

Submission to the United Nations Universal Periodic Review of

United States of America

Third Cycle
36th Session of the UPR
Human Rights Council
May 2020

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Summary

Defending Rights & Dissent works to protect the right of political expression. We formed as the merger of two organizations, Defending Rights & Dissent which was founded in 1960 by victims of McCarthyism, and the Bill of Rights Defense Committee, which was founded by grassroots opponents the USA Patriot Act.

Defending Rights & Dissent is deeply concerned about violations of the right of expression in the United States. This includes the continued misuse of surveillance authorities to monitor civil society and the use of laws against espionage to penalize journalists and their sources who expose government wrongdoing, including likely US violations of international law.

While Defending Rights & Dissent works with grassroots partners, we also consider it central to our mission to monitor and compile information about violations of the right to political expression as to alert the public, policy makers, and the media. The information in this submission is information synthesized from the public domain as part of that work.

Legal Framework

The United Nations Declaration of Human Rights Article 19 states “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Similarly, the United States is a signatory of the International Covenant on Civil and Political Rights, which states in part, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

The previous United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association stated that international law requires police to accommodate spontaneous protests and prohibits the charging of fees for permits.¹

Domestically, the United States Bill of Rights is supposed to protect human rights.

The First Amendment of the United States Constitution protects freedom of expression and the Fourth Amendment prohibits unreasonable searches and seizures. However, the Supreme Court has made it very difficult for subjects of political surveillance to find a remedy within the courts. In 1972, anti-War protesters spied on by the U.S. military sought a remedy with the courts, arguing their First Amendment rights had been violated. The Supreme Court declined to rule on the merits of the case, arguing that the plaintiffs could

not show a harm and that any unwillingness to partake in political activity due to government monitoring was an entirely subjective chill.² To this day this case remains the law of the land. While some litigants have succeeded in showing a harm was done to them, this precedent presents a major barrier to pursuing judicial relief from political surveillance.³

At the federal level, the Federal Bureau of Investigation (FBI) is both the nation's premier law enforcement agency and a domestic intelligence agency. In spite of a well-documented history of political surveillance, including documentation by the US Congress and government oversight bodies, no federal legislation exists to address the problem. The FBI's main source of regulation are guidelines promulgated by the U.S. Attorney General. Currently, the FBI operates under guidelines created in 2008. These guidelines are incredibly lax and allow for investigations, known as "assessments," to be undertaken against subjects whom the government lacks allegation or information to indicate criminal wrongdoing or a threat to national security. In selecting a target, ethnicity, religion or protected political speech is allowed to be used as a factor, so long as it is not the only factor.⁴

The First Amendment of the United States Constitution protects the freedom of the press. However, the US government has used a century old law, the Espionage Act, to attempt to stifle press freedom. While the law was ostensibly designed for spies and saboteurs, it prohibits the disclosure of "national defense information" broadly and is used to prosecute journalists' sources and now even publishers themselves.

Additionally, a number of states have passed laws that restrict the right to protest, including anti-protest laws that explicitly single out supporters of Palestinian rights. Many of these laws violate a ruling of the Supreme Court that recognizes political boycotts as political speech protected by the First Amendment.⁵ In contradiction to international law, US courts have found that permitting requirements for protests do not violate the First Amendment so long as they are based on reasonable time, place, and manner restrictions that are viewpoint and content neutral.

Background

The FBI or FBI Joint Terrorism Task Force Agents have monitored, collected information on, or sought to question activists with Occupy Wall Street,⁶ Black Lives Matter,⁷ Palestinian solidarity,⁸ Standing Rock,⁹ environmental,¹⁰ and immigrants' rights movements.¹¹ In some of these cases, like Occupy Wall Street, the FBI used its counterterrorism authorities to monitor these groups, even though it internally conceded they were nonviolent.

