

The Honorable Patrick Leahy  
Chairman, Judiciary Committee  
United States Senate  
Washington, DC 20510

The Honorable Charles Grassley  
Ranking Member, Judiciary Committee  
United States Senate  
Washington, DC 20510

July 27, 2011

**Re: Changes to the Domestic Investigations and Operations Guide**

Dear Senators Leahy and Grassley:

We, the undersigned organizations who care deeply about both constitutional values and effective intelligence-gathering, are gravely concerned about reported changes to the Domestic Investigations and Operations Guide (DIOG), the federal guidelines that define the contours of the FBI's law enforcement investigation and intelligence-collection powers. We ask that you hold hearings before the new rules go into effect to explore these proposed changes, particularly whether they are necessary, consistent with Justice Department policy, and sufficiently protective of civil liberties.

The reported changes to the DIOG are the latest in a series of alterations to FBI policies implemented in the last decade that have radically expanded the FBI's power to investigate and collect intelligence information—often without any indication of wrongdoing—about Americans. The most significant changes were implemented in 2008 through the Attorney General's Guidelines for Domestic FBI Operations. Despite the fact that these Guidelines significantly overhauled the thirty-five-year-old Attorney General Guidelines regime, they were adopted in haste and with insufficient input from congressional overseers and other stakeholders. The result was a document that extended too much power to the FBI with insufficient oversight of how that power could be used. As the Brennan Center pointed out in its report, *Domestic Intelligence: New Powers, New Risks*, the changes wrought by the 2008 Guidelines markedly increase the likelihood not only of civil liberties violations (including profiling based on perceived religion or ethnicity) but also of rendering domestic law enforcement efforts less productive.<sup>1</sup>

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<sup>1</sup> These concerns are not merely academic. Recent history provides multiple instances of investigative activity in violation of law or FBI policy in the absence of sufficient oversight and supervision. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVESTIGATIONS OF INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (2010), available at <http://www.justice.gov/oig/special/s1009r.pdf>; Jeff Stein, *FBI misled Justice about spying on peace group*, WASH. POST, Sept. 20, 2010, available at [http://voices.washingtonpost.com/spy-talk/2010/09/fbi\\_cover-up\\_turns\\_laughable\\_s.html](http://voices.washingtonpost.com/spy-talk/2010/09/fbi_cover-up_turns_laughable_s.html) (documenting FBI surveillance of targets including an antiwar rally, peace activists, and members of environmental and animal rights groups); U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), available at <http://www.justice.gov/oig/special/s0703b/final.pdf>; U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS (2010), available at <http://www.justice.gov/oig/special/s1001r.pdf> (documenting systemic improper acquisition of telephone records in violation of law and policy).

The impending changes to the DIOG compound the concerns raised by the 2008 Guidelines in that they further increase the scope of insufficiently monitored FBI power. According to reports, the new version of the DIOG will permit agents to

- conduct searches of commercial or law enforcement databases on targets for which no official investigation has been opened;
- search an individual’s trash for the purpose of finding material that might pressure him or her into becoming a government informant at the “assessment” stage, when the investigation need not be based on any factual predicate; and
- participate covertly in groups, such as religious congregations or gatherings of political activists, without any applicable rules at all. (We cannot fully evaluate the implications of the changes to the covert participation rules, however, because the rules themselves remain secret. Our knowledge is therefore limited to what can be gleaned from news reports. Nor do we know what other changes have been proposed but not reported in the media.)

Not only does the new version of the DIOG significantly augment the Bureau’s authorities, but it also seems to go beyond the permissible limits established by the 2008 Attorney General’s Guidelines in at least three respects:

- First, the Guidelines provide no authorization for investigative activity before an assessment has been opened. Pre-assessment database searches therefore have no lawful basis;
- Second, the power to search through an individual’s trash is not included in the 2008 Guidelines’ list of activities permitted at the assessment stage, yet the new DIOG declares these searches permissible; and
- Third, the DIOG purports to narrow the definition of “sensitive investigative matters”—investigations subject to more stringent oversight because they involve public officials, members of the media, or academics—to exclude cases where the target is suspected of activities unrelated to their position. For example, investigations of drug-related charges against a politician, rather than public corruption. But the 2008 Guidelines’ definition of “sensitive investigative matters” makes no mention of this distinction.

The Attorney General’s Guidelines remain binding FBI policy, yet the new DIOG apparently explicitly implements changes inconsistent with these rules.

This latest set of changes continues a trend—one that started years ago but accelerated rapidly after 9/11—to increase the FBI’s investigative and intelligence-collection authority while cutting back oversight of how that authority is used. When the Justice Department implemented the 2008 Guidelines, it did so hurriedly, and in the face of objections from several members of Congress who sought the opportunity to analyze the Guidelines, ask questions, and provide input.<sup>2</sup> Congress should not allow the FBI to once again undermine Congress’s ability to

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<sup>2</sup> Letter from Sens. Russell D. Feingold, Richard J. Durbin, Edward M. Kennedy, and Sheldon Whitehouse to Attorney General Michael Mukasey (Apr. 20, 2008) (“We have a number of questions and concerns about the guidelines, and urge you not to sign them until members of Congress, experts in the relevant fields, and affected communities have had a full opportunity to provide detailed input to the Department of Justice”); *see also* U.S. Senator Richard Durbin, *Statement on Announcement of New FBI Guidelines* (Oct. 3, 2008) (“The Justice Department claims that they consulted with Congress, but they made only cosmetic and superficial changes and

conduct meaningful oversight of FBI activities. Instead, the Judiciary Committee must examine these new authorities before they go into effect, determine how they will work, insist that the FBI explain why they are necessary, explore whether they are consistent with existing FBI policy and regulations, and consider the many constitutional and privacy concerns they implicate.

Thank you for your consideration of our views,

Brennan Center for Justice at NYU School of Law

Bill of Rights Defense Committee

Defending Dissent

Cc: Senate Judiciary Committee

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ignored all of the significant changes we suggested, including prohibiting racial profiling and requiring some factual basis for FBI surveillance.”)