

September 17, 2020

The Honorable Lindsey Graham  
Chair  
Senate Committee on the Judiciary  
226 Dirksen Senate Office Building,  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member  
Senate Committee on the Judiciary  
226 Dirksen Senate Office Building,  
Washington, D.C. 20510

The Honorable Jerrold Nadler  
Chairman  
House Committee On The Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Mary Gay Scanlon  
Vice Chair  
House Committee On The Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515

Dear Senator Lindsey Graham, Senator Dianne Feinstein, Rep. Jerrold Nadler, Rep. Mary Gay Scanlon,

For over 100 days, the nation has seen continued protests against racial injustice. While these protests were sparked by the killing of George Floyd by police, they are also the culmination of longstanding frustration with unchecked police brutality and systemic racism. Instead of taking seriously the injustices at the root of these protests, President Donald Trump, Attorney General William Barr, and other administration officials have sought to demonize the protesters. They have crafted a narrative that organized anti-fascists (“Antifa”) have hijacked the protests or that the protests themselves are orchestrated riots part of a shadowy conspiracy. Inspired by baseless claims of an Antifa plot, armed vigilante groups have mobilized to oppose the imagined threat.<sup>1</sup>

It is not just rhetoric. Mr. Barr has publicly announced that he will use the FBI’s Joint Terrorism Task Force (JTTF) against protesters and has formed a new task force on “Violent Anti-Government Extremism.”<sup>2</sup> On August 4, the head of the task force told Congress that the

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<sup>1</sup> “When They Came To An Oregon Town To Take Pictures Of The Fires, Armed Locals Thought They Were Antifa Arsonists,” *Buzzfeed News* (September 10, 2020). Available at <https://www.buzzfeednews.com/article/christopherm51/oregon-fires-antifa-rumors?scrolla=5eb6d68b7fedc32c19ef33b4>

<sup>2</sup> “Barr’s New Task Force Is a Blatant Attempt to Target Racial Justice Protesters,” *In These Times* (July 10, 2020). Available at <https://inthesetimes.com/article/fbi-barr-task-force-racial-justice-protests-dissent-red-scare-trump-antifa>

FBI had opened up 300 domestic terrorism investigations since the killing of George Floyd.<sup>3</sup> FBI JTTF agents have grilled activists about their political activities, giving rise to an inference that their social media accounts are being monitored.<sup>4</sup> Acting Department of Homeland Security Director Chad Wolf told Fox News pundit Tucker Carlson that the US government is looking into potentially pursuing RICO charges against the leaders of Black Lives Matter and Antifa (Antifa is the name of an ideology, not an organization).<sup>5</sup> Recently, a DHS whistleblower alleged that he was told to inflate the threat of Antifa, while downplaying criminal acts perpetrated by white supremacists.<sup>6</sup>

The FBI and the DHS have long histories of improperly classifying and investigating First Amendment-protected political expression and activities as national security threats. While First Amendment-protected speech should never be surveilled by law enforcement and intelligence agencies, it is clear that political bias plays a role in preventing agencies from competently differentiating between certain political movements and unlawful activity. This problem predates the Trump administration. The FBI began tracking Black Lives Matter protests as early as the 2014 protests in Ferguson, Missouri. A Defending Rights & Dissent report on FBI surveillance during the last decade showed how the FBI opened counterterrorism investigations into the Occupy Wall Street, Black Lives Matter, immigrant rights, and environmental movements, among others. The report found:

*a persistent pattern of monitoring civil society activity. The FBI frequently cites its counterterrorism authorities to justify this monitoring. In many of these cases, the FBI concedes civil society groups and social movements singled out for counterterrorism investigations are nonviolent and peaceful. The FBI sometimes uses justifications about the possibility of future violence by unknown actors or lone wolves to justify monitoring these peaceful groups. No indication is given as to why these groups in particular*

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<sup>3</sup> “Hundreds of Domestic Terrorism Investigations Opened Since Start of George Floyd Protests, Official Says,” *Voice of America News* (August 4, 2020). Available at <https://www.voanews.com/usa/race-america/hundreds-domestic-terrorism-investigations-opened-start-george-floyd-protests>

<sup>4</sup> “After Barr Ordered FBI to ‘Identify Criminal Organizers,’ Activists Were Intimidated at Home and at Work,” *The Intercept* (June 12, 2020). Available at <https://theintercept.com/2020/06/12/fbi-jtff-protests-activists-cookeville-tennessee/>

