

STATEMENT OF DEFENDING RIGHTS & DISSENT  
TO THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

APRIL 25, 2022

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Defending Rights & Dissent welcomes this opportunity to provide these comments on the government's efforts to counter domestic terrorism and their Implications for First Amendment-Protected Activities.

Defending Rights & Dissent (DRAD) is a national civil liberties organization founded in 1960 and based in Washington, DC. Our mission is to strengthen our participatory democracy by protecting the right to political expression. The right to free speech faces enumerable threats, but we have long identified FBI counterterrorism authorities as a significant detriment to the First Amendment. In 2019, we published a report, *Still Spying: The Enduring Problem of FBI First Amendment Abuse*, documenting FBI abuses of First Amendment rights since 2010. The overwhelming majority of abuses documented were carried out pursuant to counterterrorism authorities. More often than not, these were related to domestic terrorism, not international terrorism. This includes investigations into Occupy Wall Street, Black Lives Matter, and anti-pipeline activists. Evidence in the public record suggests that attempts to counter domestic terrorism are the main vehicle by which the FBI monitors First Amendment protected activity.<sup>1</sup>

Our comments will focus on four core concerns with FBI domestic terrorism operations that adversely impact privacy and civil liberties: first, how the loose standards for FBI domestic terrorism investigations enable First Amendment abuses; second, how the FBI's persistent extremist movements framework lays the groundwork for treating speech as terrorism; third, how the use of radicalization theory and the FBI's "preventive" approach opens the door for political policing; and fourth, the clear evidence of political bias in the initiation of investigations.

## **Background**

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<sup>1</sup> See Chip Gibbons, *Still Spying, The Enduring Problem of FBI First Amendment Abuse*. Defending Rights & Dissent (November 2019). Available at <http://rightsanddissent.org/fbi-spying>

Defending Rights & Dissent has an added interest in the impact of FBI domestic terrorism investigations on First Amendment protected speech. Our predecessor organization, the National Committee to Abolish the House Un-American Activities Committee was the subject of an abusive FBI *domestic intelligence* investigation. The FBI's efforts to thwart our exercise of Constitutional rights were serious enough to be cited in the landmark Church Committee investigation as an example of abusive practices of the intelligence community.<sup>2</sup>

Today's domestic terrorism investigations are the direct descendants of yesterday's domestic intelligence investigations. Some of the same investigatory classifications used to investigate our organization still exist, now as domestic terrorism classifications.<sup>3</sup> Under its domestic intelligence investigations the FBI claimed wide power to investigate groups and individuals it labeled as "subversive" and "extremist."<sup>4</sup> While most of the groups dubbed "subversive" and "extremist" were engaged in First Amendment protected speech, the FBI claimed such groups could potentially infiltrate "legitimate" organizations and thus the FBI must investigate even the groups the FBI deemed "legitimate" for potential infiltration or influence by "illegitimate" actors. While we reject the idea that it is the FBI's responsibility to determine what constitutionally protected political activities are legitimate or illegitimate, this allowed the FBI to cast its net broadly.<sup>5</sup> Unsurprisingly, those political causes supposedly most likely to be infiltrated by "subversives" and "extremists" were those disfavored by the FBI's leadership. Mere advocacy of those views then became justification for investigation (and in some cases worse) in and of itself. While the FBI's powers to monitor "subversive" and "extremist" activities included a broad authority of "general intelligence" divorced from any law enforcement purpose, they were also justified on the grounds that such information was necessary to "prevent" future crimes.

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<sup>2</sup> *Final Report, S. Rep. No. 94-755 (1976) Book III Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans* Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 1975-76 (Church Committee) at 5.

<sup>3</sup> The Classification 100 Investigation was previously "domestic security" and was used as the main classification for domestic intelligence investigations. The classification continued to be used, but for domestic terrorism investigations broadly. Currently, the FBI identifies this classification as "Terrorist Enterprise Investigations-Domestic Terrorism."

<sup>4</sup> *Domestic Intelligence Investigations: Their Purpose and Scope GGD-76-50* Report to the House Committee on the Judiciary by the Comptroller General of the United States (February 24, 1976) at 3-4.

