

FBI Fact or Fiction?

On June 12, 2011, the *New York Times* reported that the FBI's Domestic Investigations and Operations Guide, or "DIOG," the set of rules that governs the Bureau's investigative and intelligence collection activities, would be amended to extend "significant new powers" to FBI investigators.¹

The DIOG implements the Attorney General Guidelines for Domestic FBI Operations, which themselves had been altered in December 2008 by Attorney General Michael Mukasey. Similar guidelines first were implemented in 1976, in an effort to prevent a recurrence of the Bureau's excessively intrusive investigations uncovered by congressional investigation into the activities of the intelligence community. Over time, the constraints that the Guidelines place on the FBI have gradually eroded. This erosion culminated in the 2008 Guidelines, which significantly loosen restrictions on the FBI's investigative powers and eliminate oversight requirements that had been in place for decades.

The major changes wrought by the 2008 Guidelines were as follows:

1. They create a new investigative phase, called an "assessment," that permits the FBI to engage in "unpredicated investigations," or investigations for which there is no factual indication of wrongdoing or a threat to national security.
2. At the assessment stage, they permit intrusive investigative techniques—such as use of informants, interviews under false pretenses, and unlimited physical surveillance—that until 2008 had been reserved for use during investigations for which the FBI has a factual predicate.
3. They weaken procedural safeguards—eliminating or reducing many of the requirements for supervisory approval of particular investigative techniques and limits on how long investigative activity may go on—that have been integral to the Guidelines' regime since it was first implemented in 1976.

Both at the time the 2008 Guidelines first were implemented and in response to the recent *New York Times* article and a subsequent editorial,² federal officials consistently have downplayed these changes, asserting that they did not actually extend any new power to the FBI.

This document analyzes statements made by FBI and Justice Department officials to ascertain whether they accurately characterize the 2008 Guidelines, the contemplated changes to the DIOG, and the investigative powers granted to the FBI.

¹ Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. Times, June 11, 2011, at A1.

² Editorial, *Backward at the F.B.I.*, June 18, 2011, at WK7.

Exhibit #1	Former Attorney General Michael Mukasey Argues That His 2008 Guidelines Do Not Expand the Bureau's Power to Use Informants
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Claim

Michael Mukasey, Attorney General of the United States

Memorandum for the Heads of Justice Department Components,
September 29, 2008

- ❖ *Under the 2002 Guidelines, informants “may be affirmatively tasked to seek information when the purpose is to check leads [before officially opening an investigation] in ordinary criminal investigation, but the standards are more restrictive when the purpose is to gather information about threats to the national security. The [2008] Guidelines will resolve such discrepancies.”*

Fact



Fiction

Fact-Check

- ❖ The alleged “discrepancy” is a myth. It is true that national security “threat assessments” undertaken before an official investigation was opened barred the tasking of informants. But so did the 2002 Guidelines. They did not permit agents to task informants before opening an investigation. Rather, they permitted interviews with previously established informants and only *after* a preliminary inquiry had been opened. They did not permit tasking of informants until a full investigation was opened.
- ❖ The 2008 Guidelines added at the assessment stage—before finding sufficient evidence even to open a preliminary investigation—the authority not only to interview existing informants, but also to recruit and task new informants.

Exhibit #2	FBI officials Downplay the Scope of the 2008 Changes to the Attorney General's Guidelines for Domestic FBI Operations, Claiming that they Granted the Bureau No New Powers
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Claim

Robert Mueller, FBI Director

Hearing Before the Senate Judiciary Committee, September 17, 2008

- ❖ “[T]he [2008 Attorney General’s] guidelines are not designed to give the FBI any broad new authorities.”

Unidentified FBI Official

FBI Briefing, September 12, 2008

- ❖ “We’re not getting any new power. . . . There’s no new power there. . . . that we didn’t previously have.”

Valerie Caproni, FBI General Counsel

Letter to the Editor, *New York Times*, March 31, 2011

- ❖ “[T]he F.B.I. has long engaged in the prompt and limited checking of leads. The 2008 Attorney General guidelines and the F.B.I.’s [DIOG] did specify clearly for the first time how and where leads being assessed must be documented.”