<sup>5</sup> “Trump’s and Wolf’s unsubstantiated claims of ‘investigations’ carry more than a whiff of politics,” *Washington Post* (September 1, 2020). Available at <https://www.washingtonpost.com/politics/2020/09/01/trumps-wolfs-unsubstantiated-claims-investigations-carry-more-than-whiff-politics/>

<sup>6</sup> “Whistleblower: DHS Hyped ‘Antifa,’ Soft-Pedaled White Supremacist Threat,” *The Daily Beast*, (September 9, 2020). Available at <https://www.thedailybeast.com/whistleblower-dhs-hyped-antifa-soft-pedaled-white-supremacist-threat?ref=home>

*warrant such concerns, however, the FBI continuously singles out peace, racial justice, environmental, and economic justice groups for scrutiny. This is consistent with a decades-long pattern of FBI First Amendment abuses and suggests deeply seated political bias within the FBI.*<sup>7</sup>

While politically biased investigations into First Amendment-protected activities are a longstanding problem, the current climate with high level officials singling out disfavored political tendencies is likely to make the problem even worse. In addition to the clear outspoken biases of the Trump Administration, this situation is exacerbated even further by the fact that the FBI operates under some of the loosest restrictions on it at any point since the Church Committee reforms.

In 2008 when the Attorney General's Guidelines for Domestic FBI Operations were revised, a new category of investigations called "assessments" were created. According to the revised Guidelines, "Assessments...require an authorized purpose but not any particular factual predication."<sup>8</sup> For the first time since the institution of the Attorney General's Guidelines in 1976 to address the FBI's improper monitoring of First Amendment activity, the FBI was authorized to open an investigation into an individual or organization without a factual predicate. Requiring a factual predicate for opening an investigation was considered an important check to prevent investigations into First Amendment activity. In spite of the low threshold for opening an assessment level investigation, the FBI is allowed to deploy intrusive investigative means including physical surveillance and tasking confidential human sources. The radically broad nature of this authority is a prescription for civil liberties abuses.

Given these facts, greater oversight of how the FBI and DHS use their counterterrorism authorities is desperately needed. We applaud the requirements in the Intelligence Authorization Act to report on counterterrorism investigations, including requiring the FBI to report what subcategories it uses when tracking domestic terrorism and the number of assessments and investigations associated with each subcategory. Demands for this information were sparked in part by revelations that the FBI had adopted a category of domestic terrorism called "Black Identity Extremism." While the FBI has claimed they no longer use that term, instead opting for the term "Racially Motivated Violent Extremism," released documents show the FBI merely relabeled "Black Identity Extremist Terrorist Enterprise Investigations" as "racially motivated violent extremism (Black)."<sup>9</sup>

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<sup>7</sup>*Still Spying on Dissent: The Enduring Problem of FBI First Amendment Abuse, Defending Rights & Dissent* (October 2019). Available at <https://rightsanddissent.org/FBI-Spying>

<sup>8</sup> Attorney General's Guidelines for Domestic FBI Operations, September 29, 2008, p. 17.

<sup>9</sup> "Leaked FBI Documents Reveal Bureau's Priorities Under Trump," *The Young Turks* (August 8, 2019). Available at <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpditiZ7AcYLd5cRR>

Discovering how the FBI classifies domestic terrorism and who it is investigating is an important first step to assessing political bias and impermissible investigations of First Amendment-protected activity. Unfortunately, neither the FBI nor the DHS have complied with the reporting timeframe mandated by Congress. Congress must demand that the information be released. Congress must also recognize obtaining this data is the beginning, not the end of its oversight responsibilities. Congress must thoroughly investigate the whistleblower complaint that DHS was pressured to exaggerate the threat of Antifa. Finally, Congress must not only pursue how political bias has impacted domestic terrorism investigations, but what meaningful statutory reforms could be put in place to better safeguard civil liberties and prevent this repeated problem from happening continuously.

Sincerely,

Defending Rights & Dissent  
Center for Constitutional Rights  
Center for Media and Democracy  
Common Cause  
Delaware Riverkeeper Network  
Demand Progress  
Earthworks  
Green Amendments For The Generations  
Greenpeace USA  
LULAC Council 44016, Salt Lake Young  
Adult Quetzalcoatl

National Coalition Against Censorship  
National Lawyers Guild  
Palestine Legal  
PEN America  
Restore The Fourth  
RootsAction.org  
UnKoch My Campus  
X-Lab

*CC: Honorable members of the Senate Committee on the Judiciary, House Committee On The Judiciary, Senate Select Committee on Intelligence, House Permanent Select Committee on Intelligence, Senate Committee on Homeland Security & Governmental Affairs, House Committee on Homeland Security*