<sup>5</sup> *Final Report, S. Rep. No. 94-755 (1976) Book II Intelligence Activities and the Rights of Americans* Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 1975-76 (Church Committee) 47 to 49

The legacy of abuse of the FBI's domestic intelligence operations led to a series of reforms. Foreign counterintelligence investigations, including those into "international terrorism," were separated out from "domestic security" investigations. Domestic security investigations were meant to be narrowed from free ranging inquiries into political ideology to the prosecutorial pursuit of domestic terrorists based on a criminal predicate.<sup>6</sup>

While this system failed to prevent all abuses,<sup>7</sup> much of it was dismantled as part of the post 9/11 War on Terror. The wall separating intelligence and law enforcement was obliterated and investigations no longer required criminal predicates. In moves reminiscent of the FBI's war on "subversive infiltration," the FBI has launched counter terrorism investigations into groups it concedes are nonviolent on the grounds that future bad actors may infiltrate the group. The FBI's approach to domestic terrorism classifies domestic "extremist" movements based on First Amendment protected speech. The FBI also takes a "preventative" approach to domestic terrorism that raises multiple constitutional concerns. While there is no evidence that the worst of the worst abuses of the pre-reform era FBI have been repeated, many of the practices that horrified oversight bodies in the 1970s are very much the norm again.

### **Loose Standards Governing FBI Domestic Terrorism Investigations**

Both a landmark Senate Investigation and a GAO report in the mid-1970s strongly recommended Congress enact legislation governing how the FBI carries out its intelligence missions. In spite of a number of proposals and counter proposals for statutory limits on FBI authorities, Congress opted to defer to the Attorney General instead. While some intrusive techniques, such as physical searches, wiretaps, pen registers, are regulated by the Constitution, statute, or both, there exists no statutory limitations on when the FBI can initiate investigations that touch on the exercise of core First Amendment rights. Many other intrusive techniques, including the use of human infiltrators and informants and searching through trash are only regulated by the executive branch, not statute.

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<sup>6</sup> *Domestic Security Measures Relating to Terrorism* Hearing Before the Sub Committee on Civil and and Constitution Rights of the Committee on Judiciary House of Representatives 98 Congress (Testimony of William Webster FBI Director) at 23 to 24

<sup>7</sup> For one such example see *The FBI and CISPES S. Rep. No. 94-766* Report of the Select Committee on Intelligence together with Additional Views (July 1989).

The rules governing such investigations come solely from the AG Guidelines and the FBI's own Domestic Investigations and Operations Guide (DIOG). The current guidelines, promulgated by Attorney General Michael Mukassey in 2008, place the lowest standards on the FBI than at any other point in the post Watergate-era.

For the first time since the reforms of the 1970s, the FBI can open an investigation *without a factual predicate to indicate criminal wrongdoing or a threat to national security*. These investigations, called "assessments," require only an "authorized law enforcement purpose."

Even though the standards for opening an assessment are extraordinarily low, the FBI is allowed to use extremely intrusive investigative techniques in performing them. These include physical surveillance, searches of trash, use of informants, and pretextual interviews. During a pretextual interview, the FBI can misstate the purpose of the interview in order to elicit information. An FBI agent can even conceal their status as a federal official. An agent can open an assessment for 30 days without supervisory approval. After that, a supervisor must sign off on continuing the assessment every 30 days. While assessments are supposed to be short-lived, there is no hard limit on how many times they can be renewed.

Investigative matters involving the activities of a domestic public official or political candidate (involving corruption or a threat to the national security), religious or political organization or individual prominent in such an organization, or news media, are considered under the AG Guidelines "sensitive investigative matters" (SIMs). SIMs require additional approval and reporting requirements. As the DOJ IG has noted, "The AG Guidelines and the DIOG do not provide heightened predication standards for sensitive matters, or allegations potentially impacting constitutionally protected activity, such as First Amendment rights. Rather, the approval and notification requirements contained in the AG Guidelines and the DIOG are, in part, intended to provide the means by which such concerns can be considered by senior officials."<sup>8</sup>

Assessment level SIM investigations are allowed, meaning an FBI agent can initiate a constitutionally sensitive investigation without a factual predicate of criminal wrongdoing. And

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<sup>8</sup> Office of the Inspector General U.S. Department of Justice, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (December 2019) Available at <https://www.justice.gov/storage/120919-examination.pdf>

they do. The FBI conducted a 19 month assessment of a Houston based anti-Keystone pipeline protest group before closing due to failure to find evidence of “extremist activity.” In spite of never reaching the level of a preliminary investigation, this year and half assessment involved informants within the group.<sup>9</sup> Between 2015 and 2018 the FBI repeatedly opened assessments on “Black Separatist Extremists.”<sup>10</sup>