The issue of political surveillance also seems to be marred by racial discrimination. In Sacramento, California, a group of racial justice activists staged a counterprotest of a white supremacist rally. Several white supremacists stabbed the racial justice protesters. In spite

of being the victims of violence, the FBI investigated the racial justice protesters, partially on the grounds of conducting a counterterrorism investigation.¹²

Leaked documents in the US media have uncovered that the the FBI considers “Black Identity Extremism” one of the top domestic terrorism threats.¹³ The term “Black Identity Extremism” is not the self-chosen moniker of any social movement, but a term entirely made up by FBI intelligence analysts. According to a 2017 intelligence assessment leaked to the media, the FBI believes African-American concerns about societal racism and police violence, could lead to retaliatory, lethal violence against police. This intelligence assessment casts a suspicion on legitimate grievances and opens social protest up to monitoring. Additional leaked documents reveal that from 2018-2020 the FBI continued to treat African American grievances about racism and police violence as a threat. These documents also revealed that in 2018 the FBI had created a program to mitigate the threat of Black Identity Extremism called Iron Fist. While little is known at this time, the leaked documents indicate that Iron Fist included plans to infiltrate so-called Black Identity Extremist groups.¹⁴

In recent years the government has used the Espionage Act against whistleblowers who act as sources for journalists. More disturbingly, the US recently indicted under this law Julian Assange, the Australian publisher of WikiLeaks. Assange’s indictment stems from WikiLeaks publishing of information given to them by US Army whistleblower Chelsea Manning. This information includes logs from the US Iraq and Afghan wars, Guantanamo Bay Detainee files, and State Department cables. These cables revealed significant misconduct by the US, including possible violations of international law. The information was highly newsworthy as WikiLeaks from 2010 to 2011 worked with news outlets like *The New York Times*, *The Guardian*, *Der Spiegel*, *Le Monde* and *Al Jazeera*, to publish the information. Assange is being charged for having published newsworthy information that embarrassed the US government.¹⁵ This is made all the more disturbing by the fact that Assange is not a US citizen, WikiLeaks is not a US based publisher, and the Assange’s “crime” did not occur in the US. This means the US is claiming the right to prosecute and incarcerate anyone anywhere in the world who publishes truthful information it does not like.

The source of these files, Chelsea Manning, was previously prosecuted under the Espionage Act and served years in prison before having her sentence commuted. Manning made clear that her decision to give this information to the media was based on what she had witnessed during the US war in Iraq and a desire to expose the true nature of warfare, thus sparking a public debate on US foreign policy.¹⁶ Manning has refused to testify before a grand jury about WikiLeaks and has been re-incarcerated. As she is being held in “contempt,” her detention will be for the duration of the entire grand jury, a process of undefined length, or until she testifies. In addition to being detained indefinitely, she faces hefty fines.¹⁷

Manning and Assange are not the only people to be charged under the Espionage Act for publishing or furnishing information to be published about US government misconduct. Daniel Hale, a veteran of the US Air Force who participated in the drone program, currently

awaits trial for violating the Espionage Act. If convicted, Hale faces up to 55 years in prison. Hale was a participant in the US drone program and has been an outspoken critic of targeted killings and US foreign policy more generally. The US government alleges (but has yet to prove) that Hale served as the source for a reporter who wrote a series of articles and a book about targeted killings, which showed *inter alia* that during a six-month period, 90% of US drone strikes did not hit their intended targets.¹⁸

In 2018, former FBI agent Terry Albury was sentenced to 4 years in prison under the Espionage Act. Albury was the only African-American agent at his FBI field office. He was disturbed by systemic racism within the FBI and gave documents of public interest to a media outlet.¹⁹ Just several months earlier, Reality Winner was sentenced to 5 years in prison under the Espionage Act. Her crime was giving to a media outlet documents about election integrity in the US.²⁰ Edward Snowden, who garnered worldwide attention for exposing the bulk surveillance programs of the National Security Agency, continues to live in exile as he would face prosecution under the Espionage Act if he returned to the US.