Fact



Fiction

Fact-Check

- ❖ The 2008 Attorney General Guidelines and the DIOG did not merely “specify clearly” the rules for checking leads.
- ❖ The 2008 Guidelines introduced “assessments,” permitting several highly intrusive tactics, such as the use of informants, pretext interviews, and 24-hour physical surveillance without any factual predicate. Pre-2008 Guidelines permitted the use of these tactics only during investigations based on articulable suspicion and then only with supervisory authorization.
- ❖ While it is true that “threat assessments” were permitted under the 2003 National Security Investigation Guidelines, by the FBI’s own admission, those rules prohibited the techniques now permitted by the 2008 Guidelines.

Exhibit #3	FBI Director Robert Mueller Misinformed Congress Regarding the Contents of The 2008 Attorney General's Guidelines for Domestic FBI Operations
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Claim

Robert Mueller, FBI Director

Hearing Before the Senate Judiciary Committee, July 28, 2010

- ❖ **Senator Richard Durbin:** *Let me ask you this. Is -- is there a requirement of suspicion of wrongdoing before there is surveillance of an individual or surveillance of a location?*
- ❖ **FBI Director Robert Mueller III:** *Yes.*
- ❖ **Senator Richard Durbin:** *All right. And so merely the fact that it is of a certain religious sect or ethnic group is not enough.*
- ❖ **FBI Director Robert Mueller III:** *That is -- that in and of itself is not enough. There has to be something more."*

Fact



Fiction

Fact-Check

- ❖ As the FBI later conceded in a letter to Senators Leahy and Durbin, Director Mueller “misspoke” when claiming that the 2008 Attorney General Guidelines did not permit the FBI to initiate investigations in the absence of suspicion of wrongdoing.

Exhibit #4	FBI General Counsel Valerie Caproni Downplays the Scope of the Upcoming 2011 Changes
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Claim

Valerie Caproni, FBI General Counsel
As quoted in the *New York Times*, June 12, 2011

- ❖ “[T]he [upcoming] modifications to the rules are ‘more like fine-tuning than major changes.’”

Fact



Fiction

Fact- Check

- ❖ The accuracy of this statement may depend on one’s definition of the word “major.”
- ❖ The new rules, as described by the *New York Times*, undeniably include significant changes.
- ❖ According to the *New York Times*, the modifications permit the following activities:
 1. scrutiny of commercial and government databases before an investigation is officially opened;
 2. searching through an individual’s trash during an unpredicated assessment for the purpose of recruiting him or her as an informant; and
 3. undisclosed participation in a group five times before the rules governing undisclosed participation apply.
- ❖ Note that as some of the rules governing FBI investigations remain secret—such as the rules about the FBI’s undisclosed participation in religious or political gatherings—it is impossible to evaluate the extent or nature of all the changes.

Exhibit #5	FBI Assistant Director for Public Affairs Asserts that the 2011 Changes Provides <i>Increased</i> Civil Liberties Protections
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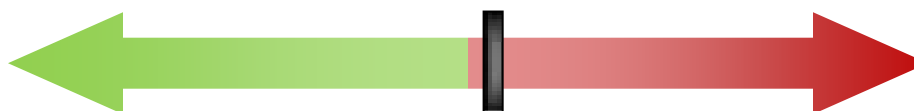
Michael P. Kortan, Assistant Director for Public Affairs

Letter to the Editor, *New York Times*, June 24, 2011

Claim

- ❖ “[C]ontrary to the [New York Times June 18, 2011] editorial’s statements, the revision will not provide ‘agents significant new powers’ . . . the F.B.I.’s operations manual establishes greater overall protections for privacy than the law and Justice Department policy require.”

Fact



Fiction

Fact-Check

- ❖ The DIOG includes privacy protections beyond those required by 2008 Guidelines only because those protections, which had been part of all previous Attorney General Guidelines, were moved from the Guidelines to the DIOG in 2008.
- ❖ Regardless of which document the rules are set out in, the *New York Times* account of contemplated changes to the F.B.I.’s Domestic Investigations and Operations Guide, describe an expansion of existing powers without concomitant privacy protections. The new rules will reportedly:
 1. allow agents to search commercial and government databases before an investigation is officially opened;
 2. add the authority to go through an individual or household’s trash to the list of tactics permitted at the “assessment” level; and
 3. narrow the definition of so-called “sensitive investigative matters,” which, because of the nature of the target – usually a member of the media, or a public figure of some sort – are subjected to extra layers of oversight.
- ❖ Note that some of these new powers seem to directly contradict the still-binding 2008 Attorney General Guidelines. For example, searching through trash is not included in the 2008 Guidelines list of permitted assessment-stage activities; and the definition of “sensitive investigative matters” in the 2008 Guidelines is broader than the one proposed for the new DIOG.