A 2019 audit by the FBI reviewed 353 SIMs and found 747 compliance errors. Many of the violations documented were serious, including failures to obtain proper legal review or get proper approval before opening an investigation. That is a ratio of more than two compliance errors per investigation. In 70% of SIMs reviewed by the audit, an FBI field office failed to notify the relevant U.S. Attorney’s Office within 30 days of opening the investigation. Some of the compliance errors also involved FBI field offices’ failure to notify FBI Headquarters or the Department of Justice about warrants or wiretaps used in SIMs.<sup>11</sup>

The current guidelines also allow FBI investigations, including assessments, to be partially based on ethnicity, religion or speech protected by the First Amendment, so long as that is not the only factor. Under existing guidelines, FBI agents may visit public places and events that are open to the public. When doing so, FBI agents are not required to disclose their identities. Mosques, political demonstrations, and organizing meetings are all places that are generally open to the public. These provisions open the door for FBI infiltration of civil society.

As discussed below, even predicated investigations have led to improper inquiries into First Amendment protected activity. The Department of Justice Inspector General in 2010 released a review of the FBI’s counter terrorism monitoring of a number of domestic advocacy groups, including People for the Ethical Treatment of Animals , the Catholic Worker organization, and Greenpeace. These investigations turned up no evidence of criminal wrongdoing, much less

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<sup>9</sup> Paul Lewis, “Revealed: FBI violated its own rules while spying on Keystone XL opponents,” *The Guardian* (May 12, 2015). Available at <https://www.theguardian.com/us-news/2015/may/12/revealed-fbi-spied-keystone-xl-opponents>

<sup>10</sup> Alice Speri, “The FBI Spends A lot of Time Spying on Black Americans,” *The Intercept* (October 29, 2019). Available at <https://theintercept.com/2019/10/29/fbi-surveillance-black-activists/>

<sup>11</sup> Compliance and Mitigation Unit Report, 2019 Domestic Investigations and Operations Guide Audit, available at <https://media.washtimes.com/media/misc/2022/03/11/audit.pdf>

terrorist activity, yet they were conducted before the guidelines were loosened to establish assessment-level investigations.<sup>12</sup>

The question is not if the current AG Guidelines and DIOG facilitate the monitoring of First Amendment protected speech, but how often they do so.

### **“Persistent Extremist Movements”**

The FBI (and DHS) divides domestic terrorism into five categories: racially or ethnically motivated violent extremists, anti-government or anti-authority violent extremists, abortion-related violent extremists, animal rights and environmental violent extremists, and all other domestic terrorism threats.

Previously the FBI recognized nine “persistent extremist movements” made up of white supremacy, black identities, militia, sovereign citizens, anarchists, abortion, animal rights, environmental rights, and Puerto Rican nationalism.<sup>13</sup>

The revelation of a 2017 FBI Intelligence Assessment identifying “Black Identity Extremism” as a threat led to widespread condemnation and invocations of the FBI’s historic unjustified surveillance of racial justice activists. As a result, the FBI consolidated its nine persistent extremist movements into four broad categories, obscuring the FBI’s focus on ideology, but not eliminating it. Leaked, unclassified documents show Black Identity Extremism and White Supremacist Extremism have clearly been merged into racially or ethnically motivated violent extremists. The 2021 FBI and DHS Strategic Intelligence Assessment and Data on Domestic Terrorism makes explicit that militia, sovereign citizen, anarchist, and Puerto Rican Nationalism extremism have all been merged into anti-government or anti-authority violent extremists.<sup>14</sup>

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<sup>12</sup> See *A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups* Department of Justice Office of Inspector General (September 2010)

<sup>13</sup> Jana Winter and Sharon Weinberger, “The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists,’” *The Guardian* (October 6, 2017). Available at <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>

<sup>14</sup> *Strategic Intelligence Assessment and Data on Domestic Terrorism*, Federal Bureau of Investigation and Department of Homeland Security (May 2021) at 5,7. Available at <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report.pdf/view>

The consolidated categories show the FBI is still using a framework of “persistent extremist movements” as part of its domestic terrorism strategy. The difference between domestic terrorism, domestic extremism<sup>15</sup>, and political speech remains unclear. But all of the FBI’s threat definitions rely chiefly on speech. For example, the subcategory of anarchist extremism/anarchist violent extremism, defines the “threat” as those who “oppose all forms of capitalism, corporate globalization, and governing institutions, which they perceive as harmful to society.”<sup>16</sup>

