request Webpage: FBI/JTTF Spying, Oct. 25, 2006, http://www.aclu.org/national-security/fbi-jttf-spying.
[4] Dep't of Justice, Office of the Inspector General, A Review of the FBI's Investigations of Certain Domestic Advocacy Groups (2010), *available at* http://www.justice.gov/oig/special/s1009r.pdf.

[5] *Id.* at 186-187.
[6] *Id.*
[7] Dep't of Justice, The Attorney General's Guidelines for Domestic FBI Operations 17 (2008), http://www.justice.gov/ag/readingroom/guidelines.pdf .
[8] *Id.* at 20.
[9] Charlie Savage, *FBI Focusing on Security Over Ordinary Crime*, N.Y. Times, Aug. 23, 2011, http://www.nytimes.com/2011/08/24/us/24fbi.html.
[10] Federal Bureau of Investigation, Electronic Communication: Counterterrorism Program Guidance, Baseline Collection Plan, Sept. 24, 2009, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM004887.pdf.
[11] *Id.* at 11-12.
[12] S. Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Final Report on Supplemental Detailed Staff Reports on Intelligence Activities and the Rights of Americans (Book III), S. Rep. No. 94-755, at 10 (1976), *available at* http://www.archive.org/details/finalreportofsel03unit.
[13] U.S. Department of Justice Civil Rights Division Guidance Regarding the Use of Race by Federal Law Enforcement, (2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.
[14] Federal Bureau of Investigation Domestic Investigations and Operations Guide (DIOG), (2008), *available at* http://www.muslimadvocates.org/cgi-bin/mt/mt-search.cgi?IncludeBlogs=1&search=investigative.
[15] DIOG at 32.
[16] *Id.* at 33.
[17] DIOG at 30.
[18] Federal Bureau of Investigation, Electronic Communication: Detroit Domain Management, July 6, 2009, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf.
[19] Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to the Black Separatist Threat, Oct. 7, 2009, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011454.pdf.
[20] Federal Bureau of Investigation, Electronic Communication: Domain Management – Criminal Asian-Eurasian Criminal Enterprise, June 8, 2009, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011495.pdf.
[21] Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Threat, Dec. 15, 2008, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011388.pdf; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Locations, Sept. 22, 2008, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM008040.pdf; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha (MS-13), Sept. 4, 2008, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM007857.pdf; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf.
[22] Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Locations, Sept. 22, 2008, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM008040.pdf.
[23] Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf.
[24] Federal Bureau of Investigation, Training: JTTF TFO Orientation & Operations Course, Nov. 16-19, 2010, at ACLURM005664-70, http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM005664.pdf.