Although the First Amendment guarantees the freedom of speech, assembly, and right to petition for redress of grievances, a number of states and even the federal government have considered or even passed laws aimed chilling protest.²¹ A number of proponents of these proposals explicitly cite particular disfavored protests or social movements as justifying their need. A number of these proposed measures are aimed at protests, including those which involve civil disobedience, near pipelines.

A disturbing number of measures are aimed specifically at supporters of Palestinian human rights. As proponents of Palestinian human rights have embraced Boycotts, Divestment, and Sanctions as way of advancing their cause, their opponents have sought legislation designed to silence them. Over 27 states have adopted laws of this kind.²² The most common way these laws seek to punish boycotts for Palestinian rights is by denying state contracts to those who engage in such boycotts. Four courts have heard challenges to such laws on the grounds they violate the First Amendment, and all but one have found the laws to have likely constitutional issues. Nonetheless, such laws remain on the books in over half of all US states. In its previous legislative session, the US Congress considered, but did not pass, legislation that would have criminalized actions taken in support of a boycott of Israel or its settlements in Occupied by Palestinian Territories, if that boycott was called for by an intergovernmental organization, such as the United Nations Human Rights Council. In the current legislative session, the very first bill considered by the US Senate was the "Combatting BDS Act," which seeks to permit states to pass anti-boycott laws similar to the ones already on the books in 27 states. While it too has not passed, it demonstrates that suppressing boycotts in favor of Palestinian rights is a top priority.

The National Park Service is currently considering rules that would impose a number of new hurdles to protests near the White House or on the National Mall – America's traditional protest space. If enacted, these regulations would close off much of the area around White House to protest and revoke the "24 hour rule," which deems permit applications not rejected within 24 hours granted. In addition to revoking the 24 hour rule, these new regulations would create a new status "provisionally reserved," allowing the NPS

to leave the status of a protest in limbo until 40 days before the protest or less, which is not enough time to organize a large protest. In addition to leaving protest organizers in limbo, these regulations would lower the standard need to revoke a permit. NPS has also proposed a “pay to protest” rule to force organizers to pay the costs of policing protests. These proposed rules would impose cumbersome requirements, heavy costs, and delays in granting permits would make it nearly impossible to effectively organize protests on the National Mall or at the White House.

After his July 11-27 2016, mission to the U.S., then United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai raised concerns that the common practice across the United States of requiring permits for demonstrations was contrary to international law. Kia stated that when a “right is subjected to a permit or authorization requirement, it becomes a privilege rather than a right.”²³

Recommendations

- The FBI and other law enforcement and intelligence agencies should be prohibited by law from investigating political expression, unless there exists articulable facts that a crime has been or is likely to be committed.
- The Espionage Act should not be used to prosecute those who give information to journalists or those who publish truthful information
- The Espionage Act should be amended so that it only applies to those who intend to harm the national security of the US, not those who act with a good faith public interest.
- States should refrain from passing laws that are designed to target specific disfavored protest movements in hopes of chilling their speech.
- All states and the federal government, including the National Parks Service, should refrain from charging for protests. In compliance with international law, they should move away from permitting systems, even those based on time, place, and manner restrictions, and instead create a system of notice.
- All levels of government should respect that boycotts are a core form of political expression and protect that right.

¹ Statement By The United Nations Special Rapporteur On The Rights To Freedom Of Peaceful Assembly And Of Association At The Conclusion Of His Visit To The United States Of America,” available at <http://freeassembly.net/news/usa-statement/>

² *Laird v. Tatum*, 408 U.S. 1 (1972)

³ Chip Gibbons, "Third Circuit Hears Case on NYPD Surveillance of Muslims," *Dissent NewsWire* (January 20, 2015). Available at <https://rightsanddissent.org/news/third-circuit-hears-case-on-nypd-surveillance-of-muslims/>

⁴ Charlie Savage, "F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Show," *The New York Times* (March 26, 2011). Available at <https://www.nytimes.com/2011/03/27/us/27fbi.html>

Emily Berman, "Domestic Intelligence: New Powers, New Risks," *Brennan Center* (January 18, 2011). Available at <https://www.brennancenter.org/publication/domestic-intelligence-new-powers-new-risks>.