Documents obtained by Defending Rights & Dissent staff from a 2004 predicated domestic terrorism investigation of pro-Palestinian activists show how these definitions transform ideology into crime. The predication for opening the domestic terrorism investigation included that the activists’ “predisposition to **anti-capitalist and anti-global philosophy** coupled with their sympathetic views on the Palestinian cause gives rise to the concern that ISM members can be directed, coerced, or through their own volition, be the purveyors of acts of terrorism.” (emphasis added)<sup>17</sup> Far from finding evidence of ideologically motivated crime, FBI agents regurgitated the ideological description of anarchist extremism in order to justify investigating political speech.

The FBI’s persistent extremism movement framework is hardwired into its investigation classifications. A list of investigative classifications for Fiscal Year 2019 obtained via FOIA show that classification 100-Terrorist Enterprise Investigations-Domestic Terrorism and classification 266-Act of Terrorism-Domestic Terrorism have subcategories for anarchist extremism, animal

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<sup>15</sup> At times the FBI has qualified the term extremism with the adjective “violent,” at other times it has not. When discussing just “extremism” broadly the FBI has made clear that non-violent, but illegal acts, such as white collar fraud carried out by sovereign citizens constitute extremism and thus fall within the purview of the Counter Terrorism Division. The Congressional Research Service has speculated this is because it allows prosecutors to “charge subjects of FBI domestic terrorism investigations under a wider array of statutes without having to convince a jury that the accused were terrorists” See “Extremism vs. terrorism” in *Domestic Terrorism: An Overview* Congressional Research Service (August 21, 2017) at 8.

<sup>16</sup> *Strategic Intelligence Assessment and Data on Domestic Terrorism*, Federal Bureau of Investigation and Department of Homeland Security (May 2021) at 5

See Also *Anarchist Extremism: A Primer*, Federal Bureau of Investigation (November 16, 2010). Available at [https://archives.fbi.gov/archives/news/stories/2010/november/anarchist\\_111610/anarchist\\_111610](https://archives.fbi.gov/archives/news/stories/2010/november/anarchist_111610/anarchist_111610)

<sup>17</sup> Chip Gibbons, “FBI Opened Terrorism Investigations Into Nonviolent Palestinian Solidarity Group, Documents Reveal,” *The Intercept* (April 5, 2020) Available at <https://theintercept.com/2020/04/05/israel-palestine-fbi-terrorism-investigation/>

rights and/or environmental extremism, abortion extremism, Black separatist extremism, white supremacy extremism, Puerto Rican extremism, sovereign citizen extremism, and militia extremism.

All of the persistent extremist movements/domestic terrorism threat definitions incorporate core political protected speech into their definition. Whatever the intent of the FBI may be, the FBI is not merely using ideological descriptors to classify actual violence and criminality. Instead, the persistent extremist movement framework has sent the message that certain ideologies are synonymous with terror and inherently deserving of government scrutiny.

### **Radicalization Theory and the Preventative Approach**

A main thrust of the FBI's post 9/11 counterterrorism strategy has been the adoption of a "preventative" strategy. Preventing senseless violence before it occurs is a noble intention. However, preventative approaches to policing have serious constitutional issues. By their very nature they involve people who have not committed a crime, but are only considered potential future criminals. In the case of "persistent extremist movements" a preventative approach transforms speech into a precursor to crime. The dangers here are not unknown. Landmark investigations into the FBI's historic abuses, like the Church Committee, all found the FBI's preventative approaches facilitated abuses of First Amendment speech.

Currently, as part of its efforts to prevent terrorism or "violent extremism" the FBI employs radicalization theory. The FBI's radicalization theory is based on the assumption that there is a set path of radicalization that one travels down before ultimately becoming a "violent extremist." By knowing this path, the FBI can intervene before one ever becomes a violent extremist based on its tell tale signs. As one step to becoming an extremist is adopting an ideology, one step in radicalization is also adopting certain political views. While the junk science of radicalization theory is offensive to the social scientist, its reliance on policing of political ideologies is offensive to a constitutional democracy.

