



October 20, 2011

Hon. Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

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.

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

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.

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

Unfortunately, this type of targeting based on broad-brush racial, ethnic, religious and national origin stereotyping appears

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

Thank you for your attention to this matter. If you have any questions or need

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-