⁵ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)

⁶ 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>.

⁷ George Joseph, "Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson," *The Intercept* (July 24 2015). Available at <https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/>

⁸ Alex Kane, "The FBI Is Using Unvetted, Right-Wing Blacklists to Question Activists About Their Support for Palestine," *The Intercept* (June 24 2018). Available at <https://theintercept.com/2018/06/24/students-for-justice-in-palestine-fbi-sjp/>.

⁹ Sam Levin, "Revealed: FBI terrorism taskforce investigating Standing Rock activists," *The Guardian* (February 10, 2017). Available at <https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access>.

¹⁰ Paul Lewis, Adam Federman, "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>

¹¹ Cora Currier, "FBI Pressed Detained Anti-ICE Activist for Information on Protests, Offering Immigration Help," *The Intercept* (August 7, 2018). Available at <https://theintercept.com/2018/08/07/fbi-pressed-detained-anti-ice-activist-for-information-on-protests-offering-immigration-help/>.

¹² 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>

¹³ Jana Winter, Sharon Weinberger, "The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists,'" *Foreign Policy* (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/>.

¹⁴ Ken Klippenstein, "Leaked FBI Documents Reveal Bureau's Priorities Under Trump," *The Young Turks* (August 8, 2019). Available at <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR>

¹⁵ Chip Gibbons, "The Crackdown on Chelsea Manning and Julian Assange Is About Protecting U.S. Empire," *In These Times* (May 14, 2019). Available at <https://inthesetimes.com/article/21885/chelsea-manning-julian-assange-war-crimes-wikileaks-press-freedoms>

¹⁶ Chip Gibbons, "Let Chelsea Go," *Jacobin* (March 27, 2019). Available at <https://jacobinmag.com/2019/03/chelsea-manning-grand-jury-solitary-confinement>

¹⁷ Kevin Gosztola, "Judge Denies Chelsea Manning A Hearing, Insists Hundreds Of Thousands Of Dollars In Fines Are Not Punishment," *Shadowproof* (August 7, 2019). Available at <https://shadowproof.com/2019/08/07/judge-denies-chelsea-manning-insists-fines-not-punishment-denies-hearing/>

¹⁸ Rachel Weiner, "Former intelligence analyst charged with leaking drone details to news outlet," *Washington Post* (May 9, 2019). Available at https://www.washingtonpost.com/local/public-safety/former-intelligence-analyst-charged-with-leaking-drone-details-to-news-outlet/2019/05/09/19eeb9e2-7258-11e9-8be0-ca575670e91c_story.html

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¹⁹ Alice Speri, "As FBI Whistleblower Terry Albury Faces Sentencing, His Lawyers Say He Was Motivated by Racism and Abuses at the Bureau," *The Intercept* (October 18, 2018). Available at <https://theintercept.com/2018/10/18/terry-albury-sentencing-fbi/>

²⁰ Amanda Holpuch, "Reality Winner: NSA contractor jailed for five years over classified report leak," *The Guardian* (August 23, 2018). Available at <https://www.theguardian.com/us-news/2018/aug/23/reality-winner-sentence-classified-report-leak>

²¹ "US Protest Law Tracker," *International Center for Nonprofit Law*. Available at <http://www.icnl.org/usprotestlawtracker/>

²² "Anti-Boycott Legislation Around The Country," *Palestine Legal*. Available at <https://palestinelegal.org/righttoboycott>

²³ "Statement By The United Nations Special Rapporteur On The Rights To Freedom Of Peaceful Assembly And Of Association At The Conclusion Of His Visit To The United States Of America," available at <http://freeassembly.net/news/usa-statement/>