Preventative approaches have been a hallmark of recent efforts to counter domestic terrorism. Instead of responding to the widespread protests in the wake of George Floyd's murder by a police officer as a moment for introspection and reform, the Trump Administration treated it as a domestic terrorism threat. Attorney General William Barr, in clear response to the protests, set up a special task force on violent anti-government extremists. According to Barr, "the ultimate

goal of the task force **will not be to enable prosecution of** extremists who engage in violence, but to understand these groups well enough that we can **stop such violence before it occurs and ultimately eliminate it as a threat** to public safety and the rule of law. (emphasis added)<sup>18</sup>

Following the January 6, 2020, breach of the Capitol, the Biden Administration has continued with this increased public prioritization of domestic terrorism. The Biden Administration issued a 2021 National Strategy for Countering Domestic Terrorism. According to the strategy document, “the overarching goal of this Strategy is preventing, disrupting, and deterring” domestic terrorism. This document explicitly adopts the persistent extremist movements frameworks.<sup>19</sup>

Singling out political speech as a precursor to terrorism as part of a framework purportedly designed to prevent terrorism is open invitation to placing preemptive scrutiny on First Amendment activity, particularly disfavored viewpoints.

### **Clear Evidence of Political Bias in The Initiating of Investigation**

When opening, initiating, and continuing domestic terrorism investigations, the FBI has shown clear political bias.

The FBI began to monitor the civil rights group By Any Means Necessary (BAMN) in 2016, after BAMN organized a counterprotest of the Traditionalist Worker Party, a white supremacist group. During the competing protests in Sacramento, California, white supremacists stabbed BAMN counterprotesters. The FBI responded by opening up an investigation into BAMN. The investigation was partially a counterterrorism investigation. The FBI also, however, misidentified the Traditionalist Worker Party as the Ku Klux Klan. The FBI investigated the possibility that BAMN had conspired to violate the civil rights of the Ku Klux Klan. In records released via FOIA, the FBI says, “The KKK consisted of members that some perceived to be supportive of a white supremacist agenda.”<sup>20</sup>

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<sup>18</sup> Chip Gibbons, “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>

<sup>19</sup> *National Strategy for Countering Domestic Terrorism* at 13. <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>

<sup>20</sup> Sam Levin “Revealed: FBI investigated civil rights group as 'terrorism' threat and viewed KKK as victims,” *The Guardian* (February 1, 2019). Available at <https://www.theguardian.com/us-news/2019/feb/01/sacramento-rally-fbi-kkk-domestic-terrorism-california>

Using its domestic terrorism authorities, the FBI has surveilled Occupy Wall Street even though it knew it was a nonviolent social movement. The FBI employed the convoluted logic that a future, hypothetical “lone offender” could exploit the movement.<sup>21</sup> The FBI used similar pretexts for monitoring the anti-war School of the Americas Watch for a decade, which it acknowledged had “peaceful intentions.” Nonetheless, the FBI monitored the group on the theory that “a militant group” could “infiltrate the protestors and use the cover of the crowd to create problems.” This fear of infiltration was not based on specific threats.<sup>22</sup> As discussed above, the FBI carried out an 18 month assessment on an environmentalist group in Houston to determine if they engaged in “extremist activities.” FBI agents visited at home individuals who posted about the George Floyd protests on social media.<sup>23</sup>

Why were these groups and individuals singled out? Certainly, by pursuing hypothetical future bad actors who might infiltrate currently peaceful political groups the FBI can cast a large net. But much like with the FBI’s preventative measures against “subversive infiltration” in the mid 20th century, the FBI’s net seems to largely target a core of set of political views disfavored by the FBI.

## **Conclusion**

Investigations launched without a factual predicate indicating criminal wrongdoing. The pursuit of ideologically defined extremist movements. A preventative approach that treats political speech as a precursor to criminality. Investigations clearly opened based on political bias. These are not just the abuses of the Hoover-era that so horrified oversight bodies. These are the present domestic terrorism practices of the modern FBI.

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<sup>21</sup> Michael S. Schmidt and Colin Moynihan, “F.B.I. Counterterrorism Agents Monitored Occupy Movement, Records Show,” *The New York Times* (December 24, 2012). Available at <https://www.nytimes.com/2012/12/25/nyregion/occupy-movement-was-investigated-by-fbi-counterterrorism-agents-records-show.html>

<sup>22</sup> “Exposed: FBI Surveillance of School of the Americas Watch,” *Partnership for Civil Justice Foundation*. Available at <https://www.justiceonline.org/soaw>

<sup>23</sup> Chris Brooks, “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-jttf-protests-activists-cookeville-tennessee/>

Given the serious issues we have outlined, we welcome a PCLOB inquiry into how FBI domestic terrorism investigations have impacted First Amendment rights.